

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 2, 2014 Session

KEVIN HUDSON v. KROGER LIMITED PARTNERSHIP I

**Appeal from the Chancery Court for Shelby County
No. CH-12-0556-2 Arnold B. Goldin, Chancellor**

**No. W2013-02181-SC-WCM-WC - Mailed August 19, 2014
Filed November 24, 2014**

An employee injured his head, neck, and back in a tractor-trailer accident while working for his employer. The employee was ultimately diagnosed with a nerve-entrapment condition, which the employer denied was caused by the accident. The trial court found in the employee's favor and awarded benefits. The employer appeals asserting that the trial court erred in excluding the expert testimony of an accident reconstruction engineer on the issue of causation. After a thorough review of the record, we conclude that the trial court erred by excluding portions of the expert's testimony. Despite the error, the judgment of the trial court is supported by a preponderance of the evidence and is affirmed.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, SP. J., joined.

S. Newton Anderson and Lance W. Thompson, Memphis, Tennessee, for the appellant, Kroger Limited Partnership.

Christopher L. Taylor, Memphis, Tennessee, for the appellee, Kevin Hudson.

OPINION

Factual and Procedural Background

Beginning in September 2008, Kevin Hudson was employed by Kroger Limited Partnership I ("Kroger") as a truck driver delivering groceries throughout the Mid-South

region. Mr. Hudson's duties consisted of keeping a log book, strapping down loads, inspecting his vehicle, and assisting in loading and unloading his trailer.

On March 7, 2010, Mr. Hudson was operating a tractor-trailer for Kroger. While he was stopped at a traffic light, his vehicle was struck from behind by another Kroger tractor-trailer. Mr. Hudson experienced pain on the left side of his neck and shoulder and on the right side of his tailbone and back. He reported the accident to his employer and was treated by several health care providers. He was initially released to light duty on April 7, 2010, and to full duty on May 7, 2010. Mr. Hudson returned to work at Kroger on July 12, 2010, but he left his job on August 9, 2010, because his pain rendered him unable to work. He requested a medical leave of absence on September 29, 2010, to seek additional medical treatment. Mr. Hudson was eventually diagnosed with "piriformis syndrome," which his treating physician described as "an irritation of the sciatic nerve at the sciatic notch where the nerves come out of the pelvis." On April 26, 2011, Mr. Hudson underwent surgery for his condition. On August 8, 2011, Mr. Hudson reached maximum medical improvement, was assigned an anatomical impairment rating of 48% to the body as a whole, and was released with permanent restrictions. Kroger declined to permit Mr. Hudson to return to work with his restrictions and suggested instead that he resign, which he did.

A Benefit Review Conference was held on March 29, 2012, but the parties reached an impasse. That same day, Mr. Hudson filed the present complaint for workers' compensation benefits in the Chancery Court for Shelby County, Tennessee. Although Kroger acknowledged that the March 7, 2010 accident was compensable, it disputed that Mr. Hudson's injuries were caused by the accident. The case went to trial on May 9, 2013.

At trial, Mr. Hudson testified that he had just stopped at a traffic light when his tractor-trailer was struck from behind by another Kroger tractor-trailer. He had no time to brace and described the impact as "hard" and "a violent force." Due to the impact, Mr. Hudson "shot out of the seat," "hit [his] head on the top of the roof," and "come [sic] down real hard on [his] arm." Mr. Hudson was wearing his seat belt, which he believed "sucked [him] back into the seat." He then "bounced up just a little[,] and the next thing [he knew] the seat slammed down." He experienced a sharp pain down the left side of his neck and shoulder and a sharp pain going up the right side of his tailbone and back. Initially, he could not feel his feet. When he exited the truck, he observed that its bumper was bent under the trailer and that the other truck's front bumper was pushed in and cracked open. He saw smoke, oil, and antifreeze leaking from the tractor.

