

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

December 9, 2004 Session

JOE H. KELLY v. FRITO LAY, ET AL.

**Direct Appeal from the Chancery Court for Shelby County
No. CH-02-0589-3 D.J. Alissandratos, Chancellor**

No. W2004-00297-SC-WCM-CV - Mailed March 29, 2005; Filed June 16, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, Joe Kelly, the employee, insists that the trial court erred in finding that he sustained no permanent disability from his work-related injury. The Panel has concluded that the judgment of the trial court should be reversed. Further, the Panel finds that Mr. Kelly has sustained a vocational impairment of 16% to the body as a whole due to his injury and that Mr. Kelly should receive future medical expenses in accordance with Tennessee Code Annotated section 50-6-204.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2003) Appeal as of Right;
Judgment of the Chancery Court Reversed**

MARTHA B. BRASFIELD, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and W. FRANK BROWN, III, SP. J., joined.

Stephen F. Libby, Memphis, Tennessee, for the Appellant, Joe Kelly.

Carl Knoerr Wyatt and David C. Riley, Memphis, Tennessee, for the Appellees, Frito Lay, Inc. and RSKO Claims Services, Inc.

MEMORANDUM OPINION

Background

Mr. Joe Kelly was fifty-eight years old at the time of the trial. He had completed three years of college and had obtained an associate degree from a junior college. He had worked for Frito Lay for twenty-one years before his work-related injury on December 1, 2000.

Prior to December 1, 2000, Mr. Kelly had sustained a prior work-related injury to his back. At times, he experienced low-grade pain due to this injury. He was careful not to pull, exert, or move in ways that would aggravate his back condition. He was able to perform all of his job responsibilities at Frito Lay with no restrictions.

On December 1, 2000, Mr. Kelly was employed as a route salesman for Frito Lay. He was in the warehouse, pulling orders for his route using a float, a piece of hauling equipment with a flat bed, four to six wheels, and a handle. The wheels of the float had accumulated debris, dust, and dirt from the warehouse floor and had not been cleaned properly, which made pulling of the float difficult. While pulling the float, Mr. Kelly felt a stretching and pulling in his back. The next day, he was unable to work due to pain.

Mr. Kelly was treated conservatively by Dr. William Harold Knight and Dr. Michael J. Sorensen. While receiving medical treatment, Mr. Kelly was placed on light duty. When he returned to regular duty work with no restrictions, he found it was very painful to bend and to pick up and load the boxes, which contained the products he distributed on his sales route. He asked his supervisor to provide him with a helper to pick up and load the boxes. Mr. Kelly's supervisor told him that if he could not perform the job without help, he would have to go home. Mr. Kelly was unable to perform his job responsibilities without help, and, therefore, he left the premises. He has not returned to work for Frito Lay since that discussion with his supervisor. He testified that the pain in his back, which radiates into his right leg, prevents him from fulfilling his job responsibilities at Frito Lay.

Mr. Kelly's activities have been limited since the injury on December 1, 2000. He must sit with his back erect. He stretches from time to time and often does not sit for long periods of time. He must support himself at the basin when he brushes his teeth or shaves. He is able to cut his yard with a self-propelled lawnmower. He can only walk for thirty minutes at a time and cannot run. Periodically, he has problems sleeping.

Mr. Kelly has been a minister for approximately eighteen years and has served one church for the last fifteen years. The church did not pay Mr. Kelly a salary until he retired from Frito Lay. The church now pays Mr. Kelly a love offering of approximately \$15,000 per year.

Prior to his retirement with Frito Lay, Mr. Kelly purchased a dump truck and earned money hauling materials such as asphalt for contractors.¹ The dump truck is a 3-axle truck with a tarp that rolls back and forth by pushing a button. The dump bed of the truck has a swinging gate that opens and shuts by pushing a button. Mr. Kelly drove the truck when he first bought it. After he retired from Frito Lay, he hired a driver because the jarring and bouncing of the truck aggravated his back condition and caused additional pain. Mr. Kelly grosses approximately

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Mr. Kelly has maintained a Class A commercial driver's license with the State of Tennessee since his retirement from Frito Lay. He successfully passed a Tennessee Department of Transportation physical exam to retain the license in 2002.

\$15,000 per year from his dump truck business. His expenses, which include a driver's salary, fuel, maintenance, licenses, and insurance, almost equal the gross income.

Dr. Knight and Dr. Sorensen, his treating physicians, opined that he had sustained a lumbosacral strain with no permanent anatomic impairment. Both doctors returned him to work with no restrictions.

Mr. Kelly was evaluated by Dr. Joseph C. Boals, III. Dr. Boals diagnosed Mr. Kelly with having "degenerative arthritis of the lumbar spine, with degenerative disc disease and chronic lumbar strain, which aggravated the arthritis and degenerative disc disease." Dr. Boals opined that Mr. Kelly's injury was caused by his December 1, 2000 injury at Frito Lay, that it was permanent, and that he had sustained an 8% anatomical impairment to the body as a whole.

The court accepted the opinions of Dr. Knight and Dr. Sorensen, the two treating physicians, over the opinion of Dr. Boals. The court found that there was no aggravation of Mr. Kelly's back condition and that Mr. Kelly sustained no anatomical impairment and no permanent disability from his injury of December 1, 2000.

Standard of Review

Review of findings of fact by the trial court is *de novo* upon the record of the trial court and is accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence shows otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Stone v. City of McMinnville, 896 S.W.2d 548, 550 (Tenn. 1995). Appellate courts "are not bound by the trial court's factual findings, but rather examine those findings independently to determine where the preponderance of the evidence lies." Ivey v. Trans Global Gas & Oil, 3 S.W.3d 441, 446 (Tenn. 1999). Conclusions of law are subject to *de novo* review on appeal without any presumption of correctness." Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

Analysis

Mr. Kelly raises three issues on appeal:

1. What is Mr. Kelly's proper anatomic impairment as a result of his work-related injury?
2. To what extent is Mr. Kelly vocationally impaired due to his work-related injury?
3. Is Mr. Kelly entitled to future medical benefits as a result of his work injury?

Anatomic Impairment

In his ruling, the trial court made the following statements concerning Mr. Kelly: “Rev. Kelly, in this Court’s opinion, is an honest man who is telling [this] Court everything truthfully. Further, I don’t doubt that Rev. Kelly is hurting. . . .” The trial court further stated, “This case does not rest, however, upon his integrity at all. It’s really a case about medical examination and proof.”

Mr. Kelly argues that if the trial court found that he was truthful, it is possible to compare his truthful statements with Table 15-3 of the AMA Guidelines, 5th Edition, and find that Mr. Kelly has sustained an anatomical impairment without the necessity of accepting the expert opinion of one doctor over the opinion of another.

The statements of Mr. Kelly, whom the trial court found to be truthful, will be discussed with the medical testimony. Mr. Kelly testified that he had sustained a back injury and had experienced back pain prior to December 1, 2000, but that he was able to fulfill his job responsibilities at Frito Lay. After the December 1, 2000 injury, he suffered not only from back pain, but from pain radiating down his leg, which he had not previously experienced, and he was unable to perform his job responsibilities at Frito Lay.

Dr. Knight saw Mr. Kelly on 2 occasions, December 15 and December 22, 2000. X-rays showed “mild diffuse degenerative changes of [Mr. Kelly’s] lumbosacral spine.” Dr. Knight made the diagnosis of lumbar strain, which normally resolves itself in approximately one to two weeks. Dr. Knight prescribed a Medrol dose pack with pain medication, physical therapy, and light duty. Mr. Kelly returned on December 22 and reported improvement. On that same day, Dr. Knight released Mr. Kelly to return to work with no restrictions and instructed him to exercise on his own. Dr. Knight found that Mr. Kelly had sustained no permanent impairment.

Dr. Sorensen saw Mr. Kelly on 4 occasions, with the first visit occurring on January 26, 2001. At that time, Mr. Kelly complained of low back pain with radiation into his legs with the pain being worse on the left side. An MRI showed a disc dessication, the loss of water content, at L3, L4, and L5, and a bulging disc at the L5-S1 level, but there did not appear to be nerve impingement or herniation. Dr. Sorensen made an initial diagnosis of lumbar strain which appeared to be an aggravation of pre-existing lumbar degenerative disc disease. He prescribed an anti-inflammatory medication and a muscle relaxer and returned Mr. Kelly to work with a fifteen-pound work restriction and no prolonged sitting or standing or repetitive flexion. On Mr. Kelly’s last visit of March 5, 2001, Dr. Sorensen determined that Mr. Kelly had sustained no permanent impairment from the injury of December 1, 2000, and returned him to work with no restrictions.

Dr. Sorensen sent Mr. Kelly to a work-hardening program at Work Solutions.² He also underwent a functional capacity evaluation on March 2, 2001. The report indicates that Mr. Kelly had numerous subjective complaints in his upper and lower back, showed initial signs of symptom magnification on the pain questionnaires, showed good mobility, showed no clinical signs of distress, and had been very cooperative in his program. He was somewhat guarded on the B200 testing for strength and mobility of the lumbar spine, but on other activities gave a good effort.³

Dr. Boals examined Mr. Kelly on May 14, 2002. Mr. Kelly gave Dr. Boals the same history that he had given Dr. Knight and Dr. Sorensen. He described his injury; he complained that his back continued to hurt and that he had radiation of pain into his right leg. Upon examination, Dr. Boals noted limited flexion with guarding, which meant that as Mr. Kelly started to bend forward, he would catch himself as if he were afraid of hurting himself. Other range of motion tests were within normal limits. The neurological examination was normal. Dr. Boals diagnosed degenerative arthritis of the lumbar spine, with degenerative disc disease and chronic lumbar strain aggravating the diagnosis. He opined that Mr. Kelly's back problems were caused or aggravated by pulling the float at work, and that his condition was permanent. He opined that Mr. Kelly had sustained an 8% impairment to the body as a whole, based upon Table 15-3, page 835, Lumbar Category 2, AMA Guidelines, 5th Edition. Dr. Boals recommended that Mr. Kelly avoid prolonged walking, standing, stooping, squatting, climbing, and repetitive flexion, extension, or rotation of the back. He suggested that Mr. Kelly determine the amount of weight he could lift by work trial.

Table 15-3 of the AMA Guidelines, 5th Edition states as follows:

DRE Lumbar Category II: 5% - 8% Impairment of the Whole Person:

Clinical history and examination findings are compatible with a specific injury; findings may include significant muscle guarding or spasm observed at the time of the examination, asymmetric loss of range of motion, or non-verifiable radicular complaints, defined as complaints of radicular pain without objective findings; no alteration of the structural integrity and no significant radiculopathy. . . . (emphasis added).

Mr. Kelly meets the following criteria under this specific table:

(1) "Clinical history and examination findings compatible with a specific injury. . . ." Mr. Kelly injured himself while pulling a float on December 1, 2000;

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Mr. Kelly attended twelve of thirteen scheduled days of the work-hardening program, from February 14, 2001 through March 2, 2001.

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The tester indicated that the scores on the B200 test suggested a sub-maximal effort.

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(2A) “. . .significant muscle guarding. . .observed at the time of the examination. . . .” Dr. Boals observed significant muscle guarding on his evaluation. In Dr. Sorensen’s medical records is the statement that one of Mr. Kelly’s goals is to “eliminate muscle guarding and tenderness”;

or

(2B) “. . .asymmetric loss of range of motion. . . .” Dr. Boals observed this during his examination;

or

(2C) “. . .non-verifiable radicular complaints, defined as complaints of radicular pain without objective findings. . . .” Mr. Kelly complained of radicular pain at trial, to Dr. Sorensen, and to Dr. Boals. The X-rays and the MRI showed no objective findings for the radicular pain complaints.⁴

The trial court found that Mr. Kelly testified truthfully. At a minimum, the following must be found to be true:

1. Mr. Kelly injured his back while pulling a float on December 1, 2000;
2. Mr. Kelly suffers from non-verifiable radicular complaints, defined as complaints of radicular pain without objective findings;

The following could also be found to be true:

3. Mr. Kelly exhibited significant muscle guarding as found by Dr. Boals (and muscle guarding as found in Dr. Sorensen’s medical records);
4. Mr. Kelly sustained an asymmetric loss of range of motion as found by Dr. Boals.

Based on these findings, Mr. Kelly meets the criteria found in the Table 15-3, DRE Lumbar Category II, AMA Guidelines, 5th Edition, which gives a 5% to 8% impairment of the whole person. Thus, it must be found that Mr. Kelly has sustained a permanent anatomical impairment, based on Table 15-3 of the AMA Guidelines, of 5% to 8% impairment to the whole person.

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Table 15-3 also allows for muscle spasms. Mr. Kelly did not complain of muscle spasms, and this was not observed on any medical examination.

Vocational Disability

Mr. Kelly's vocational disability must now be determined.

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. Further, the claimant's own assessment of her physical condition and resulting disabilities cannot be disregarded. The trial court is not bound to accept physicians' opinions regarding the extent of the plaintiff's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. Walker v. Saturn Corp., 986 S.W.2d 204, 208 (1998) (citations omitted).⁵

Mr. Kelly was 58 years old at the time of the trial. He has a high school education, has completed 3 years of college, and has attained an Associate Degree in Business Administration from a community college. He was employed 21 years at Frito Lay as a route salesman. Prior to his employment with Frito Lay, Mr. Kelly drove a dump truck for approximately 9 months, and was employed for a few days with the Board of Education. Based on Table 15-3 of the AMA Guidelines, 5th Edition, his anatomical impairment is 5% to 8%. In his present condition, Mr. Kelly is unable to work for Frito Lay, but he is able to preach at his church and administratively run his dump truck business. It is found that Mr. Kelly has sustained a 16% vocational disability to the body as a whole.

Medical Expenses

Mr. Kelly further contends that he is entitled to the payment of future medical expenses pursuant to Tennessee Code Annotated section 50-6-204. It is undisputed that Mr. Kelly was injured in the course and scope of his employment on December 1, 2000. Therefore, he is entitled to the payment of future medical benefits for medical expenses resulting from the December 1, 2000 injury.

Conclusion

The Panel concludes that the judgment of the trial court should be reversed, and that the preponderance of the evidence weighs in favor of the finding that Mr. Kelly has sustained a permanent vocational disability of 16% to the body as a whole, and that he is entitled to the payment of future medical expenses resulting from his work-related injury pursuant to Tennessee Code Annotated 50-6-204.

⁵ See, also, Tenn. Code Ann. § 50-6-241.

The case is remanded to the trial court for the award of discretionary costs and attorney fees and any further proceedings consistent with this opinion. Costs are assessed against the Appellees.

MARTHA B. BRASFIELD, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by the defendant-appellee, Frito Lay, Inc., pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

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

Costs are assessed to Frito Lay, Inc., and RSKO Claims Services, Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating