

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

August 15, 2016 Session Heard at Knoxville

**ERIC BENSON v. SOUTHERN ELECTRIC CORPORATION OF
MISSISSIPPI**

**Appeal from the Chancery Court for McNairy County
No. 9006 William C. Cole, Chancellor**

No. W2015-02053-SC-R3-WC – Mailed November 9, 2016; Filed December 19, 2016

Eric Benson (“Employee”) worked for Southern Electric Corporation of Mississippi (“Employer”) as a lineman. On July 12, 2011, he sustained an electric shock injury while working on a power line. The mechanism of the injury is not known, as Employee has no recollection of the incident nor were there any witnesses. He sustained burns to his back and groin area and the left side of his head. He bit his tongue severely and injured his right knee. He further asserted he developed depression, headaches and post-traumatic stress disorder (“PTSD”) as a result of the accident and contended he was totally and permanently disabled due to his injuries. Employer disputed the assertion. After a trial on the merits, the Chancery Court for McNairy County found Employee permanently and totally disabled and entered judgment accordingly. Employer appealed. The Supreme Court referred the appeal to the Special Workers’ Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

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

WILLIAM B. ACREE, JR., SR.J., delivered the opinion of the court, in which SHARON G. LEE, J., and KRISTI M. DAVIS, J., joined.

Dennis G. Sadler and Ronald L. Harper, Memphis, Tennessee, for the appellant, Southern Electric Corporation of Mississippi.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellee, Eric Benson.

OPINION

Factual and Procedural Background

Employee was forty-two years old at the time of trial. He is a high school graduate and completed two years of college. He is an electrician and worked various union jobs for several years before going to work for Employer in 2010.

Employee's injury occurred on July 12, 2011. He has no recollection of the incident and no one witnessed it; however, it is apparent from the nature of his injuries that Employee came into contact with a live electric cable. He was transported to Regional Medical Center in Memphis and remained there for three weeks.

Joanne Benson, Employee's wife, testified that since the accident, her husband suffers from depression and has balance problems, episodes of dizziness, and difficulty sleeping. Mrs. Benson said her husband exhibits irrational outbursts of anger and has attempted suicide several times. He once struck her, causing marks on her neck, bruises on her arms, and a broken toe. She listed a variety of stimuli that causes Employee to become anxious: thunderstorms; the sound of a grill igniter; the sight of a Taser; and the movie Powder, which centers on a character struck by lightning. She reported he can perform yard work at their home for two or three hours at a time with breaks. After such efforts, he usually spends the rest of the day in bed. Mrs. Benson said her husband can drive locally but does not drive alone due to episodes of falling asleep at the wheel. She administers his medications, which, at the time of trial, were Toradol, Oxycodone, and testosterone.

Employee testified his only memory of the day of the injury was eating lunch. His next memory is waking up with a ventilator hose in the hospital. He did not know how long he was unconscious. He stated he has nightmares and other sleep problems, anger control issues, and depression. He began having headaches about one month after being released from the hospital. The headaches and depression are present every day. He is unable to go a single day without medication. Employee has anxiety when exposed to the sound of static over a loudspeaker or fireworks. He reported being sensitive to light on some days and remains in his house with the shades down. He has episodes of dizziness once or twice a week and does not know of any specific cause of these episodes. Employee tried several antidepressant medications; none of them worked, and some actually made his nightmares more vivid. He confirmed his wife's testimony that he drives only locally because he has run stop signs and traffic lights and fallen asleep at the wheel. Employee further stated exposure to heat or cold causes his headaches to worsen. Employee said his pain management treatment is ongoing, and he is unable to hold a steady job. Employee is able to do some household chores, yard work, and attend baseball games.

Dr. Jason Hutchinson, an orthopedic surgeon, testified by deposition. Dr. Hutchinson first saw Employee on March 26, 2012. Employee told Dr. Hutchinson he has experienced pain in his right knee since the accident of July 12, 2011. Dr. Hutchinson ordered an MRI of the right knee which revealed a medial meniscus tear, patellar arthritis and a cyst in the knee joint.¹

Dr. John Masterson, also an orthopedic surgeon, testified by deposition. Dr. Masterson first saw Employee on April 30, 2012, upon the referral by West Tennessee Bone and Joint Clinic. He received a history of the accident from Employee and reviewed the MRI ordered by Dr. Hutchinson. He presumed Employee twisted his knee during the course of the electrocution. Dr. Masterson's primary diagnosis was a complex tear of the medial meniscus. He recommended arthroscopic surgery to repair the damage and performed the procedure on May 25, 2012. During the procedure, he found tears of both menisci and patellar arthritis. He opined the surgery was successful, assigned a permanent impairment of 8% to the right leg and released Employee with no restrictions.

Dr. Montgomery Berry, an otolaryngologist, also testified by deposition. Dr. Berry first saw Employee on January 2, 2012, for complaints of dizziness and vertigo. Dr. Berry ordered an audiogram, which reveals dysfunction of the vestibulocochlear nerve. The results were within normal limits. He prescribed Diazepam, which can suppress vestibular symptoms, and ordered an exercise program. Employee exhibited no improvement during a return visit seventeen days later. Dr. Berry ordered an ENG test, which stimulates nerves and measures their function. This test showed a slight weakness of the nerve function on the right side of Employee's head. Dr. Berry opined Employee's dizziness and vertigo were related to his work injury, continued Employee's balance rehabilitation and scheduled a neurological evaluation. When Employee returned in April 2012, his symptoms were unchanged. Dr. Berry ordered a "Dix-Hallpike" test for positional vertigo which returned negative results. He issued a final medical report on August 23, 2012, assigning a 50% impairment.² Dr. Berry did not base the impairment rating on the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He assigned restrictions of light duty and no climbing.

During cross-examination, Dr. Berry testified Employee was his first patient who developed vertigo after an electric shock. He relied heavily on subjective reporting of symptoms by his patients. He did not recall having treatment records from any other physicians while treating Employee. Dr. Berry confirmed he did not use the AMA Guides to assess Employee's impairment, and while he stated he knew of the existence of

¹ Employer stipulated the knee injury is work-related and compensable.

² Neither Dr. Berry's testimony, nor his medical records, disclosed the anatomical area of the body to which he assigned the impairment.

methods set out in the AMA Guides for determining injury causation, he could not say that he had actually read them.

Employee introduced the written report of Dr. Apurva Dalal, an orthopedic surgeon who performed an independent medical examination of Employee on April 22, 2013. He found Employee had a 10% impairment of the right leg, a 19% impairment to the body as a whole based on disfigurement of the skin on his back and thigh,³ and a 5% impairment to the body as a whole for headaches. Dr. Dalal recommended Employee “avoid prolonged standing and walking [and] because of his headaches and loss of balance, he should not go back to the kind of work he did before.”

Dr. Robert Kennon, a vocational evaluator, testified on behalf of Employee. His practice consists of providing Social Security disability evaluations, vocational evaluations for litigation purposes, psychological evaluations, and evaluations for custody determinations in domestic or juvenile cases. At the request of Employee’s attorney, Dr. Kennon performed a vocational evaluation. He interviewed Employee on November 13, 2012, and later examined his medical records. Employee reported to Dr. Kennon the same symptoms described in his trial testimony. Employee considered sleep disturbance to be his most significant problem and described being awakened by nightmares and recurring dreams. He told Dr. Kennon he performs daily chores, attends church, and occasionally drives. Employee described himself as “restless” in crowds.

Dr. Kennon performed a mental status examination of Employee and found him to be preoccupied and focused on his pain and other physical problems. Employee was not delusional or psychotic, and his “fund of knowledge” was normal. Dr. Kennon administered several tests to Employee. The Wide Range Achievement Test indicated Employee was functioning at the tenth or eleventh grade level. The Beck Depression Inventory indicated moderate depression. The Millon Multiaxial Inventory produced elevated results for anxiety, somatoform, dysthymia, and PTSD. These results were consistent with Dr. Kennon’s observations of Employee.

Dr. Kennon reviewed the medical records of Drs. Berry, Hutchinson, Masterson, Nadel, Anton and Pickering.⁴ Dr. Nadel evaluated Employee’s headaches and Drs. Anton and Pickering provided psychological treatment. Dr. Anton diagnosed Employee with PTSD, major depression, and insomnia. Dr. Pickering began treating Employee in

³ The trial court excluded Dr. Dalal’s disfigurement impairment based on Tennessee Code Annotated section 50-6-207(3)(E) (2008 & Supp. 2011), which limits awards for disfigurement to injuries to the head, face or hands.

⁴ Records of Drs. Nadel, Anton, and Pickering are not in the court record.

April 2012 and felt Employee “would never be able to work as a lineman or do electrical-type work [or] handle live circuits or work at heights....” Dr. Kennon agreed with Dr. Pickering’s assessment that Employee was unable to work due to his physical complaints and PTSD. Employer objected, asserting some of Dr. Pickering’s records did not concern treatment but were created in support of Employee’s application for Social Security disability benefits. The trial court overruled the objection.

Some of Employee’s treating doctors placed limitations on his activities, and others did not. Dr. Berry restricted Employee to “light duty with no climbing.” When considering this limitation, Dr. Kennon opined Employee suffered a 56.85% vocational loss.⁵ Additionally, Dr. Dalal recommended Employee “avoid prolonged standing....” When considering this limitation, Dr. Kennon opined Employee suffered a 97.58% vocational loss of highly-transferable jobs. Dr. Kennon described Employee’s various psychological problems—PTSD, anger management, distractibility, mood swings, and sleep disturbance—as additional negative variables for maintaining employment. He observed Employee’s regimen of pain medication would affect his ability to obtain some types of employment. Using Dr. Dalal’s recommendations, Dr. Kennon opined, “I really don’t think he has any reasonable opportunities in light of not just his physical limitations, but the psychological issues that are in addition to [those limitations].”

In reaching his conclusions, Dr. Kennon used employment and unemployment data from Employee’s local area. Because the evaluation took place in 2013, the most recent data available was from 2012. He agreed unemployment decreased, employment opportunities increased, and competition for jobs decreased since then.

Dr. Robert Barth, a neuropsychologist, testified for Employer. He did not conduct an examination of Employee. Dr. Barth reviewed records of Walker Pain Management and Drs. Anton, Berry, Pickering, Dalal, Kennon, and Nadel. Dr. Barth opined Employee’s clinical presentation was not reliable over time. Employee denied any psychological symptoms five months after his injury but sought mental health treatment several months later. Employee gave a different account of his symptoms to Dr. Anton than to Dr. Berry. According to Dr. Barth, the records reflected that in 2012, Employee denied any psychological symptoms when he was evaluated by Dr. Pickering. Then, at his November 2012 evaluation with Dr. Kennon, Employee described numerous mental and emotional problems. Two days later, he denied to Dr. Berry having any psychological symptoms. Dr. Barth explained the importance of these inconsistencies relates to the standard method for evaluating work-relatedness established by the American Medical Association (“AMA”). He further explained he analyzed the results of the Millon Multiaxial Inventory through a full computer analysis which did not

⁵ Dr. Kennon explained the vocational loss as the reduction in the number of jobs Employee would have otherwise had available.

indicate PTSD as a diagnostic possibility. Similarly, Dr. Kennon found the results on various “scales” of testing performed by Dr. Anton were significantly above or below the expected range for PTSD patients.

Dr. Barth testified head trauma patients with no legal claim associated with their injuries typically did not experience headaches lasting longer than twenty days. He stated research by the American Psychiatric Association determined persons with PTSD participated in the workforce at the same rate as people without PTSD. For that reason, the American Psychiatric Association recommended no level of disability be assigned for PTSD. A more recent study by the AMA reached the same conclusion.

Dr. Barth testified the AMA established a seven-step protocol to evaluate the ability to work and return to work. None of Employee’s records documented the seven-step protocol.

The trial court delivered its decision from the bench. The trial court summarized the evidence, noting the “gruesome” nature of Employee’s injuries and Mrs. Benson’s testimony about Employee’s mental condition and ability to function. The trial court found Employee and Mrs. Benson to be credible witnesses. The trial court considered Employee’s knee injury a straightforward matter and referenced the slight difference between Dr. Masterson’s 8% impairment to the right leg, and Dr. Dalal’s 10% rating. The trial court excluded Dr. Berry’s impairment rating as not consistent with the AMA Guides. The trial court also excluded Dr. Dalal’s rating for disfigurement as not consistent with Tennessee Code Annotated section 50-6-207(3)(E). The trial court weighed the testimony of Drs. Kennon and Barth concluding it was “more believable” than not that Employee sustained PTSD as a result of the injury. Based on those findings, the trial court found Employee permanently and totally disabled and entered judgment accordingly. Employer appealed and contends the trial court erred in allowing certain expert testimony and finding Employee permanently and totally disabled.

Analysis

Appellate review of decisions in workers’ compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008 & Supp. 2013), which provides appellate courts must “[r]eview ... the trial court’s findings of fact ... 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.” As the Supreme Court observed many times, reviewing courts must conduct an in-depth examination of the trial court’s factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court’s factual findings. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008). The same deference need not be afforded the trial court’s

findings based upon documentary evidence such as depositions. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Employer raises two issues in this appeal.⁶ First, Employer argues the trial court erred by permitting Dr. Kennon to offer expert opinion testimony based, in part, on facts or data which indicated a lack of trustworthiness. Second, Employer contends the evidence preponderates against the trial court's finding that Employee is permanently and totally disabled.

Dr. Kennon's Testimony

Employer contends Dr. Kennon based his opinions on inherently untrustworthy documents and the trial court abused its discretion by admitting those opinions. Trial courts act as gatekeepers when it comes to the admissibility of expert testimony. *State v. Copeland*, 226 S.W.3d 287, 301 (Tenn. 2007); *Johnson v. John Hancock Funds*, 217 S.W.3d 414, 425 (Tenn. Ct. App. 2006). Reviewing courts will not reverse a decision regarding the admission or exclusion of expert testimony unless the trial court abused its discretion. *State v. Reid*, 91 S.W.3d 247, 294 (Tenn. 2002) (appendix); *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002). "Pursuant to Tenn. R. Evid. 703, a trial court must disallow testimony in the form of opinion or inference when the underlying facts or data indicate a lack of trustworthiness." *Seffernick v. St. Thomas Hosp.*, 969 S.W.2d 391, 393 (Tenn. 1998) (citing *McDaniel v. CSX Transportaion, Inc.*, 955 S.W.2d 257, 264–65 (Tenn. 1997)).

Dr. Kennon testified he reviewed the medical records of Employee produced by Dr. Pickering, a psychologist authorized to treat Employee. Dr. Pickering's records are not a part of this record, but it is undisputed Dr. Kennon reviewed a letter written by Dr. Pickering to support Employee's application for Social Security disability benefits.

Employer contends the opinions set out in Dr. Pickering's letter are not trustworthy for two reasons.

First, Employer contends Dr. Pickering drafted the letter for purposes of Social Security benefit litigation and is, therefore, inherently untrustworthy. The correspondence reflects Dr. Pickering's opinion that Employee was not capable of returning to work as of May 21, 2013.

⁶ Employer stipulated to the compensability of the injury.

Employer relies on *Arias v. Duro Standard Products Co.*, 303 S.W.3d 256 (Tenn. 2010). In *Arias*, the relevant issue was primarily procedural. The trial court admitted an independent medical evaluation (“IME”) under the business record hearsay exception of Tenn. R. Evid. 803(6). *Id.* at 263. The Supreme Court held the IME lacked trustworthiness as the evaluator produced the IME solely for the *Arias* litigation on behalf of the plaintiff. *Id.* The Supreme Court reasoned, “[w]ere we to hold [the IME] meets the requirements of Rule 803(6), litigants would be free to present expert opinion on any subject by merely introducing an expert’s written report through a records custodian without ever subjecting the expert to cross examination.” *Id.*

We find *Arias* has no application here. Dr. Pickering’s records are not in evidence; therefore, the admission of evidence as a hearsay exception under Rule 803(6) is not implicated. In contrast with the IME of the non-treating physician in *Arias*, Dr. Pickering’s letter is a summary of the treatment he rendered with findings made during that treatment. The letter is merely one piece of data Dr. Kennon used to formulate his opinion. This argument fails.

Next, Employer contends Dr. Pickering’s correspondence should be excluded based upon language in the Sixth Edition of the AMA Guides, which states,

Treating psychiatrists and psychologists should avoid serving as an expert witness or IME examiner for legal purposes on behalf of their patients. The dual role can be detrimental to the therapeutic relationship, can be a considerable source of bias for the examiner, and can compromise the patient’s legal claim.

Guides to the Evaluation of Permanent Impairment, 6th Ed., American Medical Assoc. (April 2009) 351.

Dr. Barth testified “it’s never credible for a treating psychologist to become involved in forensic issues for someone they are treating.” We find this approach to be impractical in the workers’ compensation field and not a legal basis to exclude evidence. Trial courts have long accepted opinions from treating providers to assess causation, permanence, and impairment. The Supreme Court has chosen to give greater weight to the opinions of treating physicians, based on the facts of specific cases. *See Saylor v. Lakeway Trucking, Inc.*, 181 S.W.3d 314, 323 (Tenn. 2005); *Carter v. First Source Furniture Grp.*, 92 S.W.3d 367, 373 (Tenn. 2002); *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 677 (Tenn. 1991) (“It seems reasonable that the physicians having greater contact with the Plaintiff would have the advantage and opportunity to provide a more in-depth opinion, if not a more accurate one.”).

In forming his opinion, Dr. Kennon relied on his interview with Employee, the records of numerous medical providers, and the results of several psychological tests he administered to Employee in addition to Dr. Pickering's letter. A reviewing court "may not overturn the trial court's ruling admitting or excluding expert testimony unless the trial court abused its discretion." *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 273 (Tenn. 2005). Having carefully reviewed Dr. Kennon's testimony, we conclude the trial court did not abuse its discretion by allowing Dr. Kennon to include Dr. Pickering's letter when forming his opinion. Further, we conclude the trial court did not abuse its discretion by admitting Dr. Kennon's testimony.

Permanent Total Disability

Employer contends the evidence preponderates against the trial court's finding of permanent and total disability. We disagree.

An injured employee is permanently and totally disabled when the injury "totally incapacitates the employee from working at an occupation that brings the employee an income...." Tenn. Code Ann. § 50-6-207(4)(B) (2014) (applicable to injuries occurring prior to July 1, 2014). The Supreme Court stated:

[T]he determination of permanent and total disability is to be based on a variety of factors such that a complete picture of an individual's ability, or inability, to return to gainful employment is presented before the court. Such factors include the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability. Although such an assessment is often made and presented at trial by a vocational specialist, it is well settled that despite the existence or absence of expert testimony, an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is competent testimony that should be considered.

Vinson v. United Parcel Serv., 92 S.W.3d 380, 386 (Tenn. 2002) (citations and internal quotation marks omitted).

Although Employer correctly states Dr. Kennon relied on Dr. Dalal's recommendations, Dr. Kennon's conclusions were not based on those recommendations alone. Dr. Kennon testified as to different levels of vocational disability, according to the restrictions or recommendations of several providers. Thus, Employee's disability was 0% based on the opinions of Drs. Masterson and Anton; 56.85% based on the restrictions of Dr. Berry; and 97.58% when treating Dr. Dalal's "recommendations" as restrictions

and interpreting the “avoid prolonged standing” to mean “able to perform no more than occasional standing.” These opinions were based solely on Employee’s physical injuries. The psychological effects of the injury are also a limiting factor in Employee’s ability to obtain and retain employment. The trial court found no job opportunities exist in the immediate and surrounding communities based on the expert opinions of Drs. Kennon and Dalal.

Employee and Mrs. Benson testified to the continuing effects of the accident on his ability to function in daily life. They described ongoing anxiety, depression, anger management problems, and sleep disturbance, among other problems. These symptoms are consistent with PTSD. The trial court found both Employee and Mrs. Benson to be credible witnesses. Taking all factors into account, the evidence does not preponderate against the trial court’s finding that Employee was permanently and totally disabled as a result of his on-the-job accident.

Conclusion

The judgment is affirmed. Costs are taxed to Southern Electric Corporation of Mississippi, and its surety, for which execution may issue if necessary.

WILLIAM B. ACREE, JR., SENIOR JUDGE

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

**ERIC BENSON v. SOUTHERN ELECTRIC CORPORATION OF
MISSISSIPPI**

**Chancery Court for McNairy County
No. 9006**

No. W2015-02053-SC-R3-WC – Filed December 19, 2016

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 are assessed to Southern Electric Corporation of Mississippi, and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM