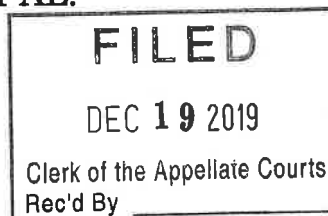


IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

September 30, 2019 Session

DARLA MCKNIGHT v. HUBBELL POWER SYSTEMS, ET AL.

**Appeal from the Maury County Circuit Court
No. 12732 J. Russell Parkes, Judge**



No. M2019-00205-SC-R3-WC – Mailed November 13, 2019

Employee filed a motion asking the trial court to require Employer to provide additional treatment for a work-related injury she suffered in March 2007. The trial court granted Employee's motion and denied Employer's motion to appoint a neutral physician. Employer's appeal has been referred to this Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Tenn. Sup. Ct. R. 51, ' 1. After reviewing the evidence in the record and the parties' arguments, we affirm the trial court's judgment.

**Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Maury County Circuit Court Affirmed.**

DON R. ASH, SR. J., delivered the opinion of the Court, in which JEFFREY S. BIVINS, C.J., and ROBERT E. LEE DAVIES, SR. J., joined.

Thomas J. Dement, Nashville, Tennessee, for appellants, Hubbell Power Systems and Liberty Mutual Insurance Co.

Robert D. Massey, Pulaski, Tennessee, for appellee, Darla McKnight.

OPINION

I.

On March 16, 2007, Darla McKnight (“Employee”) injured her neck in the course and scope of her employment with Hubbell Power Systems (“Employer”). She was treated for her injury by Dr. Cyrus Ghavam. On February 20, 2009, the trial court approved a settlement of Employee’s claim for workers’ compensation benefits. On January 3, 2018, Employee filed a “Motion to Require [Employer] to Provide Recommended Medical Treatment.” According to the motion, Dr. Ghavam advised Employee she needed surgery related to her 2007 work-related injury. On July 30, 2018, Employer filed a “Motion to Appoint Neutral Physician pursuant to Tenn. Code Ann. § 50-6-204(d)(9).”

Dr. Ghavam, a board-certified orthopedic surgeon, examined Employee on May 25, 2007. Employee, who was then 37 years of age, stated she had been “twisting and pulling on a piece of equipment” when “she felt and heard a popping sensation in her neck and had immediate burning and stabbing pain in her neck going down the left shoulder into the arm.” According to Dr. Ghavam’s deposition, an MRI “showed disc protrusions at three levels in her neck: C4-5, C5-6 and C6-7,” which were “more significant towards the left side.” Because the MRI was of “moderate quality at best,” Dr. Ghavam ordered a CT myelogram, which showed “broad-based disc protrusion, worse on the left at C4-5 and similar pathology at C5-6.” Dr. Ghavam diagnosed Employee with “degenerative disc disease with disc protrusions at C4-5, C5-6, and C6-7, as well as cervical radiculopathy.” He advised against surgery at that time, but he imposed restrictions against overhead work and lifting. Employee was also treated with medication, steroid injections, traction, and a TENS unit. Employee reached maximum medical improvement on February 15, 2008.

Dr. Ghavam re-examined Employee in November 2009, admittedly after Employee was in a car accident. Although Employee reported a “significant increase in neck pain as well as back and left leg pain,” an MRI revealed “no additional herniated disc” and “no objective change in terms of the findings on the imaging studies” as a result of the accident. Dr. Ghavam also examined Employee for neck and right arm pain on November 28, 2012; Employee had “a herniated disc at C6-7” and “a significant nerve compression on the right side affecting the C7 nerve root.” He described this as “a new condition” that did not relate to the Employee’s work injury. He surmised the condition was “most likely” a “spontaneous herniation” related to Employee’s degenerative disc disease.

On September 28, 2016, Employee reported pain in her neck and left arm. Dr. Ghavam diagnosed "chronic neck pain with cervical radiculopathy which has progressively worsened." According to Dr. Ghavam, an MRI taken in October 2016 showed Employee had "severe stenosis at C4-5, C5-6 and C6-7," which was a degenerative condition. Dr. Ghavam explained the original work accident "triggered the development of left arm symptoms due to the disc protrusions at C4-5 and C5-6," and "this is basically the same condition that's manifested itself again years later." According to Dr. Ghavam, Employee elected to proceed with surgery "in view of the duration of symptoms and increase in severity of her symptoms."

Dr. Ghavam agreed the need for surgery "arose out of her on-the-job injury in March of 2007." He explained as follows:

So my impression is that, yes, she probably had some genetic predisposition to having disc abnormalities as evidenced by having bad discs at a young age. The work injury probably triggered it. We were able to manage it for a period of time nonsurgically. I talked her out of surgery because she was young and I didn't want to do a two-level fusion on a 37-year-old woman. So we treated her very conservatively. She finally reached a point where the pain became severe. Throughout the years I treated her. And each time we were able to treat her nonsurgically, I did so. But it came to a point where she couldn't put up with it anymore. It was the same condition. It was not a new condition. There was no clear new injury. Based on that, it seems to me that the work injury is what initially triggered it.

Dr. Ghavam acknowledged Employee had a degenerative condition and a predisposition to disc herniation; however, he disagreed with Dr. Thomas O'Brien's opinion (discussed below) that Employee's need for additional treatment was not related to her March 2007 work injury. In Dr. Ghavam's view, Dr. O'Brien, who performed an independent medical evaluation ("IME") at Employer's request, was "absolutely incorrect" in diagnosing the March 2007 work injury as a mere muscle strain. Moreover, Dr. O'Brien "clearly did not adequately evaluate the medical records to realize she had herniated discs early on and continued to have radiculopathy." Dr. Ghavam stated Dr. O'Brien "did not pay adequate time to understand" Employee's condition.

Dr. Thomas J. O'Brien, a board-certified orthopedic surgeon, performed

an IME on March 28, 2017. He reviewed Employee's medical records, including the MRI scans taken in 2007 and 2016, and he assessed her sensory function, motor function, and reflexes. Based on the nature of Employee's work and her symptoms following her work-related injury in 2007, Dr. O'Brien determined Employee "sustained at most a minor muscle strain involving the shoulder girdle muscles and the neck and trapezius muscles."

According to Dr. O'Brien, the MRI in 2007 showed "longstanding preexisting degenerative arthritic changes" with "no acute findings that were attributable to the March 2007 work injury." Similarly, he testified the MRI taken in 2016 showed "multilevel degenerative disc disease" and "degenerative spinal stenosis." In comparing the 2007 MRI and the 2016 MRI, Dr. O'Brien found a "progressive natural history of degenerative disc disease." He concluded Employee "has chronic neck and back pain which are due or attributable to a manifestation and natural history of progressive degeneration disc disease of the cervical spine." He believed "the work incident in March 2007 did not cause a permanent injury," and Employee "did not sustain any type of aggravating or acceleration or precipitation of the preexisting cervical degenerative disc disease above and beyond the natural history of progression." He believed Employee had a "diagnosis of chronic neck pain and cervical radiculopathy secondary to progressive multilevel cervical degenerative disc disease."

Although he agreed the surgery recommended by Dr. Ghavam in 2016 was appropriate, Dr. O'Brien found Employee's "current cervical condition bears no causal relationship to the remote work incident on March 16, 2007." He emphasized Employee's obesity, diabetes, and "predilection toward developing degenerative disc disease." Dr. O'Brien believed Employee suffered a muscle strain in March 2007. He noted Employee's symptoms "significantly subsided," and he emphasized the "four-year gap" during which Employee had no treatment. Finally, he stated:

[T]he MRI scan that was done in 2016 clearly demonstrates the progressive natural history of degenerative disc disease, as would be expected and the MRI scan in 2016 shows the progression involving different levels of the cervical spine that were involved and manifested and demonstrated in the 2007 MRI scan, providing further support for my causation opinions.

Dr. O'Brien acknowledged Employee was not malingering. He estimated he spent 20 to 30 minutes with Employee; he denied Employee's assertion he spent only 9 minutes with her. Dr. O'Brien admitted Dr. Ghavam's notes from June 2007 indicated Employee had a "broad-based disc protrusion at C4-5, somewhat worse on the left." He also agreed Dr. Ghavam's notes from July 2007 stated Employee had "moderate herniated discs C4-5 and C5-6" and "very slight right-sided disc protrusion" at C6-7. Dr. O'Brien nonetheless insisted Employee did not have a herniated disc and that her symptoms following her work injury in 2007 were "consistent with a muscle strain." In Dr. O'Brien's view, Dr. Ghavam "us[ed] the word, herniation, when I think a more accurate descriptive term is a degenerative disc bulge."

The trial court granted Employee's motion to provide treatment and denied Employer's motion to appoint a neutral physician. This appeal followed.

II.

The trial court's findings of fact are reviewed 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). The trial court is afforded considerable deference when the credibility and weight of a witness's in-court testimony is involved. *Madden v. Holland Group of Tenn.*, 277 S.W.3d 896, 900 (Tenn. 2009). However, an appellate court may draw its own conclusions concerning the weight and credibility of expert medical testimony contained in the record by deposition. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). The trial court's 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).

A.

Employer argues the trial court erred in finding Employee's need for surgery was related to the work-related injury she suffered in March 2007. Employee contends the evidence does not preponderate against the trial court's judgment.

An employee is entitled to recover any reasonable and necessary

medical expenses which may be incurred as a result of a compensable injury. *See* Tenn. Code Ann. § 50-6-204; *Stephens v. Hensley's Supply and Industry, Inc.*, 2 S.W. 3d 178, 179 (Tenn. 1999). In most cases of work-related injury, causation must be established by expert medical evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987). Absolute certainty in the medical evidence is not required. *Trosper v. Armstrong Wood Products, Inc.*, 273 S.W.3d 598, 604 (Tenn. 2008). "The claimant must establish causation by the preponderance of the expert medical testimony, as supplemented by the evidence of lay witnesses." *Excel Polymers LLC v. Broyles*, 302 S.W.3d 268, 274-75 (Tenn. 2009). At the time of the injury in this case, an employee was granted the benefit of all reasonable doubts regarding causation of his or her injury. *Id.*

In support of its argument, Employer emphasizes Dr. O'Brien's explanation that Employee had a muscle strain in March 2007 and a degenerative condition that became worse over time. Employer also notes Employee was treated in 2007 and returned to Dr. Ghavam in 2009 after a car accident. Furthermore, after Employee returned to Dr. Ghavam in 2012, four more years passed before she sought additional treatment. Because both Dr. O'Brien and Dr. Ghavam agreed Employee had degenerative disc disease and a predilection for disc herniation, Employer argues Employee's symptoms were a natural progression over time and were not related to her 2007 injury.

In contrast, Employee asserts the trial court properly considered the depositions of Dr. O'Brien and Dr. Ghavam and emphasized "the time each physician spent with the patient, whether or not the physicians [were] performing an IME, and the history which each physician has with [Employee]." Employee likewise emphasizes that Dr. Ghavam has been her treating physician since 2007, whereas Dr. O'Brien's role was limited to performing an IME some ten years after she was injured.

An employer may be liable for future medical expenses "made reasonably necessary" by a work-related injury. *Simmons v. Ken-Kel Management, Inc.*, W2011-01924-WC-R3-WC, 2012 WL 12948150, at *2 (Sp. Workers' Comp. Panel, June 1, 2012). In *Simmons*, the employee injured her lower back in 2008 and underwent a laminectomy and a discectomy. *Id.* at *1. In 2010, she experienced pain and numbness in her right leg, as well as urinary incontinence. *Id.* In 2011, she filed a motion to require her employer to provide additional treatment, relying on the testimony of her treating physician. *Id.* The trial court granted the motion after finding "the

requested back surgery is related to the [employee's] original work injury.” *Id.* In affirming the judgment, the Panel explained, “[w]hether or not a particular medical treatment is made reasonably necessary by a work-related accident is a question ‘which must be answered based upon the proof presented at the time the treatment is proposed.’” *Id.* at *2 (quoting *Hegger v. Ford Motor Co.*, No. M2007-00759-WC-R3-WC, 2008 WL 4072047 (Tenn. Workers Comp. Panel Sept. 2, 2008)); see, e.g., *Gronan v. Cleveland Chain Co.*, E2006-01570-WC-R3-WC, 2007 WL 1710938 (Sp. Workers’ Comp. Panel, June 13, 2007) (finding the need for treatment in 2005 was related to the employee’s work injury in 1995).

We conclude the trial court properly granted Employee’s motion for additional treatment. Despite the length of time between the injury and the need for surgery, the evidence established a causal link between the work-related injury and the need for additional treatment. Specifically, Dr. Ghavam testified:

[M]y entire testimony thus far and all the medical records that I’ve reviewed indicated that she’s had a herniated disc in her neck. She’d had ongoing left upper extremity pain on and off for years. I certainly conceded that the progression has occurred. There’s no question that with time and age and her genetic predisposition has contributed to this becoming worse. But you also asked me pointedly whether or not I could give an opinion as to the causality. And I gave you that in a very broad, fair, balanced way, indicating what supports the causality and what does not, indicating that, yes, it was a work-related injury that caused the initial onset of symptoms, that that continued throughout the ten years that I’ve seen her. It’s waxed and waned. She’s sometimes had right-sided pain, which I very clearly identified was not work related. That resolved on its own. The left-sided symptoms all along have been stable. They became worse. It’s work related. Dr. O’Brien feels that everything is just age and wear and tear. That’s inaccurate in this case.

Dr. Ghavam, as Employee’s treating physician, described his findings, diagnosis, and treatment beginning with Employee’s March 2007 injury. He also specifically refuted Dr. O’Brien’s opinions, which were based on the IME. In short, we conclude the trial court properly granted the motion requiring Employer to provide additional treatment.

For accidents or injuries occurring on or after July 1, 2005, in case of a dispute as to the injury, other than disputes as to the degree of medical impairment, the court may, at the instance of either party or on its own motion, appoint a neutral physician of good standing and ability to make an examination of the injured person and report the physician's findings to the court, the expense of which examination shall be borne equally by the parties.

(Emphasis added).

According to Employer, the statute is applicable where, as here, physicians differ on a key issue. In contrast, Employee argues the statute is discretionary and does not contemplate appointing a neutral physician simply because two physicians have a disagreement. As discussed herein, Dr. Ghavam was Employee's treating physician for her original work injury and her treating physician on several occasions up to and including surgery. In contrast, Dr. O'Brien performed an IME at Employer's request. Based on Dr. Ghavam's testimony, the trial court found a causal link between Employee's injury and her need for surgery. Under these circumstances, the trial court did not abuse its discretion in denying Employer's motion.

III.

We affirm the trial court's judgment. The costs of this appeal are taxed to Employer, for which execution may issue if necessary.

DON R. ASH, Sr. J.