

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

January 27, 2015 Session

**DANIEL G. LEWIS v. COMCAST**

**Appeal from the Circuit Court for Anderson County**  
**No. B3LA0130 Donald R. Elledge, Judge**

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**No. E2014-00962-SC-R3-WC-MAILED-MAY 15, 2015**  
**FILED-JUNE 17, 2015**

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Daniel G. Lewis, the employee, was a cable technician who made a claim for workers' compensation benefits from Comcast, the employer, after he fell from a pole during a climbing recertification procedure. The employer provided medical care and paid temporary disability benefits but denied that the employee had sustained a permanent impairment or disability. Ultimately, the trial court awarded 70% permanent partial disability. The employer appeals, contending that the trial court erred by excluding evidence about the employee's history of drug abuse and by awarding permanent disability benefits. Pursuant to Tennessee Supreme Court Rule 51, the 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. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013) Appeal as of Right; Judgment of the Circuit Court Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which GARY R. WADE and D. MICHAEL SWINEY, JJ., joined.

W. Troy Hart and Julie Cochran Fuller, Knoxville, Tennessee, for the appellant, Comcast.

Brad C. Burnette, Clinton, Tennessee, for the appellee, Daniel G. Lewis.

**OPINION**

## **I. Factual and Procedural Background**

Following the employee's injury, the parties initially attempted to resolve their differences at a Benefit Review Conference on May 30, 2013. However, upon reaching an impasse, the employee filed a Workers' Compensation Petition in the Anderson County Circuit Court the same day. The matter was scheduled for trial on April 21, 2014.

Prior to the trial, the employee filed a motion in limine, seeking to prevent the employer from introducing evidence concerning his August 7, 2013 arrest for manufacturing methamphetamine. After a hearing, the trial court determined that the evidence was not relevant to the issues at trial and granted the motion.

At trial, the parties stipulated that the employee was forty years old at the time of his injury, that he was forty-two years old at the time of trial, that he was married, and that he had two adult children. The parties also stipulated that the employee attended school through the tenth grade and later obtained a general equivalency diploma (GED). The parties further stipulated that the injury occurred on March 6, 2012, and that the employer was notified of the injury the same day.

The employee testified that he had worked various jobs in the cable television industry for most of his adult life, beginning when he was hired by Cablecraft in Orlando, Florida. The employee then worked for American Telecasting, BellSouth, and Joyner Cable. Occasionally, he also did odd jobs, such as working for Papa John's Pizza, Sonny's Bar-B-Q, and Walmart. After moving to Tennessee, he obtained employment with Muzak, where he worked for two years as a technician. The employee was hired by the employer on January 16, 2007. He was initially employed as a customer technician, also known as a "Com Tech 1," and he was paid \$11.50 per hour. After 180 days, he was promoted to "Com Tech 2." In August 2007, he was promoted to "Com Tech 3," and in June 2008, he was promoted to "Com Tech 4." With each promotion, the employee received a pay raise of approximately one dollar per hour. Because few positions above "Com Tech 4" were available and the competition for those positions was extensive, the employee did not receive any other promotions. The employee said that during his employment, he had performance evaluations annually and that he never had an unfavorable review. He also said he had never been reprimanded or had serious disciplinary problems.

The employee said that every year, the employer required technicians to get recertified on their ability to climb a utility pole and that before his accident, he had always completed the recertification process.

The employee said that on March 6, 2012, he and three other technicians were scheduled to be recertified and that Mike Reynolds supervised the recertification. The recertification poles were located behind the employer's office in Oak Ridge. Before climbing, the employee dressed in "safety gear." The employee was required to climb an eighteen-foot pole, circle it at the top, lean away from the pole using safety equipment, and then descend the pole. The employee said that as he was descending, his arms became tired, and he asked Reynolds if he could keep his safety strap on while completing his descent. Reynolds cautioned that if the employee did so, he would fail the test. The employee resumed his descent without the safety strap.

The employee said that when his eyes were about even with the ten-foot marker, one of the gaffs, which were climbing spikes in his boots, came loose from the pole. The employee stated that below the ten-foot mark, the pole was "chewed to bits" from previous recertification tests. When the employee's gaff came loose, he lost his balance and fell backwards, away from the pole. He testified that he was five feet, nine inches tall and that his feet were approximately five feet above the ground when he fell. He landed on his back and neck. He said that some of the other technicians told him that he momentarily lost consciousness after the fall. Because the fall made the employee "groggy," he could not recall what happened immediately after the fall.

The employee said that Reynolds asked if he was okay and if he wanted to retake the climbing test. The employee was "sore," "confused," and "hurt" and did not think he should attempt the test again that day. Nevertheless, the employee returned to work and finished his shift. As the day progressed, he became increasingly stiff, sore, and numb in his neck and shoulder.

The employee said that around seven o'clock the next morning, he called his supervisor, Brandon Yawn, to report that he was unable to come to work. Yawn volunteered to take the employee to the doctor, and they went to Methodist Medical Center HealthWorks. While there, the employee filled out an accident report. He was examined by Dr. Stephen Ellis, who restricted him from working. Dr. Ellis prescribed anti-inflammatory medication but did not prescribe any narcotic medication.

The employee saw Dr. Ellis again on March 15. The employee's condition had not improved, and Dr. Ellis ordered magnetic resonance imaging (MRI). After reviewing the results of the MRI, Dr. Ellis referred the employee to Dr. Lawrence P. Maccree for further evaluation and treatment. The employee told Dr. Maccree that he was descending an eighteen-foot pole and that he fell from a distance of eight to ten feet to the ground. He said that Dr. Maccree may have misunderstood and thought the employee said he fell eighteen feet.

The employer sent the employee to Dr. Thomas Scott Baker, whose office was located approximately three hours from the employee's home. The employee said that the examination lasted approximately ten minutes.

The employee testified that his condition had not improved since the injury and that physical therapy had not alleviated his symptoms. He continued to have pain in his neck, left shoulder, and left arm, and he had difficulty lifting and carrying things, including a gallon of milk. He had not applied for work with any employer since his injury but had made inquiries through friends.

Mike Reynolds, a technical operations supervisor for the employer, testified that he was responsible for administering the climbing recertification on the date of the employee's injury. He said that during the descent, the employee's gaff came loose from the pole when the employee's feet were four or five feet off the ground. The employee slid down the pole, landed on his feet, and rolled backward onto the ground. Reynolds denied that the employee did a backwards "free fall." He also stated that the employee did not lose consciousness and was able to move immediately after the fall. He said the employee laughed about the incident afterwards and said he was fine. Reynolds asserted that if the employee had lost consciousness, he would have taken the employee to a hospital.

Reynolds acknowledged that other technicians were present at the time the employee was taking the recertification test. He was unable to independently recall the names of the other technicians, but he could find the names in the employer's records. Reynolds further acknowledged that the employee was "on the clock" performing a requirement of his job when he fell. Reynolds did not recall the employee's asking to use his safety strap during his descent.

During cross-examination, Reynolds agreed that the bottom of the pole used for the climbing test was worn from use. He said the employee asked to retake the test, but Reynolds suggested the employee first rest for a few minutes. The employee eventually decided to retake the test another day.

Brandon Yawn, the employee's immediate supervisor, testified that he was not present at the scene when the employee fell. He was in the employer's building when the incident occurred and came out when he heard the "commotion." The employee told Yawn that he was fine and declined an offer of medical treatment. The employee did not appear to be in pain after the incident. Nevertheless, Yawn repeatedly checked on the employee's well-being throughout the day. Yawn acknowledged that the following morning, he took the employee to a doctor.

Yawn did not see how the employee landed after his fall. He asked Reynolds and the employee, “but their stories were in conflict.” Yawn noted that Reynolds said the employee landed on his feet. Because of the conflicting stories, Yawn did not document in any of the accident reports Reynolds’s version of how the employee landed. Yawn acknowledged that the employee was not intoxicated at the time of the fall.

Dr. Lawrence P. Maccree testified by deposition that he was an osteopathic surgeon and physician whose specialty was neurosurgery. Dr. Maccree first saw the employee on May 30, 2012. Dr. Maccree said his reports reflected that the employee said he fell a distance of eighteen feet; however, he acknowledged that the height of the fall recorded in the reports could have been a typographical error. The employee reported that he landed on his neck and the back of his head, that he was rendered unconscious, and that he was unable to move for several minutes after regaining consciousness. The employee said that his primary symptoms were pain in the neck, upper back, left shoulder, and left arm. Dr. Maccree’s examination revealed decreased sensation in the C4 through C7 dermatomes on the left side and weakness in the left arm. Dr. Maccree’s review of the MRI revealed that

[a]t C3-4 there was narrowing of the opening where the nerves leave on both sides. This was associated with a disk osteophyte complex which is bone spur and disk. It did indent the spinal cord but did not compress it. At C4-5 there was mild narrowing on the right-hand side of the opening that the nerve leaves at, also due to disk and bone spur complex. There was brightness of the spinal cord starting at about that level, C4-5, and going behind the vertebral body of C5[,] . . . [t]hat area of brightness went down to the C5-6 disk space. . . . At C6-7 he had some mild narrowing of the central canal but no narrowing of the space where the nerves left and no deformity or change in the spinal cord.

Dr. Maccree explained that the brightness could be a manifestation of swelling from a possible spinal cord injury.

Based upon his examination of the employee and the MRI, Dr. Maccree thought the employee might have a spinal cord injury without radiological attributes (“SCIWORA”). Dr. Maccree said that the employee had other symptoms, such as a lack of coordination and balance, that were consistent with that condition. Dr. Maccree acknowledged that the employee’s symptoms were also consistent with a cervical sprain

or strain. Dr. Maccree thought that the employee had not had a sufficient amount of conservative treatment, so he ordered physical therapy. He also ordered the employee to have a functional capacity evaluation (“FCE”).

Dr. Maccree saw the employee again on January 17, 2013. At that time, Dr. Maccree determined that the employee had reached his maximum medical improvement. Dr. Maccree saw the employee for the final time on February 28, 2013. He determined that the employee continued to have muscle wasting in his left hand and loss of sensation in the C4 through C7 dermatomes. Dr. Maccree ultimately diagnosed the employee with pre-existing mild cervical stenosis, injury to the spinal cord and thoracic outlet, and a grade three concussion. The doctor assigned 17% permanent impairment to the body as a whole pursuant to the Sixth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (“AMA Guides”).

Dr. Maccree said that after examining the employee, he agreed with the limitations set out in the FCE; specifically, he determined that

lifting more than 20 pounds was not recommended. That activities that were frequent should be limited to 15 pounds. We felt that he could carry 20 pounds for up to 100 feet, and on an occasional basis, 10 pounds. We felt that he could climb stairs with a 10-pound load, but we did not feel that he would be able to safely climb a ladder.

We felt that he could reach to shoulder level, to bend and climb without limitations. We felt that he was able to reach above his shoulder, squat and kneel, but only on an occasional basis. We felt that he could push or pull up to 20 pounds, and on an occasional basis, 15 -- excuse me. On an occasional basis, and 15 pounds on a frequent basis. We limited his standing and walking to 60 minutes at a time. We suggested limitation of his sitting for 20 to 30 minutes at a time.

