

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

January 23, 2012 Session

DANNY SMITH v. NESTLE WATERS NORTH AMERICA, INC. ET AL.

**Appeal from the Chancery Court for Macon County
No. 4560 Charles K. Smith, Chancellor**

**No. M2011-00908-WC-R3-WC - Mailed July 18, 2012
Filed August 23, 2012**

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 pursuant to Tenn. Sup. Ct. R. 51. After the employee sustained a compensable back injury, he filed a claim for workers' compensation benefits in the Chancery Court for Macon County. During the bench trial, the trial court admitted, over the employer's objection, testimony from a physician selected through the Medical Impairment Registry ("MIR") stating that the employee's impairment arose from a work-related injury. The trial court thereafter awarded the employee permanent disability benefits based on a 6% impairment. We affirm the judgment.

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

WILLIAM C. KOCH, JR., J., delivered the opinion of the Court, in which WALTER C. KURTZ, SR.J. and J.S. "STEVE" DANIEL, SP.J., joined.

Richard Lane Moore, Cookeville, Tennessee, for the appellants, Nestle Waters North America, Inc. and Zurich American Insurance Company.

B. Keith Williams and James R. Stocks, Lebanon, Tennessee, for the appellee, Danny Smith.

MEMORANDUM OPINION

I.

Danny Smith was employed as a blow mold operator by Nestle Waters North America ("Nestle") in Red Boiling Springs. On May 1, 2006, Mr. Smith injured his back while

operating the machine. Mr. Smith promptly reported the injury to his supervisor, and Nestle referred him to Dr. Scott Baker, a physiatrist, for treatment. Between August 2006 and February 2009, Dr. Baker treated Mr. Smith conservatively with medication, physical therapy, and trigger-point injections. Mr. Smith missed only a few days of work during this period. Eventually, Dr. Baker released Mr. Smith to return to work with no permanent restrictions and with a 0% impairment rating.

Mr. Smith was dissatisfied with Dr. Baker's prognosis and requested a second opinion. He was provided with a panel of physicians and chose Dr. Charles Kaelin. Dr. Kaelin examined Mr. Smith on April 6, 2009, and concluded that Mr. Smith did not require permanent restrictions and assigned him a 0% impairment rating.

On May 19, 2009, Dr. Richard Fishbein conducted an independent medical examination of Mr. Smith at his lawyer's request. Dr. Fishbein diagnosed Mr. Smith with permanent "mechanical low back strain with . . . residual complaints of stiffness, rigidity, and pain." While he agreed with Drs. Baker and Kaelin that Mr. Smith required no permanent restrictions, Dr. Fishbein concluded that Mr. Smith had a permanent anatomical impairment of 6% to the body as a whole as a result of the May 2006 work-related injury.

Thereafter, Mr. Smith re-injured his back while lifting 25- to 30-pound dumbbells outside of work. On August 20, 2009, Mr. Smith filed a complaint in the Chancery Court for Macon County seeking workers' compensation benefits. Even though he had already been examined by three doctors, Mr. Smith was examined on July 12, 2010 by Dr. Joseph Trubia, a physician selected through the MIR process in accordance with Tenn. Code Ann. § 50-6-204(d)(5) (2008 & Supp. 2011). Dr. Trubia issued a report stating that Mr. Smith's low back pain was an exacerbation of the pre-existing degenerative condition in his lower back and that Mr. Smith retained a 6% permanent impairment to the body as a whole. When Dr. Trubia was deposed during discovery, he stated that he had detected a decreased range of motion, a muscle spasm, and some sensory deficits during his examination. Dr. Trubia also testified that Mr. Smith's impairment was work-related.

Prior to trial, Nestle filed a motion in limine to exclude the portions of Dr. Trubia's report and testimony relating to the causal connection between Mr. Smith's injury and his condition. The trial court denied the motion. During the bench trial on February 28, 2011, the parties introduced the depositions of Drs. Baker, Kaelin, Fishbein, and Trubia. In addition, Mr. Smith testified that he continued to have low back pain as well as weakness and numbness in his left leg. He also testified that he was now more careful in moving his body. While Mr. Smith agreed that he continued to be able to perform all aspects of his job and that

he managed his pain with over-the-counter medications, he testified that he no longer hunted, played golf, or lifted weights.

In a final order filed on March 31, 2011, the trial court determined that Mr. Smith had sustained a compensable injury on May 1, 2006. Based on the deposition testimony of all the physicians, including Dr. Trubia, the trial court concluded that Mr. Smith had a 6% permanent partial impairment to the body as a whole and that his award was capped at 9% because he had made a meaningful return to work. On this appeal, Nestle takes issue with the trial court's decision to admit Dr. Trubia's opinions concerning the cause of Mr. Smith's impairment.

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, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

III.

Nestle insists that the trial court erred by failing to grant its motion in limine to exclude Dr. Trubia's opinions regarding causation. It points to administrative rules of the Tennessee Department of Labor and Workforce Development which limit the scope of an MIR evaluation to the issue of impairment. *See* Tenn. Comp. R. & Regs. 0800-02-20-.02(2) & .05(2)(l) (Apr. 2012). We find this argument to be unconvincing.

Mr. Smith testified that weightlifting was an activity he had engaged in before his injury. He further testified that, after the injury, he had attempted to exercise with 25- to 30-pound dumbbells on one or more occasions but that he had given up because it was too

painful. Mr. Smith did not recall how long after the work injury those incidents had occurred, and he did not discuss these incidents with any of the doctors who treated or examined him. Based upon those limited facts, Nestle insists that Mr. Smith did sustain or may have sustained an acute injury from his attempts to exercise with dumbbells and that injury caused the spasm and sensory loss upon which Dr. Trubia based his impairment rating.

It is undisputed that Mr. Smith sustained a compensable injury in May 2006. The record contains no evidence that Mr. Smith sustained any acute injury after May 2006. To the contrary, it is clear from the record that Mr. Smith attempted a number of activities, both at and away from his workplace, that caused his back or leg to become painful. There is no competent proof that any of those events did, or even could have, advanced or accelerated the condition caused by the original event. It is quite clear from Dr. Baker's records and testimony, as well as Mr. Smith's testimony, that his symptoms waxed and waned over the months and years following his injury. In the absence of some evidence from a competent source that an intervening injury occurred, Dr. Trubia's remarks are consistent with the other competent evidence in the record.

In *Courier Printing Co. v. Sims*, No. M2010-01279-WC-R3-WC, 2011 WL 2936350 (Tenn. Workers' Comp. Panel July 15, 2011), the Special Workers' Compensation Appeals Panel directly addressed the admissibility of an MIR physician's opinion concerning causation. The Panel noted that permitting parties to present such evidence was somewhat inconsistent with the statutory and regulatory scheme of the MIR process. *Courier Printing Co. v. Sims*, 2011 WL 2936350, at *6. However, it further noted that the Tennessee Rules of Evidence did not require the exclusion of such evidence. *Courier Printing Co. v. Sims*, 2011 WL 2936350, at *6. Because the evidence was relevant, it was therefore held to be admissible. *Courier Printing Co. v. Sims*, 2011 WL 2936350, at *6.

IV.

Nestle also argues that the evidence preponderates against the trial court's finding that Mr. Smith sustained a permanent impairment supporting an award of permanent disability benefits. Pursuant to Tenn. Code Ann. § 50-6-204(d)(5), Dr. Trubia's impairment rating is presumptively correct, unless rebutted by clear and convincing evidence. *See Williams v. United Parcel Serv.*, 328 S.W.3d 497, 502 (Tenn. Workers' Comp. Panel 2010). Nestle has failed to point to clear and convincing evidence to rebut Dr. Trubia's opinion that Mr. Smith sustained a 6% anatomical impairment. Instead, it criticizes Dr. Trubia for his reliance on a muscle spasm in reaching his conclusion. It is clear from the record, however, that a muscle spasm was not the sole basis for his conclusion. Even if we were to accept Nestle's argument that Dr. Trubia should not have relied upon a muscle spasm in his diagnosis, his

deposition testimony reveals that Dr. Trubia could have relied on other independent bases for reaching a 6% impairment rating.

V.

We affirm the trial court's judgment and remand the case to the trial court for whatever further proceedings, consistent with this opinion, may be required. We tax the costs of this appeal to Nestle Waters North America and Zurich American Insurance Company, and their surety, for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUSTICE

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

DANNY SMITH

v.

NESTLE WATERS NORTH AMERICA, INC., ET AL.

Chancery Court for Macon County

No. 4560

No. M2011-00908-WC-R3-WC - Filed August 23, 2012

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 Nestle Waters North America and Zurich American Insurance Company, and their surety, for which execution may issue if necessary.

PER CURIAM