

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 25, 2013 Session

DAVID DeGALLIFORD v. UNITED CABINET COMPANY, LLC ET AL.

**Appeal from the Circuit Court for Davidson County
No. 12C3389 Amanda McClendon, Judge**

**No. M2013-00943-WC-R3-WC - Mailed January 13, 2014
Filed March 17, 2014**

In early 2012, an employee alleged that he suffered a gradual injury to his cervical spine due to strenuous repetitive tasks and heavy lifting required by his employment. He reported the injury to his employer, who denied the claim on the basis that the injury was not compensable under Tenn. Code Ann. § 50-6-102(12)(C)(ii) (Supp. 2011). This statute, which applies to injuries occurring after July 1, 2011, provides that “cumulative trauma conditions” do not include injuries resulting from repetitive work activities “unless such conditions arose primarily out of and in the course and scope of employment.” The employee’s treating physician testified that the employee’s repetitive tasks at work were the primary cause of his injury. Another doctor, however, who examined the employee’s medical records on behalf of his employer, testified that the employee’s injury was caused by a degenerative disc disease common in the aging process. The trial court ruled for the employee, and the employer appealed. In accordance with Tennessee Supreme Court Rule 51, 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. We hold that the trial court did not abuse its discretion when it relied on the testimony of the employee’s treating physician, who testified that the employee’s work activities were the primary cause of the employee’s injuries. Accordingly, 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

SHARON G. LEE, J., delivered the opinion of the Court, in which PAUL G. SUMMERS, SR. J., and DONALD P. HARRIS, SP. J., joined.

Jenny R. Ebersole-Foster and David E. Goudie, Nashville, Tennessee, for the appellants, United Cabinet Company, LLC and Builders Mutual Insurance.

Jonathan Williams, Nashville, Tennessee, for the appellee, David DeGalliford.

OPINION

Factual and Procedural Background

David DeGalliford (“Employee”) worked as a table saw operator for United Cabinet Company (“Employer”), a manufacturer of kitchen and bathroom cabinets. In January 2012, Employee began experiencing low back pain, numbness, and difficulty walking. On February 6, 2012, Employee went to an emergency room for treatment, and was referred to a neurosurgeon. After he learned that he would need surgery, Employee reported his work-related injury to Employer’s personnel director. Employer denied Employee’s claim. The parties participated in a Benefit Review Conference, but were unable to resolve their dispute. Employee filed this action in the Circuit Court for Davidson County on August 24, 2012. The case was tried on February 20, 2013.

Employee’s proof consisted of his own testimony and the deposition testimony of his treating physician Dr. Richard L. Lebow, a neurosurgeon. Employer’s proof consisted of the deposition testimony of Dr. David Adam West, an orthopaedic surgeon retained by Employer to evaluate Employee’s medical records.

Employee was fifty-one years of age at the time of the trial. He began working for Employer in April 1981. Employee left Employer for a few years to work at another company that manufactured metal cabinets, but he later returned and had worked for Employer for the twelve years preceding the trial. Employee had a combined thirty-year work history with Employer. He testified that his job as a table saw operator with Employer required him to lift pieces of wood onto a table, cut the wood with a table saw, and then stack the wood. The largest pieces of wood that Employee was required to lift were four feet wide and eight feet long sheets of plywood. Depending on the thickness of the plywood, these sheets could weigh as much as seventy-five pounds. His job required him to lift, cut, and stack sheets of wood for eight hours each day.

In January 2012, Employee began to experience low back pain, numbness in his hands, tingling and weakness in his arms, and difficulty walking. He also began having difficulty balancing, and would sometimes have to hold onto a wall or a stationary object in order to steady himself. Employee testified that no single incident caused the onset of his symptoms.

On February 6, 2012, Employee went to the emergency room at St. Thomas Hospital in Nashville, where doctors administered a chest X-ray and a lumbar MRI. He was referred to Dr. Michael Kaminski, a neurologist, who examined Employee on February 28, 2012. Dr. Kaminski ordered an MRI on Employee’s cervical spine, which was conducted on March 2, 2012. Dr. Kaminski then referred Employee to a neurosurgeon, Dr. Richard Lebow, for further evaluation and treatment.

Dr. Lebow first examined Employee on March 8, 2012. Employee told Dr. Lebow that he had experienced several months of worsening neck pain, weakness and numbness in his hands, weakness in his legs, and sharp lower back pain. The MRI ordered by Dr. Kaminski showed severe spondylosis of the cervical spine, with herniated discs at the C5-6 and C6-7 levels impinging on the spinal cord. After evaluating Employee, Dr. Lebow concluded that there was a substantial risk of damage to Employee's spinal cord if the condition was left untreated. Dr. Lebow recommended surgery to remove the discs and stabilize the cervical spine. Dr. Lebow performed surgery on Employee on March 13, 2012.