During cross-examination, Dr. Maccree agreed that an electromyogram (EMG) from September 2012, did not reveal radiculopathy. He further agreed that an April 11, 2012 cervical MRI showed disc bulges that abutted the spinal cord but no herniated discs. He admitted that he was not aware that the employee fell only five feet rather than eighteen feet or that in the employee’s interrogatory responses, he had denied losing consciousness after the fall. Dr. Maccree did not recall if he used the original or revised

version of the AMA Guides. He did not agree that the sections of the AMA Guides concerning radiculopathy were applicable to the employee's case, noting that the employee had a spinal cord injury. Dr. Maccree testified that knowing a patient had a history of drug abuse potentially could be important because it might affect the reliability of the patient's history. Dr. Macree said that his diagnosis was based on the results of the MRI and that the knowledge of any drug use by the employee did not change the diagnosis.

Dr. Thomas Scott Baker testified by deposition that he was board certified in physical medicine and rehabilitation and that he had secondary board certifications in electrodiagnostic medicine and in pain medicine. He said that he examined the employee on August 15, 2012, at the request of the employer's attorney. Dr. Baker stated that a history of illegal drug use could be significant in evaluating a patient under treatment for chronic pain. He stated that the employee said that he did not lose consciousness after his fall and did not say that he was unable to move after the fall. Dr. Baker reviewed the radiologist's reports about the April 11, 2013 MRI and said that the MRI showed only age-related changes and no acute injury. He acknowledged that he did not review the MRI, only reports about the MRI.

Dr. Baker said that he examined the employee for approximately one hour. His examination showed decreased strength in the left arm and diminished range of motion in the neck. He diagnosed the employee with cervical strain, thoracic strain, and left arm weakness and numbness. He strongly disagreed with Dr. Maccree's diagnosis of SCIWORA, stating that the condition was extremely rare in adults. Dr. Baker opined that no evidence of a spinal cord injury existed, that the employee had no permanent impairment, and that no permanent work restrictions were required.

During cross-examination, Dr. Baker agreed that he was not a treating physician and that he saw the employee solely for the purpose of conducting an evaluation for the employer. He said he relied on medical journals to reach his opinion concerning SCIWORA.

Dr. William Alan Wray testified at trial that he was a licensed clinical psychologist and a board certified professional disability consultant. He evaluated the employee at the request of the employer. Dr. Wray's testing showed that the employee's reading ability was in the seventieth percentile of adults and that his arithmetic score was slightly below average. The employee reported that his left hand was weak, but Dr. Wray did not observe the employee having any problems with that hand. Dr. Wray said that the employee had transferrable skills in his knowledge of cable systems and equipment, customer service, and management training. He opined that, with Dr. Maccree's

restrictions, the employee's vocational disability based on Tennessee data was 53% and that based on national data, the employee's disability was 49%. Dr. Wray stated that based upon Dr. Baker's opinion that the employee had no restrictions, the employee had no vocational disability.

Rodney Caldwell testified by deposition that he was a "vocational expert" and that he had conducted an evaluation of the employee at the request of the employee's attorney. In the course of the evaluation, Mr. Caldwell administered the Wide Range Achievement Test and a portion of the Minnesota Manual Dexterity Test. Testing revealed that the employee read above a twelfth-grade level and performed arithmetic at a twelfth-grade level. He scored in the lowest percentile on the dexterity test. Based on Dr. Maccree's restrictions, Mr. Caldwell opined that the employee had a 70% vocational disability. Mr. Caldwell said that if he also considered the results of the dexterity testing, the employee had a 100% vocational disability.

During the trial, the employer sought to introduce evidence that the employee was admitted to a drug treatment program in March and April 2010 for addiction to oxycodone and alcohol. The employer also sought to introduce evidence that the employee sought treatment for oxycodone addiction in October 2012 and that the employee had participated in a similar program in 2009 through 2011. The trial court sustained the employee's objection to this evidence on the ground of relevance; however, the employer was permitted to make an offer of proof of this evidence.

At the conclusion of the proof, the trial court announced its findings and conclusions from the bench. Specifically, the trial court found that the employee was a credible witness. The court accredited the testimony of Dr. Maccree and Mr. Caldwell over that of Dr. Baker and Dr. Wray. The court determined that the employee had sustained a 70% permanent partial disability to the body as a whole and entered a judgment in accordance with those findings. On appeal, the employer challenges this ruling, asserting that the trial court erred by excluding evidence of the employee's drug abuse and arrest for manufacturing methamphetamine and that the evidence preponderates against the award of permanent disability benefits.

## **II. Analysis**

In Tennessee workers' compensation cases, this court reviews the trial court's findings of fact de novo with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. Code Ann. §50-6-225(e)(2) (2008 & Supp. 2013); Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). "This standard of review requires us to examine, in depth, a trial court's factual findings and conclusions."



Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991) (citing Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 675 (Tenn. 1991)). We give considerable deference to the trial court's findings of credibility and assessment of the weight to be given to that testimony when the trial court has heard in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). On questions of law, our standard of review is de novo with no presumption of correctness. Wilhelm, 235 S.W.3d at 126. The extent of vocational disability is a question of fact to be decided by the trial judge. Johnson v. Lojac Materials, Inc., 100 S.W.3d 201, 202 (Tenn. Workers' Comp. Panel 2001).

#### A. Character Evidence

The issue of the employee's arrest and prior involvement with drugs first came to the attention of the trial court on April 4, 2014, when the employer filed a second motion for a continuance, alleging that it needed additional time to investigate issues regarding the employee's credibility and his "ulterior motive for pursuing his workers' compensation claim." In the motion, the employer said that during the employee's deposition, he was asked about the Anderson County Sheriff's Department's raid on his residence in 2013. The employee stated that he had rented two rooms of his residence to people who "were just doing some stuff that they shouldn't be doing." When asked to explain, the employee stated, "I honestly don't know what they did. I didn't see it." Nevertheless, he acknowledged that he was told his renters were manufacturing methamphetamine.

The employer said that after the deposition, it obtained the affidavit of complaint. In the complaint, Investigator Jason Leach alleged that the individuals involved, including the employee, "all stated that they participated in the manufacturing of the methamphetamines in some way and that they were all aware of what was inside the house and that meth was being made." The employer contended that "Investigator Leach's statement, under oath, that [the employee] confessed to manufacturing methamphetamine, is in direct contradiction of [the employee's] statement during his deposition that he did not know what was transpiring at his house." The employer further contended that the contradiction "seriously" raised the issue of the employee's credibility and that additional time was needed for another medical evaluation.

During a hearing on the motion for continuance, the employer acknowledged that the employee had not been indicted by the grand jury or convicted of the crime for which he was arrested. The trial court stated that to make a credibility determination, it would need to "try him and find him guilty of the crime for which he lied about" or that "there

has to be an adjudication on that.” The court therefore denied the employer’s motion for a continuance.

On April 10, 2014, the employee filed a motion in limine to exclude testimony pertaining to his “alleged criminal conduct” pursuant to Tennessee Rules of Evidence 403, 404(b), and 608. On the same day, the employee filed a motion to quash a subpoena for Investigator Leach, contending that any evidence from Investigator Leach would be inadmissible under the collateral fact rule.

On April 17, 2014, the trial court held a hearing on the motions. The employer cited Dr. Baker’s testimony that “the only diagnosis is symptom magnification,” which, according to the employer, suggested the employee might be lying. The trial court reminded the employer that admission of criminal activity not admitted to under oath or sworn to by affidavit would be governed by Rule 404(b). The court stated that “just because he’s been treated for drugs, that doesn’t mean that he’s lying. That doesn’t mean he has a drug addiction now.” The court said that the employee’s drug use and arrest were not relevant to the issue of where and how he fell, noting that it “doesn’t change the nonsubjective findings that we have on MRI and by physical examination.” The court said:

I find that [the] proof would be prejudicial, I find it’s not material, I find that it’s not relative – or not – right, [relevant], and whether he was or not taking prescription medication is not even an issue that was raised.

As counsel pointed out, it’s not an issue that he was under any – the influence of any drugs on that day. It’s not an issue of whether or not he violated any rule of substance abuse or any rule of safety.

The issue before me today is whether or not he fell off a pole, how he fell off of it, and how high it was. And then if I find that he had that, then what is the injury to the plaintiff? That’s the issues before me. That’s the issues. And whether or not he was a druggie and had to go into drug rehab two years before this happened . . . doesn’t go to an issue of credibility.

....

Again, there's nothing in this – nothing in the answers saying that he violated public policy; he was intoxicated or under the influence of drugs; he was performing his job wrong. The issue before me is, did he fall off the pole? Did he injure himself? How bad was the injury? That's simple.

The trial court found that the evidence was not relevant and therefore inadmissible under Rule 403 and that under Rule 404(b), the prejudicial effect of the evidence substantially outweighed its probative value. The court further stated that the evidence was inadmissible under Rule 608, noting that the employee did not deny the arrest; instead, “[w]e’ve got an officer who is going to make statements – allegedly make statements to the Court that are contradictory of statements that [the employee] made as a result of an alleged drug bust that he’s not even had a preliminary hearing on.” The court granted the motion in limine and the motion to quash the subpoena for Investigator Leach.

At the end of the trial, the employer made an offer of proof regarding the contested testimony. During the offer of proof, the employer asked the employee about his arrest and his statements to Investigator Leach. On the advice of counsel, the employee asserted his Fifth Amendment rights against self-incrimination. The employee also clarified that he did not mention his history of drug use or prescriptions for oxycodone and endocet to Dr. Ellis because a nurse in that office advised him to list only the drugs he was currently taking.

On appeal, the employer contends that the trial court erred by excluding evidence pertaining to the employee's drug addiction and his arrest for manufacturing methamphetamine. The employer also contends that it should have been able to inquire about the employee's deposition testimony that he was not involved in manufacturing methamphetamine and Investigator Leach's affidavit indicating that the employee had confessed his involvement in the manufacturing of methamphetamine. The employer argues that the evidence was relevant and admissible to impeach the employee's credibility. In its brief, the employer states that it is not arguing that “it is relieved from its statutory obligation to provide workers' compensation benefits because the [employee] is a drug addict and a criminal.” Instead, the employer maintains that it is relieved from its obligation because the employee “is lying about his physical condition.” The employer explains that it sought to use evidence of the employee's “confession to methamphetamine manufacturing as evidence that he is not a truthful person because he told defense counsel under oath that he had no idea drugs were being made at this house.” The employer also sought to use evidence regarding the employee's drug addiction “for the same purpose, as he lied about these matters to the authorized treating physicians in

this case, who were treating him for continued complaints of pain.” The employer asserts that the evidence was admissible under Tennessee Rules of Evidence 611 and 608.

Although the employer maintains on appeal that it should have been allowed to cross-examine the employee on the matters pursuant to Tennessee Rule of Evidence 611(b), which provides that “a witness may be cross-examined on any matter relevant to any issue in the case, including credibility,” the employer did not make this argument in the trial court. Accordingly, this issue is waived. See Tenn. R. App. P. 36(a) (providing that “[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error”).

Next, the employer argues that the evidence is admissible under Tennessee Rule of Evidence 608(b), which provides:

Specific instances of conduct of a witness for the purpose of attacking or supporting the witness’s character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness . . . , be inquired into on cross-examination.

Before a witness can be questioned, the trial court, upon request, must hold a hearing to determine whether “the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry.” Tenn. R. Evid. 608(b)(1). This court reviews a trial court’s ruling under Rule 608(b) under an abuse of discretion standard. State v. Reid, 91 S.W.3d 247, 303 (Tenn. 2002).

As the trial court observed, subsequent to his injury, the employee was arrested for manufacturing methamphetamine, but, at the time, he had not been convicted. Therefore, evidence about the arrest would have been inadmissible at the trial. See State v. Morgan, 541 S.W.2d 385, 389 (Tenn. 1976) (holding that cross-examination about “indictments, charges and accusations that some particular offense has been committed” is not permissible); Tenn. R. Evid. 608, Advisory Comm’n Cmts. (stating that part (b) reflects the view of impeachment by prior bad acts espoused by the supreme court in Morgan). As the trial court further noted, extrinsic evidence regarding the arrest and the employee’s drug treatment was inadmissible under Rule 608. Moreover, as the offer of proof demonstrates, the employee would have asserted his Fifth Amendment rights against self-incrimination if questioned about his arrest.

Additionally, the trial court found that the employee's arrest and his history of drug use were not probative to his credibility. We agree. As the Court of Criminal Appeals has previously held, drug crimes do not necessarily involve dishonesty. State v. Walker, 29 S.W.3d 885, 891 (Tenn. Crim. App. 1999).

The trial court found that evidence regarding the employee's arrest for manufacturing methamphetamine and his drug addiction were not relevant to the issues at trial. The employer repeatedly argued that the evidence related to the employee's credibility, noting that the employee's testimony during his deposition that he was not involved in manufacturing methamphetamine was not consistent with Investigator Leach's affidavit of complaint, which stated that the employee acknowledged to Investigator Leach that the employee was involved. In response, the employee argues that this evidence is inadmissible under the collateral fact rule.

The collateral fact rule provides that

the statement of a witness made during cross-examination as to a collateral fact may not be impeached by extrinsic evidence of a prior inconsistent statement as to that fact. A collateral fact is one which affords no reasonable inference as to the principal matters in dispute. A fact is collateral for purposes of the collateral fact rule if it is relevant only because it contradicts something said in court; it is not collateral if it is relevant independent of any contradiction. . . .  
The collateral fact rule is essentially a rule of relevancy.

State v. Leach, 148 S.W.3d 42, 56 (Tenn. 2004) (citations omitted); see also Neil P. Cohen et al. Tennessee Law of Evidence § 6.07[4][b] (LEXIS publishing, 6th ed. 2011).

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401; see also State v. Kennedy, 7 S.W.3d 58, 68 (Tenn. Crim. App. 1999). Tennessee Rule of Evidence 402 provides that “[a]ll relevant evidence is admissible except as [otherwise] provided . . . . Evidence which is not relevant is not admissible.” However, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Tenn. R. Evid. 403.

The employer asserts that the facts at issue are not collateral, stating that the evidence concerns the employee's "credibility concerning representations he made to his treating physicians and secondary gain motivation for pursuing his workers' compensation claim." Specifically, the employer alleges that the employee had a long history of addiction to pain pills and that he could have been engaging in "symptom magnification" in order to obtain pills to take or to sell. The employer further alleges that if the employee were involved in the manufacturing of methamphetamine, "it would be further proof that he is not as disabled as he claims to be."<sup>1</sup>

Through the depositions of Dr. Maccree and Dr. Baker, the employer introduced evidence that the employee failed to disclose any potential history of illegal drug use prior to the doctors' assessments. Dr. Baker said that the failure to disclose negatively impacted the employee's credibility. However, Dr. Maccree said that although prior drug use could be a "red flag," it did not change the nonsubjective findings visible on the MRI. Thus, Dr. Maccree's diagnosis did not change when he learned of the employee's prior drug problem.

Moreover, we note that the employee disclosed his oxycodone prescription to Dr. Maccree. None of the authorized physicians prescribed narcotic pain medication to the employee or were asked to do so. Although Dr. Baker and Dr. Maccree reached different conclusions, each made objective findings that the employee had loss of strength, muscle atrophy, diminished sensation, and decreased range of motion. Thus, Dr. Maccree's opinion, which was accredited by the trial court, was premised on more than the employee's subjective complaints. We conclude that the trial court did not abuse its discretion by excluding the evidence.

## B. Permanency and Causation

The employer's second contention is that the evidence preponderates against the trial court's finding that the employee sustained a permanent impairment or disability as a result of his fall from the climbing pole. The employer relies on Dr. Baker's opinion that the employee's "true diagnosis is symptom magnification." It observes that an EMG study found no evidence of radiculopathy. It also asserts that the employee was not a credible witness at trial. The employee argues that the trial court's rulings on compensability and disability should be affirmed.

Tennessee's Workers' Compensation Law requires that to be compensable, "an injury must both arise out of the work and occur in the course of employment." Padilla v.

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<sup>1</sup>The employer did not make this argument at trial.

Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010). “The requirement that the injury ‘arise out of’ the work refers to the cause or origin of the injury; while the requirement that the injury occur ‘in the course of’ the work involves the time, place, and circumstances of the injury.” Id. Generally, a claimant must utilize expert medical evidence to establish the causal relationship between the claimed injury and the employment activity. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008). “The claimant must establish causation by the preponderance of the expert medical testimony, as supplemented by the evidence of lay witnesses.” Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274 (Tenn. 2009). Nevertheless, because “medical proof can rarely be certain,” a claimant need not prove causation with absolute certainty. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004). Due to “the imprecision and uncertainty of medical proof of causation, any reasonable doubt must be construed in favor of the employee.” Fritts v. Safety Nat’l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). “The trial court may properly award benefits based upon medical testimony that the employment ‘could or might have been the cause’ of the employee’s injury when there is also lay testimony supporting a reasonable inference of causation.” Excel, 302 S.W.3d at 275 (quoting Fritts, 163 S.W.3d at 678).

In the instant case, there is no dispute that while the employee was taking a mandatory recertification test for his employer, he fell from a pole at a time when his feet were approximately five feet from the ground. The employee testified that he landed on his back and the back of his neck; Reynolds, who was a witness for the employer, testified that the employee landed on his feet. The trial court found the employee to be a credible witness and resolved that dispute in his favor. “When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge has had the opportunity to observe the witness’ demeanor and hear in-court testimony.” Foreman v. Automatic Sys. Inc., 272 S.W.3d 560, 571 (Tenn. 2008). Therefore, we defer to the trial court’s findings regarding the credibility of the testifying witnesses.

Additionally, the trial court was presented with conflicting opinions from the medical experts, Dr. Maccree and Dr. Baker. A trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers’ Comp. Panel 1996). Nevertheless, “[w]hen 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, 272 S.W.3d at 571. The trial court accredited Dr. Maccree’s testimony, noting that while Dr. Baker was a pain specialist, Dr.

Maccree was a neurosurgeon whose specialty included the diagnosis of spinal cord injuries. Dr. Maccree examined the employee at a time much closer to the work accident than did Dr. Baker. He also saw the employee on several occasions, while Dr. Baker conducted a single examination. Dr. Baker argued that a spinal cord injury would be observable on an MRI image. Dr. Maccree testified that there was brightness of the spinal cord on the MRI. Dr. Maccree based his opinion on the MRI images themselves, while Dr. Baker reviewed only the radiologist's reports. Based upon all of these factors, we are unable to conclude that the evidence in this record preponderates against the trial court's finding that the employee suffered a permanent "vocational disability of 70% as a result of the injuries he sustained on March 6, 2012" in the course of his work for the employer.

### **III. Conclusion**

Based upon the foregoing, we affirm the judgment of the trial court. Costs are taxed to Comcast and its surety, for which execution may issue if necessary.

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NORMA MCGEE OGLE, JUDGE



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

**DANIEL G. LEWIS v. COMCAST**

**Circuit Court for Anderson County  
No. B3LA0130**

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**No. E2014-00962-SC-R3-WC**

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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 to Comcast and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM