

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 22, 2011 Session

TIMOTHY D. CUNNINGHAM
v.
CITY OF SAVANNAH, TENNESSEE ET AL.

Appeal from the Circuit Court for Hardin County
No. 4204 Donald E. Parish, Judge

No. W2010-02411-WC-R3-WC - Mailed January 19, 2012; Filed February 28, 2012

The employee, an undercover drug investigator for the City of Savannah, alleged that he sustained a heart attack as a result of a physical confrontation with a suspect on March 2, 2005, during which he experienced tightness in his chest and shortness of breath. He experienced pressure in his chest and low energy but continued to work the following two days. On March 5, while engaged in activities unrelated to his job, he experienced nausea, profuse sweating, and severe pain in his chest, jaw, and left arm. His wife took him to a hospital emergency room where he was treated for an acute myocardial infarction. At trial, one of his treating physicians testified that the heart attack began on March 2 and continued until March 5. A second treating physician and an evaluating physician testified that the March 2 incident did not cause the March 5 heart attack. The trial court found that the heart attack began on March 2, and the employer appealed. On appeal,¹ the employer contends that the trial court erred in finding that the statutory presumption had not been overcome, erred in concluding that employee's heart attack began on March 2, 2005, and erred by finding that employee's heart attack was causally related to his employment. Although we agree that the trial court erred in its application of the statutory presumption, we affirm the judgment of the trial court.

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

¹ Pursuant to Tennessee Supreme Court Rule 51, 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.

JANICE M. HOLDER, J., delivered the opinion of the Court, in which WALTER KURTZ, SR. J., and TONY CHILDRESS, SP. J., joined.

John D. Burlison and James V. Thompson, Jackson, Tennessee, for the appellants, City of Savannah, Tennessee, and Savannah Police Department.

Curtis F. Hopper, Savannah, Tennessee, for the appellee, Timothy D. Cunningham.

MEMORANDUM OPINION

Factual and Procedural Background

In March 2005, Timothy Cunningham (“Cunningham”) worked for the City of Savannah (“the City”) as an undercover drug investigator for the 24th Judicial District Drug Task Force. He was forty-three years old and had been a law enforcement officer for approximately sixteen years.

On the evening of March 2, 2005, Cunningham conducted a drug “buy-bust” operation. The operation was originally scheduled to take place in the residence of an informant where Cunningham and other officers were waiting. When the seller failed to enter the residence, however, Cunningham hid behind a hedge to get closer to the seller’s automobile. Cunningham observed the drug sale, came out of hiding, and ordered the seller to get out of his vehicle. The seller refused to comply, forcing Cunningham to physically remove the seller from the vehicle, take him to the ground, and handcuff him. During this altercation, Cunningham began to feel “pressure” in his chest, weakness, and shortness of breath. Cunningham’s symptoms continued over the next two days and were accompanied by fatigue, difficulty breathing, an “occasional sharp pain,” and a “heaviness” in his chest. Cunningham continued to work at the Drug Task Force in spite of his symptoms.

Although Cunningham’s symptoms persisted, on the morning of March 5, 2005, Cunningham drove his truck to a friend’s home to move a pile of brush and debris using Cunningham’s bulldozer. Cunningham unloaded the bulldozer from a trailer attached to his truck and began to move the debris. While clearing the brush and debris, the tightness in his chest worsened, and he began to experience sharp chest pains and a pain in his left arm and jaw. He subsequently experienced nausea, vomiting, shortness of breath, and sweating. Cunningham finished clearing the brush and debris and returned the bulldozer to the trailer. Cunningham experienced severe chest pain as he drove home. After he returned home, Cunningham’s wife drove him to the emergency room.

Cunningham arrived at the emergency room at Jackson-Madison County Hospital on the afternoon of March 5. Dr. Sylvester Ejeh, the on-call cardiologist, concluded that Cunningham was having an acute myocardial infarction resulting from a blood clot in his coronary artery. Dr. Ejeh performed surgery to remove the blood clot, and Cunningham remained in the hospital for two days before being released.

Cunningham's condition improved, and he returned to work at the Drug Task Force in early April 2005. In 2008, Cunningham voluntarily resigned from the Drug Task Force to become a criminal investigator for the District Attorney General for the 24th Judicial District. Cunningham filed a complaint for workers' compensation benefits on April 14, 2008, in the Circuit Court for Hardin County. Cunningham alleged that his March 5, 2005 heart attack was "a result of stressors related to being undercover in many situations when working numerous hours for months prior to [his] heart attack."

The Circuit Court conducted a trial on September 10, 2010. Cunningham testified at trial that he had not been diagnosed with high cholesterol or high blood pressure prior to March 5, 2005, and that he rarely went to the doctor for anything other than police department physicals. Cunningham also testified that he was smoking approximately one pack of cigarettes per day at the time of his heart attack. He was not, however, overweight and had not experienced any serious health problems other than kidney stones a few years earlier. Cunningham also stated that after his heart attack he had difficulty working in hot weather and that his stamina had decreased. Cunningham testified that his heart attack may have contributed to his resignation from the Drug Task Force but that he "probably would have changed jobs even if [he] hadn't had the heart trouble" because the work as a criminal investigator was less strenuous.

The medical proof concerning causation consisted of the deposition testimony of three cardiologists: Dr. Sylvester Ejeh; Dr. Christopher Cherry, who was Cunningham's treating physician; and Dr. Hal Roseman, who conducted an independent medical evaluation of Cunningham at the City's request. Dr. Samuel Chung also conducted an independent medical examination of Cunningham at the request of Cunningham's counsel.

Dr. Ejeh testified that Cunningham's heart attack occurred on the day he reported to the emergency room. Dr. Ejeh based his opinion on several factors. First, he described the appearance of the clot he removed as "fresh," meaning that it had formed no more than twenty-four to forty-eight hours before it was removed. He explained that an older clot becomes hardened and cannot be removed through an export catheter, the device Dr. Ejeh used to remove Cunningham's clot. Dr. Ejeh also testified that the electrocardiogram ("EKG") he performed on March 5 showed an "ST elevation," which was consistent with an ongoing heart attack, and that blood testing revealed a very high level of tronopin, "a

chemical that leaks from the heart muscle when the heart muscle is damaged.” Dr. Ejeh also stated that Cunningham had informed him of a history of intermittent chest pain and shortness of breath during the two months leading up to March 5. Dr. Ejeh stated, however, that Cunningham never specifically mentioned the March 2 job-related incident or his symptoms in the days preceding March 5. Dr. Ejeh concluded that Cunningham’s chest pain, shortness of breath, and weakness prior to March 5 were episodes of exertional angina, a condition caused by inadequate blood flow to the heart.

Dr. Cherry testified that Cunningham’s heart attack began near the time of the March 2, 2005 drug “buy-bust” incident and that this incident caused the heart attack. Dr. Cherry stated that a tronopin level “can be elevated for seven to ten days,” meaning that Cunningham’s tronopin level detected on March 5 could have been an indication that the heart attack occurred in the seven to ten days preceding his emergency room visit.

According to Dr. Cherry, the March 5 EKG supported his conclusion that the heart attack occurred prior to March 5. Dr. Cherry believed Cunningham’s actions during the March 2 drug bust “caused plaque to begin to maybe flick debris downstream,” which “caused the chest pain injury to the heart.” Dr. Cherry believed that the plaque had been “downgraded” by enzymes in Cunningham’s body, which allowed him to “reestablish blood flow” until the later “sequence of events just overwhelmed his capability to overcome [the plaque] and eventually the vessel was occluded . . .” Moreover, Dr. Cherry explained that the absence of the symptoms of vomiting, nausea, sweating, and severe left arm and jaw pain prior to March 5 was not conclusive in establishing that the heart attack did not occur at an earlier date. Dr. Cherry supported this conclusion with the observation that Cunningham first experienced chest pain on March 2 and that the events of the drug buy-bust on that day were more physical and stressful than the effort of operating a bulldozer on March 5. Dr. Cherry did concede, however, that Cunningham likely had pre-existing heart disease prior to March 5 due to his heavy smoking and high cholesterol.

Dr. Roseman conducted an independent medical examination at the request of the City. Dr. Roseman interviewed and examined Cunningham in addition to reviewing Cunningham’s medical records. Dr. Roseman testified that Cunningham’s March 5, 2005 heart attack probably commenced four to six hours before he arrived at the emergency room and was not work-related. Dr. Roseman agreed with Dr. Ejeh that Cunningham’s prior episodes of chest pain, fatigue, and shortness of breath were “probably” angina. Dr. Roseman also noted that the 100% blockage discovered by Dr. Ejeh on March 5 supported the conclusion that the heart attack had begun earlier that day because “[u]sually if an artery becomes occluded with a clot, even for sometimes as short as hours, the body has resources to unclot that artery. The very fact that [the clot] was present . . . indicates that an acute heart attack, indeed took place.” Dr. Roseman also agreed that the elevated tronopin levels Dr.

Ejeh detected on March 5 were consistent with a heart attack that day because elevated levels of troponin appear within two to four hours of a heart attack, peak within ten to twenty-four hours and remain elevated for two to four days. Dr. Roseman noted that the ST segments shown on the March 5 EKG were “generally suggestive of an acute” event and that the follow-up EKG performed on March 7 was consistent with a heart attack occurring two days earlier.

Dr. Roseman disagreed with Dr. Cherry’s opinion that Cunningham’s troponin levels and EKG results were consistent with a March 2 heart attack. Dr. Roseman stated that Dr. Cherry’s opinion was inconsistent with Cunningham’s medical records, Cunningham’s account of events as described in his deposition, and Cunningham’s statements to Dr. Roseman during his examination. Dr. Roseman admitted, however, that he had previously testified favorably as an expert witness for the City and that Dr. Roseman had issued an initial report in this case that was favorable to the City before he had ever interviewed or examined Cunningham. Dr. Roseman concluded that Cunningham retained a 15% permanent anatomical impairment to the body as a whole as a result of the March 5 heart attack, whether or not the heart attack was work-related. Although Dr. Roseman also believed that if Cunningham had suffered a heart attack on March 2, there was “no way he could have had a heart attack on [March 5], period.”

Dr. Samuel Chung testified by deposition and issued a written report that the parties admitted into evidence by stipulation. Dr. Chung assigned a 45% impairment to Cunningham’s body as a whole. Dr. Chung disclosed, however, that his medical practice was primarily devoted to evaluation and treatment of spinal injuries and that 40% or more of the income of his practice was derived from performing evaluations for plaintiffs’ attorneys. He also stated that he had been convicted of a criminal violation of the Medicare law and had been reprimanded by the Tennessee Board of Medical Examiners.

The trial court issued its ruling from the bench. The trial court found Cunningham to be a credible witness and attributed variations among the medical histories given to various physicians, Cunningham’s depositions, and Cunningham’s trial testimony to Cunningham’s “lack of understanding of the import of that information at the moment.” The trial court found the City had not overcome the statutory presumption that Cunningham’s heart attack was work-related. See Tenn. Code Ann. § 7-51-201(2011). The trial court accepted Dr. Cherry’s opinion on causation over the opinions of Dr. Ejeh and Dr. Roseman, stating, “[Dr. Cherry] is in a better position to evaluate Mr. Cunningham . . . than any other physician because he saw him for a longer period of time and he is the treating physician.” Concerning the extent of impairment, however, the trial court accredited the testimony of Dr. Roseman over Dr. Chung, finding the appropriate impairment to be 15% to the body as a whole and

further finding that Cunningham had sustained a 20% permanent partial disability to the body as a whole as a result of his heart attack. Judgment was entered accordingly.

The City appealed, arguing that the trial court erred by finding that the statutory presumption of job-related heart disease had not been overcome, that Cunningham's heart attack began March 2, 2005, and that Cunningham's heart attack was caused by his employment.

Analysis

1. Statutory Presumption

Tennessee Code Annotated section 7-51-201(a)(1) creates a rebuttable presumption that heart disease or hypertension suffered by law enforcement officers is caused by their employment.

Whenever the state of Tennessee, or any municipal corporation or other political subdivision of the state that maintains a regular law enforcement department manned by regular and full-time employees and has established or hereafter establishes any form of compensation to be paid to such law enforcement officers for any condition or impairment of health that results in loss of life or personal injury in the line of duty or course of employment, there shall be and there is hereby established a presumption that any impairment of health of such law enforcement officers caused by hypertension or heart disease resulting in hospitalization, medical treatment or any disability, shall be presumed, unless the contrary be shown by competent medical evidence, to have occurred or to be due to accidental injury suffered in the course of employment.

Id.

The City does not dispute that the statutory presumption applies in this case; rather, the City contends that it successfully rebutted the presumption. The application of a statutory presumption is a question of law, which we review de novo. Borner v. Autrey, 284 S.W.3d 216, 219 (Tenn. 2009) (citing Lavin v. Jordon, 16 S.W.3d 362, 364 (Tenn. 2000)). The Supreme Court of Tennessee has held that to rebut the presumption of causation, “[t]here must be affirmative evidence that there is not a substantial causal connection between the work of the employee so situated and the occurrence upon which the claim for benefits is

based.” Bohanan v. City of Knoxville, 136 S.W.3d 621, 625 (Tenn. 2004) (quoting Coffey v. City of Knoxville, 866 S.W.2d 516, 519 (Tenn. Workers Comp. Panel 1993)).

The City introduced testimony from Dr. Ejeh and Dr. Roseman to rebut the presumption of causation. Drs. Roseman and Ejeh testified that Cunningham’s pre-existing coronary artery disease was caused by smoking and high cholesterol, that Cunningham’s symptoms prior to March 5 were exertional angina, and that Cunningham’s actual heart attack occurred on March 5 and was not caused by his employment.

The City presented “affirmative evidence that there is not a substantial causal connection” between Cunningham’s heart attack and his job as an undercover drug investigator. Bohanan, 136 S.W.3d at 625. The evidence presented by the City was therefore sufficient to rebut the statutory presumption. The trial court erred in finding that the City did not overcome the presumption that Cunningham’s heart attack was work-related.

2. Causation

Our finding that the City rebutted the statutory presumption does not conclude our analysis. “Once the presumption has been overcome, it disappears, and the employee must then prove causation by a preponderance of the evidence as in any other workers’ compensation case.” Bohanan, 136 S.W.3d at 625 (citing Krick v. City of Lawrenceburg, 945 S.W.2d 709, 713; Stone v. City of McMinnville, 896 S.W.2d 548, 552 (Tenn. 1995)). Except in the most obvious cases, causation must be proven by expert medical testimony. Arias v. Duro Standard Prods. Co., 303 S.W.3d 256, 264 (Tenn. 2010).

In this case, the trial court found all three cardiologists qualified to express opinions on the subject of causation.² The trial court noted, however, that because there was competing medical testimony in this case, Cunningham’s credibility was “particularly important to a resolution of the causation question.” The trial court found that Cunningham’s trial testimony was consistent with both his deposition and his statement to the insurance interviewer.

The trial court reviewed the medical proof contained in the depositions in conjunction with the trial testimony of Cunningham and his wife. The trial court is given great deference in evaluating causation testimony. Thomas, 812 S.W.2d at 283. Although expert medical testimony is required to prove causation and permanency of injury, that testimony must be

² This court will not question a trial court’s judgment of an expert’s qualifications absent an abuse of discretion, which we do not find here. See McDaniel v. CSX Transp., 955 S.W.2d 257, 263-64 (Tenn. 1997).

considered in light of the employee's lay testimony concerning the injury and other events within the employee's knowledge. Id. When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983).

Reviewing the medical deposition testimony together with Cunningham and his wife's in-court testimony, the trial court concluded that Dr. Cherry was in the best position to "speak as to the causation issue." Dr. Cherry was Cunningham's treating physician for a period of years and had more frequent contact with him than either of the other two physicians. Thus, he had the opportunity to discuss and clarify Cunningham's account of the critical events of March 2 to March 5, 2005.

The trial court also found that Dr. Cherry was in the best position to adequately communicate with Cunningham. Cunningham testified that he and his wife had difficulty understanding Dr. Ejeh's questions and instructions because of Dr. Ejeh's accent. This difficulty caused misunderstandings and ultimately led Cunningham to seek treatment from Dr. Cherry. Dr. Cherry was the only physician to ask Cunningham about his medical condition prior to March 5. Cunningham also testified that Dr. Roseman's questions were posed in the form of an interrogation and that Dr. Roseman seemed "like he was trying to make [Cunningham] say what [Dr. Roseman] wanted [Cunningham] to say."

When all expert medical testimony is presented in the record by deposition this Court is in the same position as the trial judge, and we may draw our own conclusions about the testimony's weight and credibility. Krick, 945 S.W.2d at 712. Even when medical proof is contained solely within depositions this testimony should not be "read and evaluated in a vacuum." Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991).

We recognize that live testimony at trial will often influence the trier of fact when weighing the medical proof contained in the depositions. A de novo standard of review is not appropriate when the trier of fact has weighed out-of-court evidence in conjunction with in-court testimony. Cf., e.g., State v. Mitchell, 343 S.W.3d 381, 391 (Tenn. 2011) (remarking that it is the role of the trier of fact to resolve conflicts in the evidence because it witnesses testimony "firsthand"). In other words, an appellate court is in a similar position to the trial court only when there is no live testimony to evaluate concerning the disputed issues. Cf., e.g., State v. Northern, 262 S.W.3d 741, 748 n. 3 (Tenn. 2008) (stating that de novo review does not apply when the trial court's findings were based on both live in-court testimony and a videotaped confession).

We conclude that the trial court acted within its discretion in accrediting Dr. Cherry's causation testimony over that of Dr. Ejeh and Dr. Roseman. The issue of causation in a

workers' compensation case is a question of fact. See Hill v. Eagle Bend Mfg., 942 S.W.2d 483, 488 (Tenn. 1997). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002). Our review of the trial court's factual findings in a workers' compensation case is de novo with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002).

We further conclude that the evidence does not preponderate against the trial court's findings that Cunningham's heart attack occurred on March 2 and resulted from Cunningham's employment. Tenn. Code Ann. § 50-6-225(e)(2). Although the trial court erred in its application of the statutory presumption in this case, the trial court's determination as to causation was unaffected by its consideration of the statutory presumption. The trial court concluded that Cunningham had "established causation through his testimony that the cardiac symptoms developed while [Cunningham] was engaged in an emotionally stressful and physically demanding arrest of a drug dealer on or about March 2nd."

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the City of Savannah, for which execution may issue, if necessary.

JANICE M. HOLDER, JUSTICE

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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 the Appellant, City of Savannah, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM