

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

February 23, 2009 Session

NIELSEN BAINBRIDGE, LLC v. THOMAS SHINN

**Direct Appeal from the Circuit Court for Jackson County
No. 1800-T-44 Clara Byrd, Judge**

**No. M2008-01639-WC-R3-WC - Mailed - December 15, 2009
January 15, 2010**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) (2008) for a hearing and a report of findings of fact and conclusions of law. Employee suffered a hernia as a result of his work. The trial court awarded 28.5% permanent partial disability to the body as a whole. On appeal, Employer contends that the trial court erred in basing its award upon the testimony of Employee's evaluating physician. We agree, and consequently modify the judgment to 4.5% permanent partial disability to the body as a whole.

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

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which DONALD P. HARRIS and ALLEN W. WALLACE, SR. JJ., joined.

Frederick R. Baker, Cookeville, Tennessee, for the appellant, Nielsen Bainbridge, LLC.

William A. Cameron, Cookeville, Tennessee, for the appellee, Thomas Shinn.

MEMORANDUM OPINION

I.

Thomas Shinn was stabbed in the abdomen by a co-worker on June 24, 2005. The wound was surgically repaired by Dr. Jeff McCarter. An exploratory laparoscopy was also performed to evaluate the extent of his injuries. Mr. Shinn subsequently returned to his job as a "racker" for Nielsen Bainbridge, LLC ("Nielsen Bainbridge"). On August 11, 2006, Mr. Shinn noted a burning sensation in his abdomen while working. He then discovered a protrusion, which he immediately reported to his supervisor. He was referred to Dr. McCarter, who discovered a hernia at the site of the prior surgery. Dr. McCarter repaired the hernia with surgical mesh. Mr. Shinn was off work for

six weeks, then returned in a light duty capacity for six more weeks. Eventually, he was released to full duty, with no permanent restrictions on his activities.

Nielsen Bainbridge filed this action in the Circuit Court for Jackson County, seeking an adjudication of rights and liabilities under Tenn. Code Ann. § 50-6-225(a)(2)(A) (2008). Dr. McCarter did not testify, and his records were not placed into evidence. Mr. Shinn testified that Dr. McCarter informed him that he did not perform impairment evaluations. Mr. Shinn was therefore examined by Dr. Walter Wheelhouse, an orthopaedic surgeon, at the request of his attorney. By agreement of counsel, he was also examined by Dr. T. Scott Baker, a physiatrist. Both doctors testified by deposition.

Dr. Wheelhouse examined Mr. Shinn on November 26, 2006. He also reviewed Dr. McCarter's records. He testified that he found that Mr. Shinn had a palpable and visible defect¹ in his abdomen, along the incision from the 2005 surgery. He opined that Mr. Shinn retained an anatomical impairment of 19% to the body as a whole, using the hernia tables from the AMA Guides. He recommended that Mr. Shinn "[a]void lifting greater than twenty pounds occasionally, use good lifting mechanics, and avoid repetitive lifting or bending, stooping, and straining."² On cross-examination, he agreed that the AMA Guides required a "protrusion" in order to assess impairment according to the table he used. He agreed that his report did not state that he had detected a protrusion, but he explained that he recalled observing a protrusion during his examination. He stated that a protrusion occurs through a defect, and that the defect could not be detected visually unless there was a protrusion.

Dr. Wheelhouse also conceded that he had been removed from the Medical Impairment Registry of the Department of Labor and Workforce Development ("MIR"). He asserted that the Commissioner of Labor for the State of Tennessee had unilaterally chosen to remove him without giving any reason for doing so, but he then admitted having received a letter from the Department of Labor and Workforce Development which explained the reason for his initial suspension. He disputed the reason given for his suspension, which was that he had inaccurately answered a question on his application to be placed on the MIR concerning prior disciplinary actions. He agreed that he had represented to the MIR that he had had no charges or actions against his license, and he acknowledged that a complaint filed by the Illinois Department of Registration and Education in 1984 sought disciplinary action against him. That action was settled in 1988 without an admission of wrongdoing by Dr. Wheelhouse.

Dr. Baker examined Mr. Shinn on January 26, 2007. He testified that he was unable to detect either a defect or a protrusion during his examination, even though he had asked Mr. Shinn to perform maneuvers intended to reveal these conditions. Dr. Baker's report stated that a defect is "a

¹The testimony of both doctors was that, when used in reference to a hernia, a "defect" is an opening in the abdominal wall, through which a "protrusion" of internal organs may occur.

²Both Dr. Wheelhouse and Dr. Baker noted in their reports that Dr. McCarter had advised Mr. Shinn that if he continued in employment that required heavy lifting, he would be at increased risk for a recurrence of the hernia.

hole that you can feel or put a finger in,” and he testified that if there is a defect, “you would expect to see a protrusion.” Because he did not find a hernia or defect, he opined that he could not assign impairment based upon the hernia table used by Dr. Wheelhouse. He did, however, accredit Mr. Shinn’s description of his ongoing symptoms of pain, and therefore assigned an impairment of 3% to the body as a whole as permitted by the section of the Guides concerning pain. On cross-examination, he agreed that the term “palpable defect” was not defined in the AMA Guides. He stated that his definition of that term was a “dictionary definition” of the term. He did not treat hernias as part of his practice.

Mr. Shinn was fifty-two years old when the trial occurred. He was a high school graduate. He had passed sixty-nine hours of classes in a business administration program at a community college in Arkansas with a 3.78 GPA. He had also completed several extension courses through the University of Maryland while serving in the military. Mr. Shinn had served in the Army for three years, and had received an honorable discharge. His employment history was primarily at a number of grocery stores owned by his sister and brother-in-law. He was a manager of one of the stores for five years. As a racker for Nielsen Bainbridge, his job was to stack aluminum frames on a large rack, take them to an area where they were anodized, then remove them from that area when that process was completed. He was performing that job at the time of the trial. However, he took precautions to avoid straining, which had not been necessary prior to his injury. He testified that he had pain and/or a burning sensation in his abdomen, which worsened with prolonged sitting or standing. He was able to engage in most of the household and recreational activities that he had done prior to his injury, but he had to use different equipment, such as a lightweight vacuum and long-handled scrub brush, and could only do a small portion of the work at one time. He was no longer able to shoot or pursue his hobby of carpentry. He could not sleep on his stomach and had difficulties with elimination. When asked if there had been any recurrence of the protrusion after the surgery which placed the mesh into his abdomen, Mr. Shinn responded, “No, not that I know of.”

The trial court adopted Dr. Wheelhouse’s impairment rating. It awarded 28.5% permanent partial disability to the body as a whole. In its bench ruling, the trial court stated:

Dr. Wheelhouse is a board[-]certified orthopaedic surgeon. He’s certified by the American Board of Orthopaedic Surgeons. Dr. Baker is certified here in the state of Tennessee as – I know him to be a pain management specialist. That’s not what he calls himself in here. I know he’s very good in pain management. He’s a physician specializing in physical medicine, rehabilitation, electro diagnostic medicine, and pain medication. He’s also currently on the state MIR registry or panel.

The Court has had Dr. Wheelhouse testify in many work comp cases. I basically understand that’s mainly what he does. He’s not been doing surgery since approximately – according to this deposition – 1999, but he’s been renowned in this state for his expertise as far as

determining proper medical impairments. It's a shame that he was dismissed from the registry, but apparently there is something in his past, in the 80's, where he worked in Illinois and there were some allegations of malpractice, none of which apparently were ever proven. He came to Tennessee and he's never lost his standing with the Board of Orthopaedic Medicine, or Surgeons. Now he just prefers not to do surgery. He'd rather give impairment ratings, which doesn't require a knife. He does use tools to better – that are required by the AMA Guidelines.

* * *

Dr. Baker's reputation is as a pain medication specialist to the extent that he does not, to my knowledge, have some long reputation as to impairment ratings, whereas Dr. Wheelhouse does have a huge number of ratings. I don't know how many he's done. Nobody has ever asked him that question. . . .

But when I look carefully, Dr. Wheelhouse is an expert on the guidelines. Like I said, Dr. Baker is an expert on pain.

After making these observations, the court noted the basic discrepancy between physical examinations conducted by the two doctors, i.e., that Dr. Wheelhouse found a palpable defect and protrusion, while Dr. Baker did not. The court then stated: "If Dr. Wheelhouse found a defect, I believe him. I don't believe he would in any way – there is no motivation for this Court to disbelieve him" The court then adopted Dr. Wheelhouse's impairment rating, and based its award on it. Nielsen Bainbridge has appealed, contending that the trial court erred by accrediting the testimony of Dr. Wheelhouse over that of Dr. Baker.

II.

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) (2008) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn.

2004), or to a trial court's conclusions of law, *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

When experts testify by deposition, "this Court may draw its own conclusions about the weight and credibility of that testimony," reviewing the record de novo and conducting an independent assessment of the evidence. *Carter v. First Source Furniture Group*, 92 S.W.3d 367, 370 (Tenn. 2002) (quoting *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn.1997)); see also *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 679 (Tenn. 2005).

III.

The outcome of this case hinges on a credibility determination between two physicians testifying by deposition. While we engage in a de novo review of their testimony, we note parenthetically that the trial court improperly relied on facts outside the record in resolving the factual dispute between Dr. Wheelhouse and Dr. Baker regarding the existence of a protrusion and the appropriate impairment rating. The trial court's remarks concerning the reputations of the doctors, the nature of Dr. Baker's practice, and Dr. Wheelhouse's testimony in previous cases are not derived from evidence in the record. Those remarks appear to be based upon the court's own experiences and observations outside the courtroom. In that regard, the statements set out above are similar to trial court's remarks discussed in *Blackwood v. Berkline Corp.*, No. 01S01-9609-CV-00190, 1997 WL 271700 (Tenn. 1997).³ In that case, the Court, adopting the Panel's decision, stated: "[It] is inappropriate and, generally, reversible error, for a fact finder, to base a decision on observations outside the particular judicial proceeding." *Blackwood v. Berkline Corp.*, 1997 WL 271700, at *2. A judge may not rely on personal knowledge when deciding an issue, but must depend on matters known to him or her in an official capacity. *Vaughn v. Shelby Williams of Tenn., Inc.*, 813 S.W.2d 132, 133 (Tenn. 1991). Because our standard of review is de novo, this error does not affect our analysis.

Nielsen Bainbridge contends that the evidence preponderates against the trial court's decision. It argues that Dr. Baker's examination was "more consistent with the totality of the medical proof in this case, including the findings of the treating physician," and also more consistent with Mr. Shinn's testimony that there had been no recurrence of the hernia or protrusion since the mesh had been in place. In the same vein, Nielsen Bainbridge points to the absence of any reference to a protrusion in Dr. Wheelhouse's written report as inconsistent with his testimony that he had observed such a protrusion. Nielsen Bainbridge also asserts that Dr. Baker is more credible in light of his presence on, and Dr. Wheelhouse's dismissal from, the MIR.

³The trial court had discounted a physician's credibility, stating, "I note that it's impossible for the Court to remove from [its] mind the many, many, many times that Dr. Talmage has testified either by deposition or personally in front of me, and my evaluation of his testimony is, at least, partially based in all candor upon previous judgments of credibility and weight of testimony that I have been required to make as a judge of his testimony." *Blackwood v. Berkline Corp.*, 1997 WL 271700, at *2.

In response, Mr. Shinn asserts that the trial court correctly relied upon its familiarity with the two doctors in weighing their credibility. He also points out that Dr. Wheelhouse has a certification from the American Academy of Disability Evaluating Physicians; Dr. Baker does not. Mr. Shinn suggests that Dr. Baker's certification as a physical medicine and rehabilitation specialist is less relevant to the assessment of impairment from a hernia than Dr. Wheelhouse's background.

Dr. Wheelhouse examined Mr. Shinn on November 26, 2006. His deposition was taken on April 24, 2008. His four-page report concerning his examination refers to a defect at the site of the surgical incision, but does not refer at any point to a protrusion. He testified that "a defect is an opening through which the protrusion occurs." He stated that, although he had not used the term protrusion in his report, he independently recalled that he had observed a protrusion during his examination of Mr. Shinn in 2006. Dr. Wheelhouse's report notes several times that the defect is reducible. A hernia is reduced when it is "pushed back into place" or when "the characteristic herniatic bulge occurs only intermittently." 15 *Attorneys' Textbook of Medicine* ¶¶ 222.03(1), 222.00 (Roscoe N. Gray & Louise J. Gordy, eds., 3d ed. 2000). It appears that, in his report, Dr. Wheelhouse was conflating the terms "defect" and "protrusion." Because Dr. Wheelhouse's report appears to use the terms interchangeably, his report, which noted a reducible defect, is not inconsistent with his testimony that he detected a protrusion.

Dr. Wheelhouse is a board-certified orthopaedic surgeon. He has limited his practice to non-surgical cases since approximately 1999. He was listed on the MIR but was removed by the Commissioner of Labor. During his deposition, Dr. Wheelhouse testified that the Commissioner of Labor gave no reason for his removal, but acknowledged that he received a letter explaining the reason from the Department of Labor and Workforce Development. He also stated that he made no misrepresentations in his application to the MIR, but admitted that the Illinois Department of Registration and Education filed a complaint seeking discipline against his license and that he omitted to list any charges or actions against his license on his application. Dr. Wheelhouse testified that Mr. Shinn told him that he had frequent protrusions at the site of the incision. However, Mr. Shinn testified in his discovery deposition and at trial that he had not had any such recurrence. Both Dr. Wheelhouse's report and his testimony are inconsistent with the testimony given by Mr. Shinn. The trial court specifically found Mr. Shinn, who testified in person rather than by deposition, to be a credible witness. Furthermore, Dr. Wheelhouse's testimony regarding the circumstances of his removal from the MIR appears to be somewhat misleading.

Dr. Baker examined Mr. Shinn on January 26, 2007. His deposition was taken on August 24, 2007. His report states that Mr. Shinn stated that he had intermittent pain in the area of the incision, "but is very clear that it does not protrude out any more." Dr. Baker did not detect either a defect or protrusion during his examination, although he asked Mr. Shinn to perform activities such as partial sit-ups and leg lifts, which increase pressure on the abdominal wall. He testified that the results of his examination were consistent with the clinical notes of Dr. McCarter, which were not in evidence.

Dr. Baker is a board-certified specialist in physical medicine and rehabilitation. He described this specialty as concerning “acute and chronic musculoskeletal pain conditions . . . taking care of patients who’ve had disabling injuries like strokes and have had spinal cord injuries . . . And electrodiagnostic medicine, doing muscle and nerve testing.” He did not treat hernias as part of his practice. If he diagnosed a hernia, he would refer the patient to a general surgeon. He is currently listed on the MIR.

While Dr. Baker does not treat hernias, his testimony is consistent with Mr. Shinn’s testimony that there had been no recurrence of abdominal protrusions since Dr. McCarter placed the mesh at the site of the surgical incision. Unlike Dr. Wheelhouse, Dr. Baker is on the MIR. Because we find Dr. Baker’s testimony more credible than Dr. Wheelhouse’s, we conclude that 3% impairment to the body as a whole is the appropriate basis for computing the disability award in this case. Because Mr. Shinn has returned to work for Nielsen Bainbridge at an equal or greater wage, his maximum recovery is one and one-half times that impairment rating. Tenn. Code Ann. § 50-6-241(d)(1)(A) (2005). The judgment will therefore be modified to award 4.5% permanent partial disability benefits to the body as a whole.

IV.

The judgment is modified to award 4.5% permanent partial disability to the body as a whole; it is affirmed in all other respects. Costs are taxed to Thomas Shinn, for which execution may issue if necessary.

WILLIAM C. KOCH, JR., JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

NIELSON BAINBRIDGE, LLC v. THOMAS SHINN

**Circuit Court for Jackson County
No. 1800-T-44**

No. M2008-01639-WC-R3-WC - Filed - January 15, 2010

JUDGMENT

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 will be paid by Thomas Shinn, for which execution may issue if necessary.

PER CURIAM