

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
August 22, 2011 Session

**DAVID KIRBY v. MEMPHIS JEWISH NURSING HOME**

**Appeal from the Chancery Court for Chester County**  
**No. 2010-CV-412 James F. Butler, Chancellor**

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**No. W2010-02261-WC-R3-WC - Mailed October 31, 2011; Filed December 1, 2011**

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An employee sustained a compensable injury to his shoulder. While he was recovering from surgery, he reinjured his shoulder when his dog pulled his arm while he was holding the dog by its collar. The trial court found that the reinjury was a direct and natural result of the earlier compensable injury and that the reinjury caused an increase in impairment. The employer has appealed, contending that the trial court incorrectly applied the intervening injury rule and incorrectly adopted the evaluating physician's impairment. We affirm as to the reinjury but conclude that the trial court erroneously based its award upon an incorrect impairment rating, and we modify the judgment accordingly.<sup>1</sup>

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;**  
**Judgment of the Chancery Court Modified**

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J. and TONY CHILDRESS, SP. J., joined.

Jeffrey G. Foster and David E. Goudie, Jackson, Tennessee, for the appellant, Memphis Jewish Nursing Home.

Ricky L. Boren, Jackson, Tennessee, for the appellee, David Kirby.

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<sup>1</sup> Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law

## MEMORANDUM OPINION

### Factual and Procedural Background

David Kirby (“Employee”) was an HVAC maintenance worker for Memphis Jewish Nursing Home (“Employer”). He injured his right shoulder on September 24, 2008, when he slipped on some stairs while climbing down from a roof. He grabbed a railing to prevent himself from falling down the stairs. He immediately felt pain in his shoulder and promptly reported the incident. He received conservative care from a minor medical clinic for a period of time, but his symptoms did not improve. He was referred to Dr. Adam Smith, an orthopaedic surgeon. Dr. Smith ordered an MRI that revealed a probable tear of the labrum. Dr. Smith provided additional conservative treatment for a short period of time. On June 4, 2009, Dr. Smith proceeded with a surgical repair.

During the surgery, Dr. Smith determined that Employee had a torn biceps tendon in addition to the labral tear. These are separate conditions but are located in the same area of the shoulder. Dr. Smith chose to address the injuries by performing a biceps tenodesis. Employee had physical therapy and progressed well after the surgery.

In late September 2009, Employee suffered a setback. Employee returned home from attending a physical therapy appointment to find one of his dogs “was off her leash or off the runner that I had her [tied] to, and she [ran] up to me.” Employee grabbed the dog by the collar, and the dog tried to run away. The dog “pulled [Employee’s] arm” and Employee felt immediate pain in his right arm. Employee returned to Dr. Smith within a few days.

Dr. Smith determined that the pulling injury had caused the tenodesis procedure to fail. This, in turn had caused a “popeye” deformity of the right biceps. Dr. Smith considered the effect of this injury to be cosmetic rather than functional. After discussion with Employee, it was determined not to perform an additional surgery. Employee filed a complaint for workers’ compensation benefits in the Chancery Court for Chester County on April 8, 2010.

Dr. Smith testified by deposition. Dr. Smith testified that one of the original surgical alternatives was a “tenotomy,” a procedure in which the biceps was not reattached to the humerus. The result of the reinjury was therefore similar to the result of a tenotomy. Dr. Smith testified that the reinjury did not cause any additional impairment to Employee’s shoulder or arm. Based upon range of motion measurements, Dr. Smith assigned an anatomical impairment of 4% to the body as a whole. He placed no formal restrictions upon Employee’s activities.

On cross-examination, Dr. Smith stated that one of the risks of the tenodesis procedure is that the surgery will fail, as it did in Employee's case. He had not restricted Employee from walking his dogs. He said of the failure of the tendon repair, "I think it falls into the, you know, if-it's-going-to-tear, it's-going-to-tear line of failures." He confirmed that he had ordered a Functional Capacity Evaluation after the tear and found that Employee could no longer meet the lifting requirements of his job.

Dr. Samuel Chung, a physical medicine specialist, examined Employee at the request of Employee's attorney on January 25, 2010. Dr. Chung testified by deposition. Based upon range of motion measurements, Dr. Chung assigned 5% impairment to the body as a whole for the injury to Employee's labrum. He assigned an additional 3% impairment to the body as a whole based upon the failed tenodesis and popeye deformity, for a total impairment of 8% to the body as a whole. Dr. Chung testified that the Sixth Edition of the AMA Guides ("AMA Guides") did not include a diagnosis-based impairment for biceps tendon injuries or surgeries. He used a portion of the AMA Guides pertaining to elbow strength to arrive at the 3% figure. Dr. Chung recommended that Employee avoid overhead work and repetitive motion of the right shoulder and limited frequent lifting to forty pounds. Dr. Chung did not, however, place formal restrictions on Employee's activities.

During cross-examination, Dr. Chung testified that he performed five to ten independent medical examinations per week at the request of plaintiffs' attorneys. He measured Employee's range of motion using a goniometer. He measured Employee's elbow strength by pushing on Employee's arm; no instruments were used. He agreed that the AMA Guides do not generally allow combining range of motion impairments with diagnosis-based impairments. Dr. Chung asserted that he had not done so in arriving at his impairment rating.

Employee testified that he was forty years old at the time of the trial. He was a high school graduate and had also completed an HVAC program at a vocational school. He had worked as an HVAC maintenance worker for most of his adult life. He also had served fifteen years in the National Guard, where he had been a medic and a military policeman and also had repaired generators. He did not work for several months while recuperating from his surgery. During this period Employer filled his position. He remained unemployed for four months until he was rehired by a previous employer, David McCoy. His rate of pay at that job was \$18.00 per hour. He had received \$33.00 per hour while working for Employer. He testified that his job for Mr. McCoy was less strenuous than his job for Employer or his previous work for Mr. McCoy.

Employee testified that overhead work and pulling with his right arm were painful activities. He was able to perform the duties of his present job, but he did not think he was capable of returning to the type of work he had done before his injury because he estimated

that his right arm had 50% less strength than before the injury. He testified that he was the coach of his daughter's softball team and the injury had affected his ability to throw a ball. He had unsuccessfully attempted to resume bow hunting, a previous hobby. He was able to ride and care for horses he owned but had difficulty training them.

The trial court issued its ruling from the bench. The trial court found Employee to be a credible witness and specifically accredited his testimony concerning the effects of the injury. It found that Employee had not acted negligently by moving his dog by the collar in September 2009. Noting the testimony of Dr. Smith concerning the inherent risk that a tenodesis procedure will fail, it found that the deformity resulting from the reinjury was a natural consequence of the original injury. The court then found that Dr. Chung's method of using a diagnosis-related method to determine an impairment for the popeye deformity, combined with range of motion impairment, was incorrect. However, the court then stated, "I find the same rating as Dr. Chung on the second injury." It found that Employee had sustained an impairment of 8% as a result of the two injuries and awarded 40% permanent partial disability benefits. Judgment was entered in accordance with those findings.

Employer has appealed, arguing that the trial court erred by finding the second injury was a natural and probable consequence of the original injury rather than an intervening injury and by assigning impairment for the second injury. Employer also contends that the 40% award of permanent partial disability is excessive and not supported by the evidence.

### **Standard of Review**

The standard of review of issues of fact is "de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). When the trial court has heard in-court testimony, considerable deference must be afforded to the trial court in reviewing findings of credibility and assessment of the weight to be given to that testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

## Analysis

### *Intervening Injury or Direct and Natural Consequence*

Employer first contends that the popeye defect, caused by the Employee's arm being pulled or jerked by his dog, was an intervening injury, and any impairment or disability caused by that event is therefore not compensable. The Tennessee Supreme Court has recently addressed the related concepts of direct and natural consequences and intervening injuries in Anderson v. Westfield Group, 259 S.W.3d 690 (Tenn. 2008). The general rule is that a subsequent injury that is the "direct and natural result" of a compensable injury is compensable. Id. at 696. The general rule, however, has its limits. A subsequent injury is not compensable when it is a result of an independent intervening cause attributable to the claimant's own conduct. Id.

Employer contends that Employee acted negligently when he grabbed his errant dog by the collar and thus broke the chain of causation from the original, compensable injury. Employee contends that his actions were not negligent. In support of his assertion, he points to the testimony of Dr. Smith. Dr. Smith had advised him to "push past his limits" in order to improve his range of motion and stated that he would not have advised Employee to avoid walking his dog. Moreover, Dr. Smith stated that failure of the tenodesis was simply one of the risks of the procedure. Dr. Smith also testified that it was highly unusual that an event such as that described by Employee, occurring more than three months after surgery, would cause the repair to fail. In light of the testimony of Dr. Smith, the evidence does not preponderate against the trial court's conclusion that Employee did not act negligently and that the September 2009 injury was a direct and natural consequence of the earlier work injury.

### *Impairment*

Employer next contends that the trial court erred by assigning an impairment for the second injury. The trial court found that Dr. Chung's 3% impairment for that injury was based upon an incorrect method, and also that Dr. Chung had incorrectly combined that impairment with range of motion measurements to opine that Employee had sustained an impairment of 8% to the body as a whole. Nonetheless, the trial court's assignment of an 8% impairment agrees with Dr. Chung's rating. Employer points out that if Dr. Chung's additional 3% is disregarded, the only medical evidence on the subject was Dr. Smith's assessment of 4% to the body as a whole or Dr. Chung's 5% to the body as a whole, both based upon the same range of motion model. Employer then points to Tennessee Code Annotated section 50-6-204(d)(3)(A), (B) (2008), which requires physicians in workers' compensation cases to assign impairment based on the latest edition of the AMA Guides and

makes impairments not based upon the AMA Guides inadmissible at trial. The statute, however, does allow for other “appropriate methods” for impairments not covered by the AMA Guides. Tenn. Code Ann. § 50-6-204(d)(3)(A).

Employee contends that the trial court acted properly because the AMA Guides do not specifically address the failure of a biceps tenodesis and that Dr. Chung properly used what he considered to be an analogous portion of the AMA Guides to assess impairment. In the alternative, Employee argues that Walker v. Saturn Corp., 986 S.W.2d 204 (Tenn. 1998) and Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988) provide a basis for the trial court to make an award in the absence of an impairment rating.

In Corcoran, the Court observed, “We do not think that, when medical evidence establishes permanency, the failure of a medical expert to attribute a percentage of anatomical disability can justify a denial of compensation if the other evidence demonstrates that an award of benefits is appropriate.” 746 S.W.2d at 457. Similarly, in Walker, the Court stated,

An anatomical impairment rating is not always indispensable to a trial court's finding of a permanent vocational impairment. In fact, anatomical impairment is distinct from the ultimate issue of vocational disability that the trial court must assess. An employee should not be denied compensation solely because she is unable to present a witness who will testify to the exact percentage of her medical impairment.

986 S.W.2d at 207 (citations omitted). In effect, Employee contends that the undisputed existence of an anatomical change caused by the second injury justifies or requires the assignment of additional impairment by the trial court. We disagree.

Although the second injury caused an anatomical change, Dr. Smith testified that the change did not affect the function of Employee's shoulder or arm. He explained that he considered and discussed with Employee an alternative surgical procedure in which the biceps tendon would not be reattached to the upper end of the humerus. Ultimately, as Dr. Smith saw it, Employee's shoulder and arm were as they would have been if the alternate procedure had been used. He further testified that Employee would perceive decreased strength in the arm because certain motions would be painful. However, he stated, “Good studies have shown that there are very minimal decreases in overall function” when the alternate procedure is used.

Dr. Chung testified that Employee had residual weakness of the arm as a result of the biceps tendon condition and based his additional impairment upon that weakness. His

method of assessing that weakness was “having the patient’s elbow flexed, and then moving towards [the head], and I apply the pressure and see how much resistance the patient is able to provide, and then I measure the degrees of strength.” The measurement is a subjective one, based upon Dr. Chung’s experience as a rehabilitation physician.

In its findings, the trial court noted that “the original injury and the shoulder injury were all in the shoulder area. It was not in the distal area. It was not in the elbow area.” It further noted that Dr. Chung’s findings were based in part upon a perceived “weakness in elbow flexion.” For that reason, and because Dr. Chung had impermissibly combined diagnosis and range of motion impairments, the trial court found it necessary to disregard his additional impairment rating. We have examined the evidence and concur with the trial court’s reasoning and conclusion on those subjects. However, we are compelled to agree with Employer that there was no basis in the evidence for the trial court to assign additional impairment for the second injury.

The trial court agreed that Dr. Chung’s impairment rating was done “incorrectly using an incorrect method.” The trial court correctly stated that in finding vocational disability, medical impairment was only one of many factors. The trial court, however, found that it would still rely on 8% medical impairment in determining vocational disability. Specifically, the trial court stated:

So the Court then comes back to the fact that while I feel like Dr. Chung rated it incorrectly using an incorrect method, the doctor’s rating is only one factor that the Court considers in assigning vocational impairment - - disability. So finding causation and permanency by expert testimony, I have found that the same - - I find the same rating as Dr. Chung on the second injury, which ultimately is 3 percent. So, thus, we arrive at the same place, 8 percent. If I’m wrong on that and if it’s appealed, then the Court of Appeals will correct me on that, but this is where I am at this time.

So I find that he does have an 8 percent body as a whole rating for both injuries, that he is entitled to 40 percent to the body as a whole for a vocational disability rating for the two injuries based on the proof and also the foregoing facts that I’ve just stated. So the Court finds 40 percent.

The finding of 8% impairment is not supported by the record. It is obvious from the quote above that the trial court relied on the finding of 8% medical impairment in setting the 40% vocational disability. There was no competent medical proof to support the finding of 8% medical impairment.

The maximum impairment upon which an award of permanent disability benefits can be based in this case is 5% to the body as a whole.

*Award of Permanent Disability Benefits*

The trial court's permanent partial disability award was five times the anatomical impairment that it relied upon. An award of five times the anatomical impairment or more requires specific findings pursuant to Tennessee Code Annotated section 50-6-241(d)(2)(B)(2008). The trial court found that Employee could perform "some but not all" of the duties of his previous position. It further found that Employee's "main skill is in the HVAC work area. He can do that type of work, but he now excludes himself from the more labor-intensive areas. And also he avoids heavy lifting. He tries to avoid pulling." The court also found that his limitations would not exclude him from employment in his field but would limit his opportunities. We conclude that these findings are sufficient to support an award of five times the anatomical impairment in this case.

**Conclusion**

The judgment is modified to award 25% permanent partial disability to the body as a whole. It is affirmed in all other respects. Costs are taxed one-half to Memphis Jewish Nursing Home and its surety, and one-half to David Kirby, for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE



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**No. W2010-02261-WC-R3-WC - Filed December 1, 2011**

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**JUDGMENT ORDER**

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed one-half to the Appellant, Memphis Jewish Nursing Home and its surety, and one-half to the Appellee, David Kirby, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