Mr. Hudson reported the incident to Kroger's transportation safety manager, Allen Kelso. Mr. Hudson was initially examined at the Baptist Memorial Hospital emergency room where he was administered a drug screen and given a shot for his pain. According to Mr. Hudson, he was numb and still in pain when he returned home.

The next day, Kroger sent him to Dr. Phillip Mintz who prescribed pain medication and referred him to an orthopedist. Mr. Hudson selected Dr. John Lochemes from a panel of physicians. Mr. Hudson testified that he described the accident to Dr. Lochemes and related that he was having problems with his arm and shoulder on the left side and that pain was radiating down his lower back and right hip. Dr. Lochemes referred him to physical therapy. Mr. Hudson's neck, left arm, and shoulder got better with time, but he continued to experience bad headaches.

Dr. Lochemes referred Mr. Hudson to Dr. Alan Nadel for treatment of his headaches. Dr. Nadel prescribed medication, and the headaches improved. Mr. Hudson testified, however, that his lower back and right hip continued to cause him pain. Dr. Lochemes ordered an MRI and two nerve blocks, one on the right side and one on the left. After Mr. Hudson reported to Dr. Lochemes that the lower portion of his back and hip were getting worse and that he was experiencing pain in his groin and on the right side of his hip, Dr. Lochemes referred Mr. Hudson to Dr. LaVerne Lovell for a myelogram and bone scan. Mr. Hudson returned to Dr. Lochemes for another MRI, which according to Mr. Hudson, was normal. Dr. Lochemes released Mr. Hudson to return to work. Mr. Hudson attempted to return to work at Kroger but was in "pain, really bad pain" and "was going back and forth to the emergency room." Mr. Hudson sought treatment from his family care physician, who reviewed his medical records, prescribed several medications, and ordered physical therapy.

Mr. Hudson then saw Dr. Jean Simard, an orthopedist, who reviewed an x-ray, continued physical therapy, and gave him an injection. Mr. Hudson testified that "lightening [*sic*] pains were shooting down" his leg and that he could not sleep. Dr. Simard referred him to a spinal specialist, Dr. Douglas Linville. Dr. Linville treated him for pain and administered injections. After ordering an EMG, Dr. Linville referred Mr. Hudson to Dr. Robert Bobo. Mr. Hudson requested a medical leave of absence in September 2010, while he underwent additional treatment.

After reviewing Mr. Hudson's medical records, Dr. Bobo performed surgery to release pressure on his sciatic nerve and referred him to physical therapy. Mr. Hudson testified that the surgery released pressure on the nerve and stopped the "lightening [*sic*] pain going down [his] leg" although he continued to have problems with his lower back and tailbone. Dr. Bobo again referred him to Dr. Linville, but Mr. Hudson was unable to see Dr. Linville or any other physician due to his lack of insurance. Dr. Bobo released Mr. Hudson with permanent restrictions. When Kroger declined to permit Mr. Hudson to return with the restrictions imposed, Mr. Hudson resigned from his position.

Mr. Hudson testified at trial that he still had "a lot of lower back and hip pain up under [his] tailbone every day" and that he continues to suffer from burning nerve pain in his lower back. He stated that his condition has prevented him from participating in golf, basketball,

swimming, and racquetball although he conceded on cross-examination that he had limited participation in those activities prior to the accident. He cannot perform certain household activities such as cleaning or mowing the yard. According to Mr. Hudson, he has difficulty walking and sleeping and cannot sit for prolonged periods. Prior to his employment at Kroger, Mr. Hudson worked as a real estate agent, a car salesman, a mortgage broker, and a truck driver with other companies. Mr. Hudson's real estate license has lapsed, and he testified that he is no longer able to perform the duties required by his previous employment. Mr. Hudson has unsuccessfully applied for work.

On cross-examination, Mr. Hudson agreed that when he returned to work at Kroger in July 2010, he pulled loads and drove hundreds of miles per week. However, he explained that the pain from this work caused him to seek emergency treatment.

Kroger's safety and human resource supervisor, Robert Butter, testified at trial that he dealt with medical leave and workers' compensation claims and was familiar with Mr. Hudson's claim. Mr. Butter testified that Mr. Hudson was permitted by his treating physician to return to work in July 2010 without restriction. Mr. Hudson never informed him of any problems in performing his job nor did he request to see any doctor. He did, however, request a medical leave of absence.

On cross-examination, Mr. Butter conceded that it was not part of his responsibility to communicate with employees regarding any problems an employee might experience while performing his or her duties. Mr. Hudson did tell him that he was experiencing problems from the accident that caused him to request a medical leave of absence. Kroger did not permit Mr. Hudson to return to work with the permanent restrictions imposed by Dr. Bobo.

Kevin Brangers, a vehicle accident reconstruction forensic engineer, testified on behalf of Kroger at trial. He stated that he has investigated accidents for the past eight to ten years and that his experience and training allow him to render opinions about how forces and accidents cause injury. According to Mr. Brangers, a baseline is established by documented testing of human volunteers to determine the "Delta-V," or change in velocity, to vehicle occupants from a crash. In these tests, a medical doctor evaluates, documents, reviews, and monitors the volunteers' injuries. Specifically, Mr. Brangers relied on a 1995 paper from the Society of Automotive Engineers entitled "Data and Methods for Estimating Severity of Minor Impacts," which lists the type of vehicle being tested and the generated change in velocity of the vehicle and the tested individual. The paper details the individual's reported symptoms after the collision with those of the volunteers. Using this protocol, Mr. Brangers calculated the severity of Mr. Hudson's collision in terms of Delta-V and miles per hour and compared Mr. Hudson's symptoms after the collision with those of the volunteers. Mr. Brangers also relied on another study entitled "Head Kinematics and Upper Neck Loading

During Simulated Low-Speed Rear-End Collisions: A Comparison with Vigorous Activities of Daily Living,” to compare the calculated force in Mr. Hudson’s case to the force generated in common daily activities. Mr. Hudson objected to further testimony from Mr. Brangers concerning the cause of Mr. Hudson’s injuries, arguing that only physicians determine medical causation. The trial court sustained the objection, limiting Mr. Brangers’ testimony to Mr. Hudson’s accident.

Mr. Brangers testified that he reviewed the photographs of the vehicles after the accident and performed research regarding the rear impact guard or bumper of Mr. Hudson’s vehicle. He inspected the vehicles but conceded on cross-examination that they had been repaired at the time of his inspection. Based on the deformation of the rear bumper of Mr. Hudson’s trailer, Mr. Brangers concluded that the vehicle which struck Mr. Hudson’s vehicle was traveling five to seven miles per hour. Using this calculation, he determined that the Delta-V of Mr. Hudson’s vehicle was 2.6 to 3.8 miles per hour.

Mr. Brangers also studied the seat in Mr. Hudson’s vehicle to determine the actual kinematics that developed during the collision. Mr. Brangers opined that Mr. Hudson’s body would have been propelled rearward into the seat and not in a vertical direction.

Following this testimony, Kroger made an offer of proof with respect to Mr. Brangers’ proposed testimony concerning whether the accident could have caused Mr. Hudson’s injury. Mr. Brangers testified that he calculated the change of velocity of Mr. Hudson’s vehicle and compared that change with the volunteers’ injuries. He testified that the accepted threshold for injury of occupants is approximately 5 miles per hour. The calculated Delta-V of Mr. Hudson’s vehicle was between 2.6 to 3.8, which was substantially lower than the 5 miles per hour threshold. Relying on another Society of Automotive Engineers technical paper, he compared the Delta-V of this collision with activities of daily living. These typical daily activities included hopping, skipping rope, falling, sitting in a chair, stopping abruptly during a run, and riding bumper cars. Kroger also introduced an exhibit to his report, which had been excluded by the trial court. The pertinent portion was as follows:

Based on rear-end collision testing with human volunteers, a Delta-V of 5mph or less is within human tolerance levels. The Delta-V calculated for the Hudson unit of 2.6 to 3.8 mph is less than the 5mph injury threshold level and is, therefore, unlikely to cause injury to properly seated and belted occupants.

On cross-examination, Mr. Brangers testified that he had not spoken with Mr. Hudson or the other driver involved in the accident. He agreed that there were no skid marks left at the scene. Mr. Brangers admitted that he was unaware that the collision caused damage to the other vehicle in the amount of \$11,000 but stated that knowing the cost of the repairs would not have benefitted his analysis.

Dr. Bobo testified by deposition that Mr. Hudson was first seen by his partner, Dr. Simard, on October 11, 2010. Dr. Simard's history revealed that Mr. Hudson had been rear-ended in an accident on March 7, 2010. Mr. Hudson experienced pain in his lower back and had undergone physical therapy. Mr. Hudson had attempted to return to work but was unable to continue. Dr. Simard conducted a physical examination that indicated pain with the external rotation of Mr. Hudson's right hip and significant tenderness over the outside of his right hip. Dr. Simard's impression was right trochanteric bursitis and mild degenerative disk disease in the lumbar spine.

Dr. Bobo first saw Mr. Hudson on March 29, 2011. Between his visits to Dr. Simard and Dr. Bobo, Mr. Hudson saw Dr. Phillip Green and Dr. Linville, both of whom diagnosed Mr. Hudson with piriformis syndrome. Dr. Bobo performed a piriformis stretch test and noted tenderness in the area of the right sciatic notch. Based on his evaluation, Dr. Bobo confirmed that Mr. Hudson has piriformis syndrome and opined that Mr. Hudson's problems were related to his March 7, 2010 accident. On April 26, 2011, Dr. Bobo performed surgery for this condition.

Dr. Bobo continued to treat Mr. Hudson after his surgery. In May 2011, Mr. Hudson appeared to be doing well but was experiencing pain over the right ischium, which Dr. Bobo felt was a minor complication. On June 24, 2011, Mr. Hudson complained of continuing pain in the right posterior radiating down his right leg. An EMG and nerve conduction study showed no evidence of irritation or radiculopathy. At that point, Dr. Bobo believed that Mr. Hudson had reached maximum medical improvement. On August 8, 2011, Dr. Bobo reviewed with Mr. Hudson the results of a functional capacity evaluation, which revealed "some self-limitation to a light-medium to medium physical work capacity range, which includes lifting 35 to 50 pounds occasionally." Dr. Bobo did not believe that Mr. Hudson could perform his duties as a truck driver for Kroger. Dr. Bobo assigned an anatomical impairment of five percent to the right lower extremity, which equated to four percent to the body as a whole. Dr. Bobo provided permanent restrictions from prolonged sitting on hard surfaces for more than one hour and from pulling, pushing, or lifting weights greater than 35-50 pounds on an occasional basis or five pounds on a frequent basis. Dr. Bobo released Mr. Hudson to return to work on August 15, 2011, but continued to see him for complaints with his right lower back and posterior hip. Dr. Bobo did not feel, however, that these conditions were related to piriformis syndrome.

On cross-examination, Dr. Bobo testified that piriformis syndrome can be caused both acutely and chronically. He explained that chronic causes include sitting on hard surfaces for long periods of time, and acute causes are generally some type of contusion or blow to the back of the hip. In the case of a motor vehicle collision, you would "wonder if the person came out of the seat and dropped back down." Dr. Bobo generally expects the victim of a rear-end collision to be projected forward and backward. On redirect examination, Dr. Bobo

agreed that Mr. Hudson's description of his body movement during the accident was consistent with his opinion as to the cause of the piriformis syndrome.

On cross-examination, Dr. Bobo explained that the functional capacity evaluation indicated that Mr. Hudson had been limiting his effort. This self-limitation made it more difficult for Dr. Bobo to provide a valid impairment rating. He opined that Mr. Hudson could work in the field of real estate, automotive sales, and as a mortgage broker.

The Medical Impairment Rating ("MIR") Report of Dr. Kelvin Wren was admitted into evidence. Dr. Wren's report states that he evaluated Mr. Hudson on August 14, 2012, for injuries to his neck, left shoulder, and low back/right hip. Dr. Wren reviewed Mr. Hudson's medical records from the Baptist Memorial Hospital emergency room, the Methodist Hospital emergency room, Dr. Mintz, Dr. Lochemes, Dr. Nadel, Dr. Lovell, Dr. Linville, Dr. Simard, Dr. Bobo, and other providers. He additionally reviewed Mr. Hudson's diagnostic studies, including x-rays, MRIs, myelograms, EMGs, and CT studies. Dr. Wren took a detailed history, including an Activities of Daily Living Questionnaire, a QuickDASH questionnaire, and a Pain Disability Questionnaire, and performed a physical examination. He diagnosed Mr. Hudson with a cervical strain, a left shoulder strain, and right piriformis syndrome/low back pain. He opined that all of these conditions were causally related to Mr. Hudson's work injury, that Mr. Hudson had permanent impairment, and that he reached maximum medical improvement on August 8, 2011. Dr. Wren assigned Mr. Hudson a 2% anatomical impairment to the body as a whole for his cervical strain, a 0% anatomical impairment to the body as a whole for his left shoulder strain, and a 14% anatomical impairment to the body as a whole for his right piriformis syndrome/low back pain, for a total anatomical impairment to the body as a whole of 16%.

The trial court announced its decision from the bench and found that the the March 7, 2010 accident caused Mr. Hudson's piriformis syndrome. It adopted Dr. Wren's 16% impairment rating and awarded permanent partial disability benefits based on 48% vocational disability. The trial court also awarded future medical expenses and forty-five weeks of unpaid temporary total disability benefits. Kroger appealed, arguing that the trial court erred by: (1) excluding portions of Mr. Brangers' testimony; (2) finding Mr. Hudson's piriformis syndrome was caused by the March 7, 2010 accident; (3) awarding benefits based on a 48% vocational disability; and (4) awarding forty-five weeks of unpaid temporary total disability benefits. This case was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51.

Standard of Review

Factual issues in workers' compensation cases are reviewed de novo on the record of the trial court and are accompanied by a presumption of correctness unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2)(2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court's decision when the trial judge had the opportunity to observe the witness's demeanor and hear in-court testimony. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given expert testimony when the medical proof is presented by deposition, as it was in this case. Glisson v. Mohon Int'l, Inc., 185 S.W.3d 348, 353 (Tenn. 2006); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court's conclusions of law are reviewed de novo on the record with no presumption of correctness. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 642 (Tenn. 2008).

Analysis

Kroger contends that the trial court erred by excluding Mr. Brangers' expert testimony contained in the offer of proof. Specifically, Kroger contends that Mr. Brangers should have been permitted to calculate the change of velocity of Mr. Hudson's vehicle with the injuries recorded in the volunteer testing. Relying on Mr. Brangers' research, the Delta-V generated in this case was similar to hopping and skipping rope. Kroger contends that Mr. Brangers should have been allowed to testify that "injuries to a properly seated and belted occupant would be unlikely" based on his analysis and comparison with the Delta-V generated in similar rear end collisions. The trial court excluded this testimony because only a physician can address causation in workers' compensation cases.

As our Supreme Court has explained:

Generally, questions pertaining to the qualification, admissibility, relevancy[,] and competency of expert testimony are matters left to the trial court's discretion. We may not overturn a trial court's ruling admitting or excluding expert testimony unless the trial court abused its discretion. A trial court abuses its discretion if it applies an incorrect legal standard or reaches an illogical or unreasonable decision that causes injustice to the complaining party.

Brown v. Crown Equip. Corp., 181 S.W.3d 268, 273 (Tenn. 2005) (citations omitted).

The trial court found that the proffered testimony related to the cause of Mr. Hudson's injuries. We disagree. Mr. Brangers' testimony was offered to explain the method of

determining the extent of potential injury to humans based on given forces and how a hypothetical person's body responds to those forces. This proffered testimony was a continuation of his testimony concerning the accident and was limited to injuries in general. Moreover, Mr. Brangers' testimony did not concern the cause of Mr. Hudson's injuries and was not offered to prove the actual cause of Mr. Hudson's specific injuries. As such, the trial court erred by excluding this testimony.

Kroger relies on Mr. Brangers' excluded testimony to support its position that the accident could have not have resulted in injuries to Mr. Hudson in the manner that Mr. Hudson described. We conclude, however, that the record contains ample evidence to support the trial court's conclusion that Mr. Hudson's injuries were caused by the March 7, 2010 accident. Mr. Brangers' proffered testimony in this regard was that the injury to the occupant was unlikely. Mr. Brangers has no medical training and did not review Mr. Hudson's medical records. He was not familiar with piriformis syndrome. Mr. Hudson testified with clarity concerning how his body moved during the collision. The trial court found that Mr. Hudson was consistent in terms of what happened in the accident and that Mr. Hudson's testimony was credible in describing the manner in which the accident occurred. The trial court specifically discounted Mr. Brangers' description of the accident. We must therefore defer to the trial court's determination. Furthermore, Dr. Bobo testified that the injury was caused by the March 7, 2010 accident. Dr. Bobo's opinion, in our view, represents a clear statement of medical causation. We therefore conclude that the evidence does not preponderate against the trial court's finding that the March 7, 2010 tractor-trailer collision caused Mr. Hudson's injuries.

Kroger next challenges the trial court's award of permanent partial disability benefits based on a vocational impairment of 48%. In support, Kroger again relies on the excluded testimony of Mr. Brangers and Mr. Hudson's self-limiting performance in his functional capacity evaluation.

In reaching its conclusion that Mr. Hudson was 48% vocationally disabled, the trial court relied on Dr. Wren's MIR Report, which assigned an anatomical impairment rating of 16% to the body as a whole. The trial court determined that this rating was entitled to the statutory presumption contained in Tennessee Code Annotated section 50-6-204(d)(5)(2008). Nothing in this record suggests that Kroger rebutted by clear and convincing evidence the presumption attached to Dr. Wren's impairment rating. The mere fact that Dr. Bobo assigned a lower anatomical rating is insufficient to overcome the statutory presumption.

It is undisputed that Kroger could not accommodate Mr. Hudson with the restrictions imposed by Dr. Bobo and did not allow his return to work. The trial court accredited Mr. Hudson's testimony regarding the significant limitation placed on his ability to resume gainful employment as a result of his injuries. In sum, the evidence does not preponderate

against the trial court's award of a permanent partial disability benefits based on a 48% vocational disability.

Finally, Kroger contends that the trial court erred in awarding Mr. Hudson 45 weeks of unpaid temporary total benefits for the period between September 23, 2010, and August 2011, when he was released by Dr. Bobo. Again, Kroger relies on the excluded testimony of Mr. Brangers regarding causation. For the reasons already articulated, we conclude that Kroger's argument is without merit.

Conclusion

The trial court's judgment is affirmed. Costs of this appeal are taxed to Kroger Limited Partnership I, and its surety, for which execution may issue if necessary.

JON KERRY BLACKWOOD, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

KEVIN HUDSON v. KROGER LIMITED PARTNERSHIP I

**Chancery Court for Shelby County
No. CH-12-0556-2**

No. W2013-02181-SC-WCM-WC - Filed November 24, 2014

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Kroger Limited Partnership I, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Kroger Limited Partnership I, and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM