

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

THOMAS L. KELLER V. THYSSENKRUPP ELEVATOR CORP.

**Appeal from the
Chancery Court for Hardeman County
No. 17701 Martha B. Brasfield, Chancellor**

**No. W2013-02529-SC-WCM-WC - Mailed August 18, 2014;
Filed November 21, 2014**

An employee sustained a work-related injury to his back and leg and returned to work but eventually resigned due to his continued back and leg pain. The trial court found that the employee established a compensable injury, did not have a meaningful return to work, and awarded sixty-eight percent permanent partial disability benefits. The employer appealed, alleging that the trial court erred in finding that the employee did not have a meaningful return to work and in awarding excessive benefits. We affirm the trial court's judgment.

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

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

Steve Taylor, Memphis, Tennessee, for the appellee, Thomas L. Keller.

P. Allen Phillips, Jackson, Tennessee, for the appellant, Thyssenkrupp Elevator Corp.

OPINION

Factual and Procedural Background

Thomas L. Keller, forty years of age at the time of trial, worked for Thyssenkrupp Elevator Corporation ("Thyssenkrupp") for twenty-one years. On December 10, 2010, Mr. Keller was moving an elevator panel that weighed approximately 150 pounds when he suffered a low-back injury that he described as severe with pain radiating down his left leg. Mr. Keller immediately reported the injury to his supervisor, Ken Moore, and to the safety coordinator, James Smith. Mr. Keller was referred to an orthopedic surgeon who obtained

an MRI study and prescribed a “nerve block.” When the nerve block failed to provide relief, Mr. Keller was referred to Dr. Glenn Barnett, a neurosurgeon. Dr. Barnett performed surgery on March 22, 2011. Mr. Keller continued to have low-back pain, leg pain, numbness, and tingling. Although Mr. Keller advised Dr. Barnett of his continuing symptoms, Dr. Barnett returned Mr. Keller to work without restrictions on August 17, 2011.

Mr. Keller resigned his position on July 6, 2012, citing his continued low-back pain. On December 3, 2012, the parties participated in a Benefit Review Conference but were unable to resolve their differences. On December 12, 2012, Mr. Keller filed a complaint for workers’ compensation benefits in the Chancery Court for Hardeman County, Tennessee, and the case proceeded to trial on October 9, 2013.

Mr. Keller testified at trial that his job duties for Thyssenkrupp included painting engraved numbers on the elevator control panels in the signals and fixtures department and bolting studs to elevator panels in the stud-welding department. Following his return to work, Mr. Keller resumed working in the signals and fixtures department where he worked in a seated position and could stand or change positions as needed. He was also required, however, to continue working in the stud-welding department, which necessitated bending and twisting his body and caused low back and leg pain. Although he told Mr. Moore and Mr. Smith that the stud-welding duties caused severe pain to his back, they required him to continue doing that job.

Mr. Keller testified that the pain affected his ability to work around his home and to interact with his children. He stated that he was unable to stand or sit for long periods of time and had trouble sleeping. Several months after Mr. Keller’s surgery and his return to work, his wife, Heather Keller, accepted a new job in Birmingham, Alabama. Mr. Keller testified that his wife’s new position required her to leave a tenured teaching position in Tennessee and necessitated selling their family home.¹ On July 6, 2012, after Ms. Keller accepted employment in Birmingham, Mr. Keller turned in a letter of resignation, stating that he had enjoyed his years and benefits with Thyssenkrupp but had to resign due to “continued . . . pain in [his] lower back and down [his] left leg.”

Dr. Glenn Barnett, a board certified neurosurgeon, testified by deposition that he first saw Mr. Keller on March 2, 2011. Mr. Keller said that he hurt his lower back while lifting an elevator panel and that he had pain in his left hip, left leg, and left foot. Dr. Barnett determined that he had an “acute injury” that resulted in a herniated L3 disc on the left side and the extrusion of a fragment of the disc caused compression of the L3 and L4 nerve roots. He also had degenerative conditions at the L4-L5 discs. Dr. Barnett performed surgery to

¹ Ms. Keller, who also testified at trial, stated that she accepted the new position because the increase in her salary would enable her husband to resign his position at Thyssenkrupp.

remove the fragment from the L3 disc. Mr. Keller reported improvement following surgery but still complained of numbness in his left foot and left great toe. An MRI and a CAT scan performed following the surgery showed resolution of the herniated L3 disc. Dr. Barnett saw Mr. Keller for the final time on August 17, 2011. Although Mr. Keller continued to report some pain in his left foot, Dr. Barnett “hoped he could return to full duty” and did not put Mr. Keller on specific restrictions. He acknowledged that bending and twisting would be difficult for Mr. Keller and advised him against lifting heavy elevator panels.

Dr. Tewfik Rizk, who is board certified in physical medicine and rehabilitation, testified by deposition that he evaluated Mr. Keller numerous times. On September 15, 2011, Mr. Keller complained of pain in his lower back, left foot, and left great toe, as well as a “burning feeling” in his left thigh. Mr. Keller reported that his pain level improved following surgery in March 2011 and that he had returned to work. Mr. Keller told Dr. Rizk, however, that he could not move by the end of the work day because of pain and numbness. Mr. Keller reported the same symptoms during office visits on October 13 and December 1, 2011. He had a “very restricted” range of motion and “muscle wasting of about one-half inch with the left side of the left lower extremity compared to the right side.” Dr. Rizk determined that Mr. Keller had signs of post-laminectomy syndrome and advised him not to lift, push, or pull more than twenty to twenty-five pounds. On April 20, 2012, Mr. Keller reported that Thyssenkruppr changed his job duties to include standing and bending while using a sealing gun. Mr. Keller stated that his back pain had “flared-up” although the pain was not as bad as it had been. In October 2012, Mr. Keller reported that he had moved to Birmingham and was no longer working. In March 2013, Mr. Keller complained of back pain and said that he could not do simple jobs around the house. In June 2013, Mr. Keller reported that he was “doing well” on medication but that he was not involved in any physical activity. Dr. Rizk testified that Mr. Keller has had L3-L4 herniated disc surgery with residual radiculopathy and spondylolisthesis at L4-L5 and L5-S1. It was Dr. Rizk’s opinion that all of these conditions were caused by the December 10, 2010 work-place injury. He assigned a fourteen percent permanent partial impairment to the body as a whole and imposed restrictions of no repetitive spinal movements, bending, or twisting; no prolonged standing or walking; and no lifting more than fifteen pounds.

Dr. Apurva Dalal, a board-certified orthopedic surgeon, testified by deposition that he evaluated Mr. Keller on May 21, 2012. Mr. Keller reported a work-related injury to his lower back, and although a subsequent surgery “did help him,” he continued to have pain in his left hip, left leg, and left foot. Mr. Keller had moderate tenderness over his left sacroiliac joint and tenderness over the greater sciatic foramina. A straight-leg test was “strongly positive” on the left side and sensation was decreased in the L3 and L4 nerve distribution on the left side. According to Dr. Dalal, Mr. Keller had herniated disc surgery at L3-L4 and “continues to have significant radiculopathy.” He also has spondylolisthesis at L4-5 and L5-S1. He explained that spondylolisthesis is the term used when one vertebral body slides

on the top of another. These conditions, in the opinion of Dr. Dalal, were caused by the December 10, 2010 incident at the Thyssenkrupp plant. Dr. Dalal imposed work restrictions against lifting over fifteen pounds, as well as prolonged sitting, standing or walking. Dr. Dalal testified that Mr. Keller sustained a fourteen percent impairment to the body as a whole as a result of this injury based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition.

Dr. David Strauser, an expert in the field of vocational rehabilitation, testified at trial that he had conducted a vocational assessment of Mr. Keller. Based on Mr. Keller's age, education, and work experience, as well as the restrictions imposed by Drs. Rizk and Dalal, Dr. Strauser opined that Mr. Keller had a vocational impairment of seventy-two percent. Dr. Strauser acknowledged that if one relied solely on Dr. Barnett's conclusions, Mr. Keller had no vocational impairment. He agreed that Mr. Keller could compete successfully in a vocational training environment or in a two-year or four-year college program.

James Smith testified that he was the environmental safety and health manger for Thyssenkrupp at the time of Mr. Keller's injury. He recalled that when Mr. Keller returned to work following surgery, he was assigned to the same position that he held prior to his injury. Mr. Smith testified that on one occasion, Mr. Keller told him that his supervisor, Kenny Moore, required him to lift something that caused pain in his back. Mr. Smith told Mr. Moore "to refrain from doing that."

Mr. Moore also testified at trial. Mr. Moore stated that he was the production manger for Thyssenkrupp. He testified that Mr. Keller returned to work in the signals and fixtures department following surgery. Mr. Moore acknowledged that Mr. Keller also helped with the "stud-welding area" as needed and testified that the stud-welding job required lifting small objects. Mr. Moore recalled Mr. Keller complaining to Mr. Smith about the stud-welding task, but he did not recall Mr. Keller lifting over twenty-five pounds. He believed Mr. Keller was doing a good job and was treated fairly.

After considering the evidence, the trial court found that Mr. Keller did not have a meaningful return to work and determined that Mr. Keller "resigned his job . . . due to his back injury." The trial court therefore concluded that Mr. Keller's award was not limited to one and one-half times his impairment rating. The trial court found that Mr. Keller sustained a fourteen percent permanent impairment to the body as a whole and awarded permanent partial disability benefits based on a vocational disability of sixty-eight percent. Thyssenkrupp appealed. 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

Our standard of review of factual issues in a workers' compensation case is de novo on the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of witnesses' credibility and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be afforded the trial court with regard to those issues. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002); see Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

Analysis

Thyssenkrupp argues that the trial court erred in finding that Mr. Keller did not have a meaningful return to work because Mr. Keller voluntarily resigned from his employment. As a result, Thyssenkrupp argues that the trial court should have capped the award at one and one-half times the impairment rating. In contrast, Mr. Keller argues that the trial court correctly found that he did not have a meaningful return to work.

“When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work.” Tryon v. Saturn Corporation, 254 S.W.3d 321, 328 (Tenn. 2008); see also Williamson v. Baptist Hospital of Cocke County, 361 S.W.3d 483, 488 (Tenn. 2012); Howell v. Nissan North America, Inc., 346 S.W.3d 467, 472 (Tenn. 2011). “The determination of the reasonableness of the actions of the employer and the employee depends on the facts of each case.” Tryon, 254 S.W.3d at 328.

An employee “has not had a meaningful return to work if he or she returns to work but later resigns or retires for reasons that are reasonably related to his or her workplace injury.” Id. at 328-29. In such cases, the trial court may award benefits of up to six times the impairment rating. Tenn. Code Ann. § 50-6-241(b). “If, however, the employee later retires or resigns for personal reasons or other reasons that are not reasonably related to his or her workplace injury, the employee has had a meaningful return to work.” Tryon, 254 S.W.3d at 329. In such cases, for injuries occurring after July 1, 2004, the award is limited to one and one-half times the impairment rating. Tenn. Code Ann. § 50-6-241(a)(1). See Tryon, 254 S.W.3d at 329; Williamson, 361 S.W.3d at 488-89.

In applying these principles, we conclude that the evidence does not preponderate against the trial court's finding that Mr. Keller did not have a meaningful return to work. Although Mr. Keller managed to work for more than nine months after Dr. Barnett released him, the trial court found that he was in "excruciating pain" by the end of the day and that he was unable to enjoy his home life or play with his children. The trial court further found that Mr. Keller:

had radiculopathy in his left leg, and he was hurting, and he was not getting any relief. It was not that he was afraid he was going to hurt it, he was hurting it already. Probably a lesser man would have left sooner or maybe they just couldn't get things to work out sooner, but I don't think he is able to do the . . . job with no restrictions, even though he was only asked to do the painting and engraving with the addition [of] this stud welding job.

In short, the trial court concluded that Mr. Keller's "resignation from work was because he had low back pain" and that he and his wife decided to move to Birmingham because "they were at their wits end and could not find anything else to do."

On appeal, Thyssenkrupp argues that Mr. Keller had a meaningful return to work and that his decision to retire was entirely voluntary. Thyssenkrupp places great emphasis on the fact that Dr. Barnett, as the treating physician, returned Mr. Keller to work with no restrictions and that Mr. Keller was able to work for over nine months. The trial court, however, accredited Mr. Keller's testimony that he continued to have severe pain during this period of time, which was corroborated by Ms. Keller's testimony. As stated above, we must defer to the trial court's assessment of this testimony. Moreover, Dr. Rizk examined Mr. Keller numerous times from September 2011 to March 2013, and his findings supported Mr. Keller's testimony. In contrast, Dr. Barnett acknowledged that Mr. Keller continued to complain of back, leg, and foot pain during his treatment and that he had no contact with Mr. Keller after his final visit on August 17, 2011. In sum, the trial court specifically found that Mr. Keller's resignation was reasonably related to the workplace injury he suffered in December 2010. In our view, the evidence in the record does not preponderate against the trial court's finding.

Vocational Disability

In arguing that the trial court's award of sixty-eight percent permanent disability is excessive, Thyssenkrupp emphasizes that Dr. Barnett, as the treating physician, assigned no impairment rating and that Mr. Keller returned to work for over nine months. Mr. Keller argues that the evidence does not preponderate against the trial court's judgment.

In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition. See Tenn. Code Ann. § 50-6-241 (2008); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). The claimant's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972). The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability; instead, the trial court should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983).

The trial court acknowledged that Dr. Barnett treated Mr. Keller's herniated L3 disc but found that Mr. Keller had spondylolisthesis and radiculopathy caused by the work injury. Moreover, the trial court emphasized the testimony of Drs. Rizk and Dalal that Mr. Keller's "low back pain, the radiculopathy, and the pain and numbness in his foot at night has not been alleviated or relieved." The trial court considered the impairment ratings assigned by Drs. Rizk and Dalal in determining Mr. Keller's vocational disability. When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson, 654 S.W.2d at 676-77. Finally, the trial court observed that Mr. Keller had been a good and dependable worker for Thyssenkrupp for more than twenty years and that although he wanted to work, Mr. Keller's physical and financial condition limited his vocational and educational opportunities. We conclude that the evidence does not preponderate against the trial court's award of sixty-eight percent permanent partial disability.

Conclusion

For the foregoing reasons, the trial court's judgment is affirmed. Costs of this appeal are assessed to Thyssenkrupp Elevator Corporation and its surety, for which execution shall issue if necessary.

DONALD P. HARRIS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

THOMAS L. KELLER v. THYSSENKRUPP ELEVATOR CORPORATION

**Chancery Court for Hardeman County
No. 17701**

No. W2013-02529-SC-WCM-WC - Filed November 21, 2014

Judgment Order

This case is before the Court upon the motion for review filed by ThyssenKrupp Elevator Corporation pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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 ThyssenKrupp Elevator Corporation and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

JANICE M. HOLDER, J., NOT PARTICIPATING