

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
October 25, 2010 Session

**ROBIN BAKER v. A & L INDUSTRIAL CONSTRUCTION AND
MAINTENANCE, INC.**

**Appeal from the Chancery Court for Sullivan County
No. K0035411(L) E. G. Moody, Chancellor**

No. E2009-02658-WC-R3-WC - Filed March 7, 2011

The employee sustained a compensable injury to her left wrist. She alleged that she also sustained a neck injury as a result of the same incident. The employer denied the neck claim. The employee's evaluating physician expressed somewhat contradictory opinions regarding the causal relationship between the work incident and her neck injury. The trial court held that the employee had a compensable neck injury in addition to her wrist injury and awarded benefits accordingly. The employer has appealed that finding. We affirm the judgment.¹

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

WALTER C. KURTZ, SR.J., delivered the opinion of the Court, in which GARY R. WADE, J., and JON KERRY BLACKWOOD, SR.J., joined.

J. Eddie Lauderback, Johnson City, Tennessee, for the appellant, A & L Industrial Construction and Maintenance, Inc.

Gregory W. Francisco, Kingsport, Tennessee, for the appellee, Robin Baker.

MEMORANDUM OPINION

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.

Factual and Procedural Background

Robin Baker (“Employee”) was a truck driver for A & L Industrial Construction and Maintenance, Inc. (“Employer”), a contractor at the Eastman Chemical Company site in Kingsport. It is undisputed that Employee tripped and fell at work on December 12, 2005. It is also undisputed that she injured her left wrist at that time. She contends that she also injured her neck as a result of that incident. Employer denies that contention.

Employee reported the incident to her supervisor immediately. She was examined by an onsite nurse. She completed her shift, but testified that she merely rode along with a co-worker for the remainder of the day. On the following day, she was examined by Dr. Breeding, an onsite physician. He prescribed a steroid dosepack and followed her for one or two months. The initial report of the nurse and Dr. Breeding’s notes were introduced by stipulation. These records refer to Employee’s left shoulder, the palms of both hands, both wrists and her left arm. They do not contain any reference to neck symptoms.

Dr. Breeding referred Employee to Dr. Paul Gorman, an orthopaedic surgeon. She saw Dr. Gorman on February 28, 2006, and on March 16, 2006. His diagnosis was a tear of the triangular fibrocartilage complex (“TFCC”) of the left wrist. Employee “didn’t get along” with Dr. Gorman, and she requested through her attorney to be referred to another physician. A panel was offered, and she selected Dr. Robert Ivy, an orthopaedic surgeon in Knoxville. She first saw Dr. Ivy on April 17, 2006. His diagnosis was the same as that of Dr. Gorman. He recommended a surgical procedure to repair the TFCC and prescribed a period of physical therapy to be administered prior to surgery. The surgery took place on June 21, 2006. After a course of postoperative treatment, Dr. Ivy released Employee from his care on October 16, 2006. He assigned a 3% impairment to the left arm and placed no restrictions upon her activities. Neither Dr. Gorman nor Dr. Ivy testified, but their records were placed into evidence by stipulation.

Employee testified at trial that both her neck and right shoulder were painful immediately after the December 12, 2005 incident, and that she told each and every doctor and therapist about those symptoms. However, there is no reference to neck or right shoulder symptoms in any of the various medical and physical therapy records from the date of her injury until August 2006. The first mention of such symptoms is contained in an August 17, 2006 handwritten note by a physical therapist employed by Arthritis Associates.² The August 17, 2006 note refers to ongoing pain in Employee’s right shoulder. A note dated August 24, 2006 also refers to right shoulder pain and mentions the December 2005 work injury.

² Prior to her work injury, Employee had received treatment from Arthritis Associates for fibromyalgia, which will be discussed in greater detail *infra*.

Employee was referred to Dr. Bruce Miller, an orthopaedic surgeon, for treatment of her right shoulder and neck symptoms. Dr. Miller had previously treated Employee for fibromyalgia. Her right shoulder symptoms eventually resolved. Dr. Miller ordered an MRI of the neck, which showed only normal degenerative changes.

Dr. William Kennedy, an orthopaedic surgeon, conducted an evaluation of Employee on April 23, 2007, at the request of her attorney.³ Among other information, Employee told him that she had injured her neck in 1999 but that “she did not have any additional episodes of neck pain until the work-related incident of December 12, 2005.” Dr. Kennedy’s diagnoses were “sprain to the cervical spine with pain referred into the right shoulder,” and “complex tearing of the [TFCC], treated by arthroscopic surgery.” He initially opined that both of these conditions were caused by the December 2005 event. He assigned 7% impairment to the body as a whole for the neck injury and 7% to the left upper extremity (4% to the body as a whole) for the wrist injury. He recommended a twenty-pound lifting restriction, avoidance of various head positions, and no overhead work.

On cross-examination, Dr. Kennedy stated that he had not seen certain pre-injury records of Arthritis Associates and other health providers when he prepared his report. He conceded that these records were inconsistent with the history provided to him by Employee. Dr. Kennedy referred to the two physical therapy notes from August 2005, which reported that Employee had limited range of motion of the cervical spine that she described as neck pain at levels of 5/10 and 7/10, and that she had a history of several years of neck pain. Dr. Kennedy also conceded that the records of Employee’s medical providers after the work injury did not reflect “any complaint whatsoever regarding her cervical spine, her cervical pain, her cervical neck condition, muscle spasms, anything that would indicate a problem aggravated by her work fall until she came under [his] care in April of 2007.” He testified that it would be unusual for a person with a significant neck injury to fail to report symptoms to any health care providers for that length of time. Confronted with this information, Dr. Kennedy modified his opinion concerning causation as to the neck injury and stated that the findings he made during his examination were just as likely to have been caused by her pre-existing fibromyalgia. His opinion continued to fluctuate during redirect and recross examinations. His final statement concerning the cause of Employee’s neck symptoms was: “After taking everything into consideration that we have today, I simply don't know.” He never, however, excluded causation for the neck injury related to the fall. His “I don’t know” answer related only to his inability to decide if the neck injury was caused by the fibromyalgia or the work fall. The neck injury could have been caused by the fall.

Employee was forty-six years old when the trial occurred. She was a high school

³ Dr. Kennedy testified by deposition.

graduate and had attended Bristol College, which she described as a “vocational school,” for one year. She had been a truck driver for Employer for approximately three years prior to her injury. Her previous work experience was with restaurants, convenience stores, factory work, and truck driving. She did not return to work for Employer and was not working at the time of the trial.

Employee admitted that she had received treatment for fibromyalgia prior to December 2005, but she stated that the condition mainly affected her legs and feet. On cross-examination, Employee conceded that her neck was “sore” in August 2005, but that she “didn’t have neck pain.” She disputed the accuracy of the physical therapy records that described her neck pain as five or seven on a scale of ten at that time and also reflected that she had diminished range of motion of her neck. She testified that she told all or most of her healthcare providers between December 2005 and August 2006 about her neck and shoulder symptoms. She speculated that her complaints were not recorded because her wrist problems were more significant at the time and because Dr. Ivy and Dr. Gorman were hand specialists.

Employee testified that she was unable to bend her head forward without pain, she was unable to stand for long periods of time, and she had difficulty sleeping as a result of her injuries. She said that her husband had taken over many of the household cooking and cleaning duties that she had performed before her injury.

William Baker, Employee’s husband, testified that she had been active and had no limitations from her fibromyalgia prior to the December 2005 injury. He stated that she was less active since the fall, and he confirmed her testimony that he had taken over many household duties. He had seen her crying because of pain. On cross-examination, he conceded that she had been unable to work for one or two months during the summer of 2005 due to fibromyalgia.

Jody Musick, a physical therapist, testified at trial. He had treated Employee for her fibromyalgia during August and September 2005. He had measured the range of motion of her neck at that time. He compared his results with the measurements taken by Dr. Kennedy in 2007. Dr. Kennedy’s results showed additional loss of range of motion.

Employee placed into evidence the deposition of Alan Meade, a physical therapist who treated her from August 2006 to January 2007. He testified that he initially provided therapy for her wrist. Beginning in September 2006, he also treated her neck and right shoulder. Employee attributed her neck and shoulder symptoms to the December 2005 incident. He had only limited knowledge of her medical history prior to August 2006.

The trial court took the case under advisement. It issued a five-page written opinion

in which it found that Employee had injured her neck and wrist as result of the December 2005 event. It awarded 38.5% PPD to the body as a whole. Employer has appealed, contending that the trial court erred by finding that Employee sustained a compensable neck injury.

Standard of Review

The standard of review of issues 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(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Employer contends that the evidence preponderates against the trial court's finding of compensability. It argues that the testimony of Dr. Kennedy, the only expert medical witness to testify, was so equivocal that it cannot support a finding of causation.

The trial court stated the following findings:

In addition to Dr. Kennedy's equivocal testimony, [Employee] and her husband testified that the accident was, in fact, the cause of her right shoulder/neck condition.

The records from Arthritis Associates corroborates [sic] [Employee's] and her husband's testimony that she has had right shoulder pain since the accident.

In addition, [Employee's] physical therapist, Jody Musick, testified that although [Employee] had some headaches and neck pain prior to the accident, that they were from migraine headaches and fibromyalgia, which are different from cervical neck pain and that, although she had some loss of range of

motion prior to the work-related accident, her range of motion after the accident was severely reduced.

The Court finds that the totality of the evidence preponderates in favor of a finding that [Employee] suffered permanent injuries to her right shoulder and neck which are causally related to the accident at bar.

Employer asserts that the testimony of Dr. Kennedy is so equivocal and self-contradictory that the finding of causation in this case amounts to speculation. In support of this assertion, Employer notes that Dr. Kennedy admitted that he had not been given an accurate history by Employee and that he had not been provided with relevant pre-injury medical records before being cross-examined. Employer also points out that Dr. Kennedy changed his testimony concerning causation several times during the course of his deposition. Because of these factors, Employer contends that Dr. Kennedy's opinion is not sufficient to support the trial court's findings.

Employee agrees that Dr. Kennedy's testimony was equivocal and implicitly concedes that it would be insufficient to support a finding of causation by itself. However, Employee contends that the additional testimony of Mr. Musick and of Employee and her husband supplement Dr. Kennedy's testimony sufficiently to satisfy the standard set out in *Reeser v. Yellow Freight System, Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997), that "an award may properly be based upon medical testimony to the effect that a given incident 'could be' the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury."

We are bound to review this case consistent with the law on causation:

Generally speaking, a workers' compensation claim claimant must establish by expert medical evidence the causal relationship between the alleged injury and the claimant's employment activity, "[e]xcept in the most obvious, simple and routine cases." *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008) (quoting *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991)). The claimant must establish causation by the preponderance of the expert medical testimony, as supplemented by the evidence of lay witnesses. *Id.* As we observed in *Cloyd*, the claimant is granted the benefit of all reasonable doubts regarding causation of his or her injury:

"Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty

is not required because medical proof can rarely be certain” *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004); *see also Glisson v. Mohon Int’l, Inc./Campbell Ray*, 185 S.W.3d 348, 354 (Tenn. 2006). All reasonable doubts as to causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. *Phillips v. A & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004).

Id.; *see also Fritts v. Safety Nat’l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005). The trial court may properly award benefits based upon medical testimony that the employment “could or might have been the cause” of the employee’s injury when there is also lay testimony supporting a reasonable inference of causation. *Fritts*, 163 S.W.3d at 678.

Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274-75 (Tenn. 2009).

There is no doubt that the evidence in this case presented the trial court with a close question. Dr. Kennedy’s testimony, the only expert medical evidence in the record addressing the cause of Employee’s alleged neck injury, is ambivalent. His opinion changed according to which side was asking questions and what assumptions were proposed. Nevertheless, taken as a whole, we find that his testimony can permit an inference that the December 2005 incident would have caused the type of neck injury alleged by Employee. Employee testified that her symptoms arose immediately after the event. This testimony was corroborated in whole by the testimony of her husband and in part by the testimony of Mr. Musick and Mr. Meade.⁴ After careful consideration of this case, we are unable to find that the evidence preponderates against the decision of the trial court.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to A & L Industrial Construction and Maintenance, Inc. and its surety, for which execution may issue if necessary.

WALTER C. KURTZ, SENIOR JUDGE

⁴ The trial court specifically held, “The plaintiff and her husband were very credible witnesses.”

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JUDGMENT

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 appeals 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 are taxed to A & L Industrial Construction and Maintenance, Inc. and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM