IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT MEMPHIS
July 22, 2019 Session

FLOYD MCCALL v. FERRELL PAVING, ET AL.

Appeal from the Court of Workers' Compensation Claims
No. 2016-08-0214 Amber E. Luttrell, Judge

No. W2018-01676-SC-WCM-WC- Mailed October 31, 2019; Filed January 22, 2020

Floyd McCall ("Employee") was a truck driver for Ferrell Paving ("Employer"). The parties stipulated that Employee sustained an injury arising out of and in the course and scope of employment on October 6, 2014, and that Employee gave timely notice of the injury. Employee received authorized medical treatment for the injury, paid for by Employer. Employee also received temporary total disability benefits for the period October 7, 2014 to February 5, 2015. Employee did not return to work for Employer following the injury. After being released from his authorized treating physician, Employee subsequently received unauthorized treatment, including surgery on his cervical spine. Employee filed this action seeking additional past temporary disability and medical benefits, permanent partial disability benefits, and future medical benefits. The Court of Workers' Compensation Claims determined that Employee was not entitled to any additional workers' compensation benefits. Employee has appealed that decision. 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(a)(1) (2014) (applicable to injuries occurring on or after July 1, 2014) Appeal as of Right; Judgment of the Court of Workers' Compensation Claims Affirmed

WILLIAM B. ACREE, JR., SR.J., delivered the opinion of the court, in which HOLLY KIRBY, J. and MARY L. WAGNER, J., joined.

Steve Taylor, Memphis, Tennessee for the appellant Floyd McCall.

Paul Todd Nicks, Germantown, Tennessee for the appellees Ferrell Paving and Phoenix Insurance Company.

OPINION

Factual and Procedural Background

Employee worked as a cement truck driver for Employer. The parties stipulated that Employee sustained an injury arising out of and in the course and scope of employment on October 6, 2014, and that Employee gave timely notice of the injury. Employee received authorized medical treatment, for which Employer paid $14,008.23. Employee also received $8,770.30 in temporary total disability benefits for the period October 7, 2014 to February 5, 2015. The parties stipulated that Employee reached the maximum level of medical improvement on April 15, 2015. Employee did not return to work for Employer following the injury. After being released from his authorized treating physician, Employee subsequently received unauthorized medical treatment, including surgery on his cervical spine. Employee filed this action seeking additional past temporary disability and medical benefits, permanent partial disability benefits, and future medical benefits.

Testimony of Employee

At trial, Employee testified that on October 6, 2014, he was standing on the tire of a cement truck in order to raise the hood as part of his pre-trip inspection, when he lost his balance and fell approximately four feet to the ground. He landed on his left side, hitting his head, shoulder, elbow, and side of his hip. Employee went to Concentra where he received x-rays, medication, and physical therapy. Employee then selected Dr. Riley Jones from a panel of physicians provided by Employer. Dr. Jones ultimately released Employee back to work at full duty on February 4, 2015, although Employee testified that he was still having problems at that time. Employee returned to Concentra on February 6, 2015, and received a medical fitness determination to recertify his commercial driver's license. Dr. Jones released Employee from his care on April 13, 2015, with no permanent work restrictions.

Employee testified that when he returned to Employer he was told that work was slow and he was given an unemployment card, but was unable to draw unemployment and instead found other work. He testified that he did not receive a separation notice from Employer. In February or March 2015, Employee worked for Nike through a staffing

agency for a period of three to four months.[1] Employee's job was loading shoe boxes onto pallets. During Employee's shifts at Nike, he would continuously load shoe boxes as they travelled down a conveyor belt onto pallets. Employee lifted boxes that were up to fifteen pounds. In April 2015, Employee saw Dr. Apurva Dalal for an independent medical examination requested by Employee's counsel. Employee did not tell Dr. Dalal about the physical requirements of his job at Nike.

In May 2015, after leaving Nike, Employee went to work for Ingersoll Rand through another staffing agency.[2] He was eventually hired full time in June 2016. At Ingersoll Rand, Employee worked several different jobs packaging parts that were continuously coming down a conveyor belt and operating machinery, all of which involved light lifting.

Employee saw Dr. Dalal again on November 16, 2015, for treatment. At the end of 2015, Dr. Dalal referred Employee to Dr. Glenn Crosby, who saw Employee for the first time on February 1, 2016. Employee testified that he was unable to continue seeing Dr. Crosby until he was able to obtain health insurance through Ingersoll Rand. Employee saw Dr. Crosby a second time in December 2016, and Dr. Crosby recommended surgery on his cervical spine, which was performed on March 23, 2017. Dr. Crosby released Employee from his care on May 15, 2017. Employee's personal health insurance has paid for all of the medical care Employee received after he was released from Dr. Jones's care.

Employee testified that he had no problems with his neck, shoulder, or elbow prior to his fall on October 6, 2014. After the fall, he could not turn his head to the left, but after surgery he could. Employee testified that from the time of his fall until he had the surgery his neck and shoulder continued to get worse. However, Employee did not miss any work related to his injury between the time Dr. Jones released him back to work and the date of his surgery. Employee further testified that he has not missed any work related to his injury since the surgery, and his supervisors have not complained about his performance as a result of his injury.

Employee testified that he continues to have issues with his left shoulder and elbow and tingling and numbness in two fingers on his left hand. He also has pain, numbness, and tingling in his left shoulder and arm, but he no longer has neck pain since the surgery. Employee also testified that he is no longer able to do much lifting with his left arm. In

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[1] It was disputed at trial whether Employee began working for Nike on February 1, 2015 or in March 2015. This date is immaterial given our holding, as discussed below.

[2] At some points in the record, Ingersoll Rand is also called Trane.

addition, the pain and numbness interrupts his sleep, although he still gets seven hours of sleep each night. He also testified that his injury does not affect his ability to stand, that he can sit still for approximately five hours, and that he can walk as far as needed. He also testified that Dr. Dalal and Dr. Crosby have discussed performing surgery on his left elbow.

Testimony of General Manager for Employer

Ricky Ferrell, General Manager for Employer, also testified at trial. Mr. Ferrell testified that Employee never physically returned to work after his accident on October 6, 2014, or requested to return to work. Employee's separation notice and personnel file state that he voluntarily quit.

Testimony of Dr. Riley Jones

Dr. Riley Jones, Employee's authorized treating physician, testified by deposition. Dr. Jones is a board certified orthopedic surgeon who has practiced since 1978. Dr. Jones first saw Employee on November 5, 2014. At that appointment, Employee had complaints related to his left shoulder, arm, and neck associated with the October 6, 2014 injury. Employee's symptoms included aching, neck pain, and numbness. His neurologic, strength, reflex, and range of motion examinations were all normal.

With respect to his elbow, Employee had tenderness on his left bicep, and some pain over the ulnar nerve. As it concerned his shoulder, Dr. Jones ordered an EMG, performed an injection on Employee's shoulder, and prescribed a Medrol Dosepak. An x-ray showed mild degenerative joint disease and an os acromiale with a degenerative acromioclavicular joint. Dr. Jones explained that an os acromiale is a failure of the bone to totally calcify when someone is growing, but it also gives a beaking over the rotator cuff. He further explained, as patients work through range of motion, a lot of time they get impingment symptoms. Dr. Jones ordered an x-ray of Employee's cervical spine. It showed decreased disc space with anterior spurring at levels C4-C5, C5-C6, and C6-C7. Dr. Jones's overall diagnosis was "cervicalgia and rule out a tardy ulnar nerve palsy," which is irritation of the nerve at the elbow.

On November 12, 2014, Dr. Jones performed the EMG which yielded normal results. Employee saw Dr. Jones again on November 14, 2014, and his symptoms were unchanged. Dr. Jones ordered an MRI of the cervical spine and left shoulder, which was performed on November 25, 2014. The MRI included findings of stenosis, tendinosis, and a partial tear of the rotator cuff, which Dr. Jones testified will typically heal over time and

did not require surgery. The MRI also showed some mild irritation and os acromiale impingement. Dr. Jones testified that the impingement did not come from the October 2014 work incident, but is instead the result of Employee having a degenerative joint combined with normal wear and tear. Dr. Jones further testified that such impingement problems are the most common cause of slight rotator cuff tears, which "happens all the time."

Dr. Jones also testified that stenosis is a degenerative process, not a traumatic process, that takes months and years to develop. Similarly, he testified that spondylosis is a degenerative change to the spine. Dr. Jones explained that the MRI showed that there was no ruptured disc or radiculopathy. He further explained that Employee would continue to have problems resulting from degenerative changes as he ages. Dr. Jones testified that Employee's October 2014 fall could not have caused the stenosis or spondylosis. Dr. Jones testified that the fall caused bruising and sore muscles, but that it caused no structural change to Employee's neck, elbow, or shoulder, which were instead pre-existing problems.

Dr. Jones's treatment plan for Employee involved physical therapy and work hardening. Employee had a functional capacity evaluation on January 22, 2015, which placed him in the medium/heavy to heavy work range, which would exceed his job demands at Employer. At an appointment on February 4, 2015, Employee reported to Dr. Jones that his symptoms had improved, but that he still had mild aching. Dr. Jones returned Employee to work at regular duty as of February 4, 2015. Dr. Jones saw Employee again on March 3, 2015, and Employee continued to have some pain and numbness in his left arm and neck. Dr. Jones ordered another EMG, which was performed on April 1, 2015, and which ruled out any type of neurological problem. Employee saw Dr. Jones for a final time on April 13, 2015. At that appointment, Employee stated he was having occasional pain but was able to work without limitations. Dr. Jones released Employee at maximum medical improvement on April 13, 2015.

Dr. Jones testified that during his treatment of Employee, he did not see any issues that would require surgery on Employee's cervical spine. Dr. Jones explained:

> I did not see any reason why he would require surgery on his cervical spine when we saw him. He has a progressive degenerative problem called getting older. And in that process, he's going to have increasing problems with his neck. Those things were prior, and they were severe prior. You got portions in their severity. The injury didn't cause a structural change there. There's no ruptured disc. You know, there's no herniation or anything like that. We're talking about bony problems and arthritic problems. And there's no

> fracture. Again, he improved. I mean, his motion got better, he improved; but he's always going to have some irritation in his neck just from what he has. But there's -- you know, he was not at a point with a normal EMG and with MRI's even showing some stenosis. Unless he was having, you know, abnormal EMG showing radiculopathy or something like that, there's not a whole lot of reason to operate on that. You don't operate just on the arthritic changes. You operate on the neurologic changes. He did not have any neurologic changes.

Dr. Jones similarly testified that he saw no reason for Employee to have surgery on his left shoulder or left elbow.

Dr. Jones further testified, based upon a reasonable degree of medical certainty under the AMA Guides, that Employee retained no permanent impairment as a result of his October 6, 2014 fall. Dr. Jones concluded that Employee was sore from his fall, but that all of the findings were pre-existing, and there was no structural change as a result of the fall.

Prior to his deposition, Dr. Jones was not aware that Employee did not return to work for Employer. Dr. Jones testified during his deposition that Employee's repetitive work for his subsequent employers could have aggravated his pre-existing conditions. Dr. Jones reiterated that he did not believe Employee's October 6, 2014 fall led to the surgery performed on March 23, 2017:

> Well, first of all, he had no objective findings that would require a surgical procedure two and a half years before. I mean, we have MRI's, we have x-rays, and we have -- do not have the complaint. Having done neck surgery for 40 years putting plates and screws, wiring, all this, you know, I'm pretty used to seeing things and seeing what happens over a period of time with people. And you've got a long period of time between the time he had his injury and the time we let him go back to work before they did the surgery. And during that process, he was working, doing other things. And I suspect that those other things have more to do with it than just a fall flat on your back.

Dr. Jones also addressed Dr. Crosby's finding, discussed below, that "the facet joint collapsed on the nerve root." Dr. Jones concluded that the "collapse" was not the result of the fall because that is something that "shows up pretty quickly" and is "an immediate deal," but such a collapse was not indicated on the MRIs, EMGs, or x-rays Dr. Jones had

ordered.

Testimony of Dr. Glenn Crosby

Dr. Glenn Crosby also testified by deposition. Dr. Crosby is a neurosurgeon who has been practicing since 1996. Dr. Crosby first saw Employee on February 1, 2016, after being referred by Dr. Dalal for neck and arm symptoms. Employee presented with constant pain in the left side of his neck, which was aggravated by turning his head to the left or extending his neck. Employee also had pain in his left arm, with tingling symptoms down to his fourth and fifth fingers, which was aggravated by use of his left arm. Dr. Crosby referred Employee to therapy, and Employee returned ten months later, on December 5, 2016, with worsening pain. Dr. Crosby believed Employee's spondylosis and upper extremity radiculopathy were worsening, and began anticipating possible surgery.

Dr. Crosby ordered an MRI, which was performed January 13, 2017. Employee returned on March 6, 2017, and the MRI showed spondylosis, as well as a disk osteophyte complex at C6-C7, and a compression on the neural foramen. The MRI showed that the neural foraminal stenosis was worsening. Dr. Crosby offered Employee surgery, which was performed on March 23, 2017. In the operative report, Dr. Crosby noted that a portion of the facet joint had collapsed upon the nerve root and was compressing the nerve root, which the surgery resolved.

Employee returned to Dr. Crosby for his final visit on May 17, 2017. At that visit, Employee had good resolution of his pain, but still had some weakness in his left arm. Dr. Crosby felt that Employee was progressing nicely, but referred him to therapy to strengthen his arm.

Dr. Crosby testified that Employee's October 6, 2014, fall made the surgery on his cervical spine in March 2017 medically necessary by aggravating or accelerating Employee's spondylosis and stenosis. Dr. Crosby testified, to a reasonable degree of medical certainty, that the collapsed facet joint was caused by the fall. Dr. Crosby agreed with Dr. Dalal's impairment rating related to the cervical spine, discussed below. Dr. Crosby disagreed with Dr. Brophy's opinion, also discussed below, that the surgery was the result of an underlying pre-existing condition.

On cross-examination, Dr. Crosby reviewed the EMG nerve conduction studies ordered by Dr. Jones that were performed in November 2014 and April 2015. Dr. Crosby said that he had not previously reviewed those studies, and agreed they were both normal and showed no radiculopathy. Dr. Crosby also was not aware that Dr. Jones released

Employee to full duty work after having a normal EMG and functional capacity evaluation in April 2015. Dr. Crosby agreed that his initial findings were different from those of Dr. Jones in November 2014.

Dr. Crosby also reviewed on cross-examination the physical examination findings from Concentra on October 6, 2014, which showed full range of motion, no palpable bony or muscular tenderness, a negative Spurling's test and axial load, normal deep tendon reflexes, normal motor strength, and an intact sensory examination. Dr. Crosby agreed that these were "total different findings" compared to his own findings when he first saw Employee in February 2016. Dr. Crosby conceded that when he concluded the surgery was necessary as a result of the October 2014 fall, he had not seen the Concentra medical records, Dr. Jones's records, or the previous EMG studies.

Dr. Crosby further testified he did not know what Employee did for work after his fall in October 2014. Dr. Crosby was not aware that Employee went to work for Nike and Ingersoll Rand, or that those jobs involved repetitive lifting. Dr. Crosby also agreed that the MRIs showed Employee's foraminal stenosis became worse between November 2014 and December 2015. Dr. Crosby also agreed that he did not offer Employee surgery when he first saw him in February 2016, but only after Employee's condition had worsened. Dr. Crosby further agreed that the worsening of Employee's cervical spine condition between February 2016 and December 2016 "could very well have been related to the work that he did for these other employers." However, Dr. Crosby continued to maintain that the October 2014 fall was the majority cause of Employee's cervical radiculopathy, although he was "not as convinced" that it was the cause of Employee's ulnar neuropathy, which Dr. Crosby testified "seems to support more repetitive work." Dr. Crosby continued to testify that "the facet joint collapse was traumatic," which he related to the October 2014 fall, although he testified that he could not tell when that facet fracture occurred.

Testimony of Dr. Apurva Dalal

Dr. Apurva Dalal, an orthopedic surgeon, testified by deposition. Dr. Dalal first saw Employee on April 15, 2015-- two days after Employee was released by Dr. Jones-- for an independent medical examination at the request of Employee's counsel. Dr. Dalal's diagnosis was cervical spinal stenosis, rotator cuff tear in the left shoulder with acromioclavicular joint arthritis, and ulnar neuropathy in the left arm with medial epicondylitis. On cross-examination, Dr. Dalal agreed that his physical examination of Employee on April 15, 2015, had a number of findings that were different from Dr. Jones's physical examination that was performed on April 13, 2015.

Dr. Dalal also saw Employee for treatment, separate from the independent medical examination, on November 16, 2015. Following that appointment, Dr. Dalal ordered an EMG, which was performed on December 2, 2015, and indicated Employee may have cervical radiculopathy. Dr. Dalal agreed that finding was different than the two previous EMGs ordered by Dr. Jones. Dr. Dalal also ordered an MRI, which was performed on December 3, 3015, and agreed it showed a worsening condition compared to the previous MRI ordered by Dr. Jones. Dr. Dalal saw Employee again for treatment on December 21, 2015, and Employee reported pain going toward his right arm, which was a new complaint, and the examination showed a worsening condition compared to five weeks earlier, which caused Dr. Dalal to refer Employee to Dr. Crosby.

Dr. Dalal saw Employee for a second independent medical examination at the request of Employee's counsel on August 16, 2017 (after Employee's surgery with Dr. Crosby) with complaints of numbness in his left fingers, inability to lift with his left thumb, neck pain, and shoulder pain. Dr. Dalal recommended a repeat MRI because he thought Employee may need to have surgery on his left shoulder for rotator cuff repair and a distal clavicle extension, as well as ulnar nerve decompression.

Dr. Dalal testified, to a reasonable degree of medical certainty, that the October 6, 2014, fall aggravated Employee's pre-existing disease of his cervical spine causing cervical radiculopathy, caused a left shoulder rotator cuff tear, and aggravated a pre-existing degenerative disease of Employee's acromioclavicular joint. Dr. Dalal further testified that Employee developed ulnar neuropathy and medial epicondylitis after the fall.

Dr. Dalal assigned an impairment rating for the cervical spine of twelve percent to the body as a whole for multi-level spinal stenosis with evidence of radiculopathy. He also assigned a five percent impairment rating for Employee's left shoulder due to acromioclavicular joint arthrosis with range of motion loss. He further assigned a five percent impairment rating for ulnar neuropathy in the left elbow. Combined, Dr. Dalal assigned a seventeen percent impairment to the body as a whole. Dr. Dalal testified that Employee's normal EMG tests do not impact his opinion because a negative test "doesn't mean anything." He said that a positive EMG test has 100 percent predictive value with no false positives, but that "when they are negative, they are false negatives."

On cross-examination, Dr. Dalal testified that he was not aware that Employee performed repetitive work for Nike starting in February 2015, or for Ingersoll Rand beginning in May 2016. Dr. Dalal agreed that repetitive work can aggravate and exacerbate cervical spondylosis, foraminal stenosis, acromioclavicular joint arthritis, partial rotator cuff tears, and ulnar neuropathy. Dr. Dalal also agreed that something made Employee's

condition worsen between February 2015 and December 2016. However, Dr. Dalal continued to maintain that Employee sustained an injury when he fell in October 2014 "that aggravated everything," and that while his subsequent work "didn't help," Employee was already injured as a result of the fall.

Testimony of Dr. John Brophy

Dr. John Brophy, a neurosurgeon, testified by deposition. Dr. Brophy saw Employee on October 12, 2017, for an independent medical examination at the request of Employer's insurer. Dr. Brophy testified, within a reasonable degree of medical certainty, that Employee's ulnar complaints, spondylosis, stenosis, and radiculopathy were not related to or caused by the October 2014 fall. He further testified that Employee's March 2017 surgery was not related to the fall. Dr. Brophy also addressed Dr. Crosby's finding regarding the facet joint, stating:

> That terminology I've never heard before, a collapse. What we see is narrowing of the foramen, in this case caused by degenerative changes. There was no evidence of trauma to the facet joint by MRI or CT scan. So it wasn't related to the fall, whatever he saw. . . . The MRIs are quite sensitive to bone injury. There would be signal changes within the facet joint; and certainly if he had a clinical radiculopathy, Dr. Jones has seen thousands of those over the years and would have noted it also.

Dr. Brophy agreed with Dr. Jones that Employee had returned to baseline when he was released in April 2015, and that any subsequent issues were not related to the October 2014 fall. Dr. Brophy further testified, based upon a reasonable degree of medical certainty under the AMA Guides, that no impairment rating was indicated for Employee's cervical spondylosis or ulnar neuropathy because they were not related to the fall. Dr. Brophy deferred to Dr. Jones regarding whether an impairment rating was warranted with respect to Employee's shoulder.

The Court of Workers' Compensation Claims held that Employee did not successfully rebut the statutory presumption afforded Dr. Jones's causation and impairment opinions, and that Employee's cervical spine condition and surgery did not primarily arise out of his October 2014 work injury. Thus, the Court of Workers' Compensation Claims held that Employee did not meet his burden to establish by a preponderance of the evidence entitlement to any additional workers' compensation benefits. Employee appealed.

Analysis

Review of the trial court's findings of fact is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(a)(2) (2014 & Supp. 2018). The trial court is afforded considerable deference where the credibility and weight of a witness's in-court testimony is involved. *Madden v. Holland Grp. of Tenn.,* 277 S.W.3d 896, 900 (Tenn. 2009). However, the reviewing court may draw its own conclusions concerning the weight and credibility of expert medical testimony provided by deposition. *Foreman v. Automatic Sys., Inc.*,272 S.W.3d 560, 571 (Tenn. 2008). Conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging,* 284 S.W.3d 294, 298 (Tenn. 2009).

Under the Workers' Compensation Law, Employee bears the burden of proving each and every element of his claim. Tenn. Code Ann. § 50-6-239(c)(6) (2014) (applicable to injuries occurring on or after July 1, 2014). While Employee purports to raise five separate issues, they can be consolidated into one: whether Employee carried his burden to establish causation. We agree with the trial court that he did not.

Tennessee Code Annotated section 50-6-102(14)(E) states:

> The opinion of the treating physician, selected by the employee from the employer's designated panel of physicians pursuant to § 50-6-204(a)(3), shall be presumed correct on the issue of causation but this presumption shall be rebuttable by a preponderance of the evidence.

Tenn. Code. Ann. § 50–6–102(14)(E)(2014)(applicable to injuries occurring on or after July 1, 2014). Thus, as the authorized treating physician, Dr. Jones's opinion on causation is presumed correct.

Employee argues that Dr. Jones's testimony was speculative. However, Dr. Jones unequivocally testified that Employee's October 6, 2014 fall caused no permanent impairment, an opinion that is supported by the MRIs and EMGs that were taken following the fall. In particular, Dr. Jones testified Employee's impingement did not come from the October 2014 work incident, but is instead the result of a degenerative joint combined with normal wear and tear. Dr. Jones testified that during his treatment he did not see any issues that would require surgery on Employee's cervical spine. Similarly, Dr. Jones testified that he saw no reason for Employee to have surgery on his shoulder or elbow.

Dr. Jones also testified that stenosis is a degenerative process, not a traumatic process, that takes months and years to develop. Similarly, he testified that spondylosis is a degenerative change to the spine. Dr. Jones explained that the MRI showed that there was no ruptured disc or radiculopathy. He further explained that Employee would continue to have problems resulting from degenerative changes as he ages. Dr. Jones testified that Employee's fall caused bruising and sore muscles, but it did not cause structural changes to Employee's neck, elbow, or shoulder, which were instead pre-existing problems. Importantly, Dr. Jones testified that Employee's October 2014 fall could not have caused the stenosis or spondylosis.

Dr. Brophy agreed that no impairment rating was warranted as a result of the October 2014 fall, and that Employee's March 2017 surgery was not related to the fall. In particular, Dr. Brophy testified that Employee's ulnar complaints were unrelated to his fall at work, and Employee's fall at work did not cause his cervical spondylosis or foraminal stenosis.

The presumption of correctness afforded Dr. Jones's opinion on causation is rebuttable by a preponderance of evidence, but Dr. Crosby's and Dr. Dalal's opinions do not meet that standard. When there is conflicting expert medical testimony, the trial judge must choose which testimony to accredit. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 644 (Tenn. 2008). Among the factors for the court to consider in making such a determination are "the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn.1991).

In this case, the Court of Workers' Compensation Claims held that Dr. Jones's and Dr. Brophy's testimony, supported by the diagnostic studies, were more compelling considering Employee's testimony, the totality of the medical proof, and the timeline. This Court agrees.

While Dr. Crosby testified that Employee's October 6, 2014, fall made Employee's surgery medically necessary, Dr. Crosby was unaware prior to his deposition that Employee had normal EMG studies in November 2014 and April 2015. Dr. Crosby was also unaware that Dr. Jones had released Employee at full duty after a normal functional capacity evaluation in April 2015. Moreover, Dr. Crosby did not know that Employee had performed repetitive work for other Employers beginning in February 2015, which was well before Dr. Crosby first saw Employee in February 2016.

Although Dr. Crosby testified that Employee had a facet joint collapse, which he

attributed to the October 2014 fall, Dr. Crosby agreed that he could not tell when that fracture occurred. In addition, both Dr. Jones and Dr. Brophy testified that any such facet joint collapse could not be attributed to the October 2014 fall in light of the previously normal MRI and EMG studies.

Dr. Dalal provided unpersuasive testimony that the October 2014 fall "aggravated everything," asserting that the normal EMGs "don't mean anything." Dr. Dalal's opinions are further undermined by the fact that his examination findings on April 15, 2015 had a number of findings that were different from Dr. Jones's final examination of Employee performed two days prior. Ultimately, Dr. Jones's opinion on causation must be presumed correct, and Employee has not rebutted that presumption by a preponderance of the evidence.

Conclusion

The judgment of the Court of Workers' Compensation Claims is affirmed. Costs are taxed to Floyd McCall, for which execution may issue if necessary.

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WILLIAM B. ACREE, JR., SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FLOYD MCCALL v. FERRELL PAVING CO., ET AL.

Court of Workers' Compensation Claims
No. 2016-08-0214

No. W2018-01676-SC-WCM-WC – Filed January 22, 2020

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Floyd McCall 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 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 taxed to Floyd McCall, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Kirby, J., not participating