Employee testified that Dr. Lebow informed him that his symptoms might be work-related during their initial meeting on March 8, 2012. After learning this, Employee reported that his cervical spine condition was work-related to Employer's personnel director.

After having back surgery, Employee was off work until July 24, 2012. At that time, Dr. Lebow permitted him to return to work with light duty restrictions. However, due to severe pain, Employee was not able to continue working. Dr. Lebow took him off work from August 6 through August 20, 2012. After that period, Employee returned to work and performed the job, although he had some difficulty gripping for long periods of time and required assistance lifting large pieces of wood.

Employee testified that, prior to February 2012, his primary recreational activities were bowling and swimming at the lake. He did not lift weights, participate in contact sports, or engage in other strenuous activities away from his job. After having surgery, however, Employee testified that he no longer bowled due to balance-related problems, and that he no longer went swimming.

During cross-examination, Employee confirmed that several of his job activities required him to bend over and that he was able to perform those activities. He also restated that no particular event caused the onset of his symptoms. Employee denied that he had described an episode of severe neck pain occurring six months before his initial meeting with Dr. Lebow. Employee agreed that his primary complaint when he went to the emergency room and to Dr. Kaminski was lower back pain. Employee also agreed that he did not have neck pain when he went to the emergency room, although he did experience pain and numbness in his arms, which he reported. Employee testified that since having surgery, he had no lower back symptoms, but continues to experience numbness in his hands and difficulty balancing.

Dr. Lebow testified for Employee by deposition. He stated that Employee came to him complaining of several months of worsening neck pain, weakness and numbness in his hands, and weakness in his legs. After reviewing Employee's MRI, Dr. Lebow noted that Employee had severe cervical spondylosis with herniated discs at the C5-6 and C6-7 levels, which impinged on Employee's spinal cord. Dr. Lebow testified that although the herniated

discs probably did not cause Employee's low back pain, the herniated discs were very likely the cause of his leg symptoms and his difficulty balancing. According to Dr. Lebow, because there was a substantial risk of spinal cord damage, he recommended that Employee have surgery "in a matter of days to a few weeks." Dr. Lebow also testified that "any traumatic injury to his spine could leave him with paralysis of C5-6 which would make him a quadriplegic."

Employee's surgical procedure consisted of removing his two herniated discs and fusing his C5, C6 and C7 vertebrae. When Dr. Lebow last saw Employee on October 15, 2012, Employee still had signs of spinal cord damage, numbness and tingling in both of his hands, and severe back pain. Dr. Lebow opined that Employee retained 25% permanent anatomical impairment to his body as a whole. At that time, Dr. Lebow released Employee to return to work with temporary restrictions.

During direct examination, Dr. Lebow testified as follows concerning causation:

Q: And in your opinion, did [Employee's] work for [Employer] advance the severity of a preexisting condition in his cervical spine at C5-6 and C6-7?

A: Yes.

Q: Therefore was [Employee's] cervical spine condition at C5-6 and C6-7 primarily caused by his work activities at [Employer]?

A: From all the data that I have available to me at this time, yes.

* * * *

Q: So was one of the symptoms the surgery was designed or intended to help, was one of those symptoms pain?

A: Yes.

Q: So therefore in your opinion, did [Employee's] work at [Employer] cause him to have pain that became disabling?

[Opposing counsel]: Object to the form.

Q: You can answer.

A: Yes.

During cross-examination, Dr. Lebow confirmed that Employee did not complain of neck pain during his emergency room visit, during his examination by Dr. Kaminski, or during Dr. Lebow's initial examination of Employee. Dr. Lebow stated that Employee's symptoms of gait disturbance and weakness in his legs were consistent with cervical myelopathy, which refers to pressure on the spinal cord. He further testified that Employee's cervical spine MRI showed signs of severe degenerative disease in Employee's cervical spine, including bone spurs and signs of chronic inflammation. Dr. Lebow placed no permanent restrictions on Employee's activities.

Employer submitted the deposition testimony of Dr. David West, who reviewed Employee's medical records at the request of Employer and agreed with Dr. Lebow's conclusion that Employee had cervical spondylosis. However, Dr. West opined that Employee's condition was most likely the result of an underlying degenerative condition, rather than the result of a work-related injury. Specifically, Dr. West testified that "the on-the-job injury did not cause the disc herniation and the instability to [Employee's] neck." However, Dr. West acknowledged "the possibility [that Employee's] on-the-job performance could exacerbate an underlying condition." He also noted that "having a degenerative condition like [Employee's] could certainly be exacerbated by lifting, pushing, [and] pulling," but testified that such activities were not the primary cause of Employee's injury. Dr. West testified that he would be able to obtain more information if he could examine and talk to Employee. Dr. West also stated that over 50% of all persons over age fifty have some degree of degenerative disc disease as a result of the natural aging process. He further added that degenerative disc disease is a progressive condition, and that routine activities can cause or advance the process.

During cross-examination, Dr. West stated that he had not personally examined Employee, and that he had not seen or reviewed the depositions of either Employee or Dr. Lebow. Dr. West also testified that he had not personally examined Employee's MRI or X-ray films, but instead had relied on the radiology reports of those studies. Dr. West agreed that unsteadiness of gait can be a symptom of cervical myelopathy, but also stated that this symptom is not necessarily caused by myelopathy. Dr. West considered the herniated discs at C5-6 and C6-7 to be the most significant finding of the MRIs. He opined that Employee's work did not cause the herniations, but stated that there was "a strong possibility" that Employee's work activities had advanced the underlying degenerative condition. Dr. West repeated again that the condition can also advance as a normal, ordinary progression of life.

The trial court ruled that Employee had sustained a compensable injury, that the advancement of Employee's repetitive work for Employer caused disabling pain that required

surgery, and that Employee's pre-existing cervical spine condition arose primarily out of and in the course of his employment with Employer. In reaching its holding that Employee had sustained a compensable injury, the trial court also referenced the Tennessee Supreme Court's decision in *Trosper v. Armstrong Wood Products, Inc.*, 273 S.W.3d 598 (Tenn. 2008). In *Trosper*, the Court held that an employee does not suffer a compensable injury if work activities aggravate pre-existing conditions, but does suffer a compensable injury if work activities advance the severity of pre-existing conditions. *Id.* at 607. Relying on this holding, the trial court also determined that "for the purpose of any appeal," Employee's work for Employer had advanced the severity of his pre-existing disc injuries. Employer timely appealed the trial court's ruling.

Analysis

Employer raises four issues on appeal. First, Employer contends that the trial court erred by granting Employee's motion in limine to exclude a portion of Dr. West's testimony. Second, Employer contends that the trial court erred by basing its findings on *Trosper*, 273 S.W.3d 598. Third, Employer contends that the trial court erred by basing its award on a finding that Employee's work advanced his pain. Fourth, Employer contends that the trial court erred by finding that Employee's injury arose primarily from his employment.

We are required by law to review the trial court's factual findings "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2012). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." *Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 664 (Tenn. 2008) (quoting *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses at trial, but we do not afford the same deference to depositions and other documentary evidence. *Padilla v. Twin City Fire Ins. Co.*, 324 S.W.3d 507, 511 (Tenn. 2010); *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). "Although workers' compensation law must be construed liberally in favor of an injured employee," *see Crew*, 259 S.W.3d at 664, the employee must still prove all elements of his or her case by a preponderance of the evidence. *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992).

Motion in Limine

Prior to trial, Employee filed a motion in limine seeking to exclude the following testimony of Dr. West because it was given in response to a leading question:

Q: But that [lifting, pushing and pulling] was not the primary cause of the injury found at the C5-6 and C6-7 level?

A: No.

[Plaintiff's counsel]: Object to the form.

A: No, I don't believe so.

The trial court granted the motion and excluded the testimony. Employer contends that the trial court erroneously granted the motion, arguing that the question was not leading, but instead sought to clarify the witness's previous response.

We disagree. In our view, the question is leading, since it suggested a particular answer. Employee made a timely objection, providing Employer with an opportunity to rephrase the question in an acceptable manner. Employer chose not to do so. Admissibility of evidence is within the sound discretion of the trial judge. "When arriving at a determination to admit or exclude even that evidence which is considered relevant trial courts are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion." *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992). We are unable to conclude that the trial court abused its discretion in granting the motion in limine. Furthermore, even if this testimony should have been admitted, the net effect of excluding it was minimal since Dr. West's statement is consistent with other statements contained in his testimony and report which were admitted into evidence.

Causation

Employer's three remaining arguments each concern the issue of causation. Taken as a whole, Employer's position is that the trial court's reliance on *Trosper*, 273 S.W.3d 598, and its finding that Employee's work advanced his pre-existing condition by increasing his pain, both run afoul of the changed definition of injury contained in Tenn. Code Ann. § 50-6-102(12)(C)(ii) (Supp. 2011).¹ This statute, which applies to injuries occurring after July 1, 2011, states as follows:

(12) "Injury" and "personal injury":

(A) Mean an injury by accident, arising out of and in the course of employment, that causes either disablement or death of the employee; provided, that:

¹ 2011 Public Chapter 416, section 8.

(i) An injury is “accidental” only if the injury is caused by a specific incident, or set of incidents, arising out of and in the course of employment, and is identifiable by time and place of occurrence; and

* * * *

(C) Do not include:

* * * *

(ii) Cumulative trauma conditions, hearing loss, carpal tunnel syndrome, or any other repetitive motion conditions unless such conditions arose primarily out of and in the course and scope of employment[.]

Employer argues that this language effectively overrules *Trosper*, in which the Tennessee Supreme Court stated:

We reiterate that the employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain. However, if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable.

273 S.W.3d at 607.

When interpreting a statute, “Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope.” *Estate of French v. Stratford House*, 333 S.W.3d 546, 554 (Tenn. 2011) (citing *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002)). “Courts are to interpret statutes by looking to the plain language and giving effect to the ordinary meaning of the words.” *State v. Jennings*, 130 S.W.3d 43, 46 (Tenn. 2004).

The language of § 50-6-102(12)(C)(ii) defines the law regarding aggravation of pre-existing medical conditions resulting from repetitive work activity. However, by its explicit terms, it does not prohibit recovery of benefits for such conditions. The text of the statute provides that an injury does not include “cumulative trauma conditions, hearing loss, carpal tunnel syndrome, or any other repetitive motion conditions *unless such conditions arose primarily out of and in the course and scope of employment.*” Tenn. Code Ann. § 50-6-102

(12)(C)(ii) (emphasis added). Accordingly, the plain text of the statute clearly permits a finding of compensability when a specific repetitive work activity *is* the primary cause of a medical condition, and as such, the statute does not overrule *Trosper*.

The testimony of Dr. Lebow and Employee supports the trial court's finding that Employee's repetitive lifting of large pieces of wood did not merely cause an increase in pain, but advanced the severity of his neck condition. Employee had herniated discs at two levels of his neck that placed pressure on his spinal cord, caused numbness in his hands, and, most significantly, affected his ability to stand and walk without assistance. Both Dr. Lebow and Dr. West agreed that Employee's condition was serious, and that immediate surgery was appropriate. The primary dispute between Employee and Employer was whether the pressure placed on Employee's spinal cord by two herniated discs was primarily caused by repetitive work activities or was merely the inevitable result of the progressive nature of degenerative disc disease.

Dr. Lebow testified that Employee's condition was primarily caused by his repetitive work activities. He described the repetitive lifting of heavy wood objects as the "main trauma" to Employee's neck, and also observed that there was no evidence of other trauma likely to cause the extensive damage he observed in Employee's cervical spine. Dr. Lebow further testified that Employee's work did not merely increase his pain, but also advanced the severity of his pre-existing condition.

In contrast, Dr. West noted that degenerative disc disease is known to be a progressive condition, and considered Employee's cervical myelopathy to be a natural result of that process. Nevertheless, Dr. West also conceded that there was a "strong possibility" that Employee's work activities caused a material advancement of his pre-existing condition.

The trial court was presented with conflicting expert medical opinions. In *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672 (Tenn. 1991), the Tennessee Supreme Court provided us with guidelines to assist in weighing the evidence in these circumstances, explaining that: "When the medical testimony differs, the trial judge must obviously choose which view to believe. In doing so, [the judge] is allowed, among other things, to consider 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." 803 S.W.2d at 676. Dr. Lebow's curriculum vitae reveals that he is a specialist in spinal surgery. In contrast, Dr. West testified that although he had performed spinal surgery while serving in the Army in 1998 and 1999, he had not done so since. Dr. Lebow personally examined Employee, discussed his work activities with him, and examined Employee's cervical MRI films. Dr. West, however, did not examine Employee, did not review Employee's deposition or Dr. Lebow's deposition, and relied on reports of Employee's MRI and other studies to reach his conclusions. Considering these factors, we conclude that the trial court did not err by giving greater weight to Dr. Lebow's opinions. Dr. Lebow had more

information than Dr. West to consider and process in his evaluation, including the opportunity to personally examine and speak with Employee. Consequently, we are unable to conclude that the evidence preponderates against the trial court's finding that Employee sustained a compensable repetitive injury as a result of his work activities.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to United Cabinet Company, LLC and Builders Mutual Insurance, and their surety, for which execution may issue if necessary.

SHARON G. LEE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT
November 25, 2013 Session

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**Circuit Court for Davidson County
No. 12C3389**

**No. M2013-00943-SC-WCM-WC
March 17, 2014**

JUDGMENT

This case is before the Court upon the motion for review filed by United Cabinet Company, LLC, 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 United Cabinet Company, LLC, and their surety, for which execution may issue if necessary.

Lee, J., not participating