

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

May 19, 2014 Session

**PATRICIA HAWKINS v. MAURY COUNTY BOARD
OF EDUCATION ET AL.**

Appeal from the Chancery Court for Maury County
No. 12-110 Robert L. Holloway, Jr., Circuit Judge Sitting as Chancellor

No. M2013-01083-WC-R3-WC - Mailed July 31, 2014
Filed October 23, 2014

The employee filed a workers' compensation action alleging that she suffered a lower back injury in the course of her employment as a school counselor. Her employer denied the claim. The trial court found that the employee failed to prove that the injury had occurred in the course and scope of her employment and dismissed the case. Judgment was entered accordingly, and the employee appealed. The appeal was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. We affirm the judgment of the trial court.

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

E. RILEY ANDERSON SP. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J. and PAUL G. SUMMERS, SR. J., joined.

Gene Hallworth, Columbia, Tennessee, for the appellant, Patricia Hawkins.

D. Andrew Saulters, Nashville, Tennessee, for the appellees, Maury County Board of Education and Maury County.

OPINION

I. Factual and Procedural Background

Patricia Hawkins (“Ms. Hawkins”) is employed by the Maury County Board of Education (“the Board”) as a school counselor. Ms. Hawkins claimed that she injured her back in the course and scope of her employment when she moved a desk in her classroom on December 16, 2009. Ms. Hawkins did not immediately report the injury to the principal of her school and only filed a claim for workers compensation benefits more than a month later, on the day after she was informed by her doctor that her condition would likely require surgery. The Board denied her claim. The parties participated in a Benefit Review Conference on January 26, 2012, but were unable to resolve their differences. Ms. Hawkins filed this action in the Chancery Court for Maury County on February 13, 2012, and the case was tried on February 11, 2013.

Ms. Hawkins testified at trial that she had worked as a Guidance Counselor for the Board since 2001. On December 16, 2009, she was in her classroom at Joseph Brown Elementary School in Maury County, Tennessee, when she noticed that the students’ chairs had been left on top of the tables by the janitorial crew. She placed the chairs in their proper positions and arranged the tables. She sat down at her desk but then got up to push the desk away from the wall because it was too close. When she sat down again, she felt a sharp pain in her back. The pain was so intense that she decided she had to go home. She went to the cafeteria, asked for coverage of her cafeteria duty, and then went to the school office, where she told the attendance clerk that she had hurt her back, was going home, and needed a substitute. During this time, she asked the school resource officer to retrieve her purse for her from her classroom, as she was in too much pain to do it herself. He did so and also assisted Ms. Hawkins to her car.

Ms. Hawkins testified that her pain was so severe that, rather than going home, she then drove herself to her primary care physician’s office at Family Health Group in Columbia, Tennessee. Her doctor was not available, so she was seen by Gina Graves, a licensed nurse practitioner. Ms. Hawkins told Ms. Graves that she had pain in her leg and that it was the worst she had ever experienced. Ms. Hawkins described the pain in her leg and hip as like a muscle cramp. She asked Ms. Graves if the cause could be over-exercising, because she recently had swum without stretching after not swimming for a few days. She had not swum during that period because her husband had suffered a stroke. Ms. Hawkins testified that she did not tell Ms. Graves about hurting her back at work because “it was no big deal.” Ms. Graves gave Ms. Hawkins an injection, prescribed pain medication, and issued a work excuse for two days.

Ms. Graves testified by deposition. She first saw Ms. Hawkins on Wednesday, December 16, 2009. On that day, Ms. Hawkins furnished a history of left knee pain “radiating from her [left] knee to her hip,” which she usually relieved by applying heat and cold, which usually helped, and taking the medication “Aleve.” Ms. Hawkins described her pain level to Ms. Graves as intense, ten on a scale of one to ten. Ms. Graves confirmed that Ms. Hawkins told her that her injury could be due to putting up Christmas decorations or swimming after taking time off since her husband had suffered a stroke. Ms. Graves testified that she specifically asked Ms. Hawkins if she had been injured but that she denied any injury. When Ms. Graves thereafter examined Ms. Hawkins’s knee and back, she found no pain or tenderness on palpation. Ms. Graves noted on Ms. Hawkins’s record that Ms. Hawkins was being treated for “the same left hip pain,” explaining that she meant that it was “ongoing hip pain and no different from any other day.” At that time, Ms. Hawkins denied having any back pain. Ms. Graves injected Ms. Hawkins with toradol, prescribed her loratab and amerix—the latter a muscle relaxer—and wrote a note excusing her from work for two days.

Ms. Hawkins took off work the next day but returned to work on Friday, December 18, 2009. She still did not report a work injury to the principal, Ms. Tina Weatherford, or to any other school officials, at that time. Ms. Hawkins said she did not do so because she “thought it was just some minor thing that was going to go away in a day or two.” However, on Monday, December 21, 2009, Ms. Hawkins again stayed home from work because she was still having pain in the left hip and leg. At that point, she went to see Dr. Douglas Wilburn, at the Mid-Tennessee Bone and Joint Clinic in Columbia, Tennessee. Ms. Hawkins testified that Dr. Wilburn examined her, ordered X-rays, prescribed pain medications, and restricted her from working. On January 27, 2010, Dr. Wilburn discussed various treatment options with Ms. Hawkins, including surgery. Ms. Hawkins declined surgery at that time. Dr. Wilburn continued to treat her throughout the spring and summer of 2010, giving her intermittent epidural injections.

Testifying by deposition, Dr. Wilburn, an orthopedic surgeon, stated that he first saw Ms. Hawkins on Monday, December 21, 2009. Ms. Hawkins told him that she had “fairly severe pain in her left hip radiating down the left leg,” explained that after her husband had suffered a stroke two weeks earlier she had lifted him, and that she had developed lower back and leg pain a week later. When filling out the patient intake sheet during her initial visit, Ms. Hawkins wrote “no” in response to the question, “Is this a work-related injury?” Dr. Wilburn diagnosed her with lumbar disk syndrome or a pinched nerve in her back and gave her medication. When Ms. Hawkins returned for a

follow-up visit on December 29, 2009, she said that she was “[eighty] percent better,” although she still had twinges in her knee and calf and some soreness in her hip. When Dr. Wilburn saw her again on January 14 and January 19, 2010, she was still complaining of pain in her hip and leg. During her January 14 visit, Ms. Hawkins filled out a patient information sheet on which she denied that her injury was work related, but during her January 19 visit, she filled out an identical form on which she indicated that her injury was work-related and had occurred on December 16, 2009.

On January 19, Dr. Wilburn ordered an MRI, which was done on January 20, 2010. On January 27, 2010, Dr. Wilburn met with Ms. Hawkins to discuss the MRI results. The MRI showed a disc bulge at L5-S1 in Ms. Hawkins’s lower back. Dr. Wilburn informed her of various treatment options, including surgery. On that January 27 visit, Ms. Hawkins again indicated on a patient information sheet that her injury was work-related. On a form from Dr. Wilburn’s office dated April 2010, a handwritten note reads as follows: “disability got denied due to dictation saying she was lifting husband. Pt. states she never lifted him [and] pain med[ication] made her ‘crazy’ [and] if she said it she didn’t mean it.”

On January 28, 2010, the day after Ms. Hawkins met with Dr. Wilburn to discuss her MRI results and possible treatment options, she reported a work injury to her employer. Tina Weatherford, the principal at Joseph Brown Elementary School, testified at trial that she received a voicemail from Ms. Hawkins on January 28, 2010. The voicemail, which was transcribed and placed into evidence, said:

Dr. Weatherford. Patricia Hawkins calling. I apologize for not filling out a report before now but I didn’t know the extent of my injuries and um I am just not getting any better. Um, I’m waiting for my son to decide for me to make a decision of what I really need to do, so if at all possible could you please put me a accident report in the mail and I can fill it out and mail it back. Thank you very kindly. Give me a call if uh you need to discuss this with me. Thank you. Bye bye.

Ms. Weatherford testified that she returned the call and sent a “complaint form” to Ms. Hawkins. Ms. Weatherford testified that her receipt of the voice mail was the first time she had heard from Ms. Hawkins concerning a work injury. She denied receiving

any phone calls from Ms. Hawkins, and she also denied receiving a request from Ms. Hawkins for an accident report prior to that date.

Amanda Alexander, a human resources coordinator for the Board, testified at trial that she had sent Ms. Hawkins an Employee Accident Occurrence report on January 28, 2010, and received the report back by fax that same day. In the report, Ms. Hawkins described her injury as follows: “completed regular job duties and sat down to eat lunch, noticed lower back pain that continued to get worse.” Ms. Hawkins also claimed in the report that she gave notice of her injury at that time to Tammie Thompson, the school secretary, and Mrs. Wanda Greenway, the attendance clerk.¹

Ms. Alexander also testified that Ms. Hawkins called her within a few days of filing the accident report, complaining that she had been harassed, apparently by an insurance adjuster who had called to take a statement concerning the injury. Ms. Alexander said she was aware that Trish Harrington, an insurance representative, had called Ms. Hawkins on or about February 1, 2010, to get a statement Ms. Alexander received a handwritten letter from Ms. Hawkins by fax that same day.² The letter was placed into evidence and read as follows

Dear Ms. Alexander,

This is a followup of the telephone conversation I had with you on January 28, 2010. Yes, my husband suffered a stroke on December 6, 2009. Yes, I did help him get on the floor. However, I suffered no pains and no injury. I was able to perform all my regular daily duties, including my job and continued to swim a mile at the YMCA until December 16, 2009.

On December 16, 2009, I reported to work with no pains whatsoever. I performed all my regular job duties. The last job duty performed was straightening [sic] my classroom which included picking paper off the floor and from under tables, pushing and pulling tables. Prior to sitting down, I

¹ Neither Ms. Thompson nor Ms. Greenway testified at trial.

² The letter is dated January 29, 2010. However, it contains a fax transmission header indicating that it was sent on February 2, 2010.

pushed my desk away from the wall. Upon completion, I sat at my desk. I immediately experienced pain in my lower back. As time passed, the pains became more severe. They were so severe, it was difficult [to] walk to the front office. Dr. Weatherford was not on campus. Mrs. Greenway was sitting at the desk. Officer Greene and Coach Jamison were also in the front office. I believe Mrs. Thompson later walked in.

I went immediately to my doctor. I was treated but was told I should have gone to the emergency room. The pains continued to worsen. On December 21, 2009, I was diagnosed with LBP/injury.

I made several unsuccessful attempts to communicate with Dr. Weatherford. She never returned any of my calls. I also left [a] message for Dr. Weatherford to send me an accident report form. I never received an accident report form from her.

Please fax me a copy of my completed accident report form and attach a copy of this letter to the completed accident report form.

Very truly,
Patricia Hawkins

Ms. Alexander testified that she was unaware of Mr. Hawkins's injury or that Ms. Hawkins had mentioned lifting him until she received this letter. She denied speaking to Ms. Hawkins the day previous to receiving this letter.

In her trial testimony, Ms. Hawkins denied ever lifting her husband. Ms. Hawkins also testified that after her workers compensation claim was denied, she called to ask about the information they used to deny her claim. She was informed that her doctor had said she hurt her back lifting her husband when he had a stroke and that if he would change his diagnosis they would recognize her claim. Ms. Hawkins testified that she then asked Dr. Wilburn to correct the record to indicate that she had not hurt herself lifting her husband. However, Dr. Wilburn never agreed to make the correction.

Dr. Wilburn proceeded to treat Ms. Hawkins with periodic epidural injections starting in the winter and through the summer of 2010. Dr. Wilburn testified that he was

first informed that Ms. Hawkins had claimed a work injury on June 7, 2010. On that date, the purpose of her visit was listed as “to discuss cause of injury for Dept. Of Labor report.” At that time, Dr. Wilburn noted a discrepancy between that claim and her previous representations to him that her injury was due to lifting her husband. He noted at that time that “the cause of her symptoms [was] in dispute.” On August 11, 2010, Dr. Wilburn ordered another MRI which showed progression in Ms. Hawkins’s disc protrusion as well as nerve root compression. Dr. Wilburn opined that Ms. Hawkins’s injury was consistent with the initial account she had given of the injury, in which she attributed her pain to lifting her husband after his stroke. He also opined that Ms. Hawkins’s degenerative disc disease and disc protrusion could be the result of aging over time and could occur in the absence of trauma.

Ms. Hawkins changed doctors in October, 2010, and began seeing Dr. Michael McNamara of the Vanderbilt Bone and Joint Clinic in Franklin, Tennessee. In paperwork submitted to the Clinic on October 27, 2010, Ms. Hawkins described her back injury as work-related and caused by pushing a desk. Dr. McNamara performed two disc surgeries on Ms. Hawkins, one in December 2010 and a second in March 2011. Ms. Hawkins recovered from surgery and was released with no restrictions. At the time of the trial, she had substantially recovered from her back surgery and had returned to work for her Employer in the same capacity, with no work restrictions, and at a higher rate of pay.

Dr. Richard Fishbein, an orthopedic physician, evaluated Ms. Hawkins at the request of her attorney in October 2010. Dr. Fishbein testified by deposition that Ms. Hawkins gave him a medical history in which she attributed her back injury to pushing a desk at work. When he examined her, he found that she had pain on palpation in the lower lumbar area, her range of motion was limited but acceptable, and her reflexes, sensation, and muscle strength were good. Dr. Fishbein believed that Ms. Hawkins’s injury was consistent with pushing a desk, and it was his opinion that she suffered eleven percent impairment to the body as a whole as a result of her injuries and surgeries. He thought she had a good result from her two back surgeries by Dr. McNamara. Dr. Fishbein also conceded on cross examination that it was possible that a disc rupture could occur without trauma. He did not place any restrictions on her future activity.

The trial court entered its findings and judgment on April 8, 2013. After considering the foregoing evidence, the trial court found that “A[t]he history Mrs. Hawkins gave to Ms. Graves and Dr. Wilburn shortly after whatever happened at work on December 16, 2010, and for several weeks thereafter is inconsistent with an injury in the

course and scope of her employment.” It further found that Ms. Hawkins had not proved by a preponderance of the evidence that her injury occurred in the course of her employment and dismissed her complaint. Ms. Hawkins then appealed. The Supreme Court referred the appeal to this panel.

II. Analysis

Appellate review of decisions in workers’ compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), which provides that 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 has 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). No similar deference need 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).

Whenever there is a conflict of expert opinions, the trial court generally has the discretion to choose which expert to accredit. Johnson v. Midwesco, Inc. 801 S.W.2d 804, 806 (Tenn. 1990). Moreover, “when the medical testimony differs, the trial judge must obviously choose which view to believe. In doing so he is allowed . . . 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.” Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

Ms. Hawkins relies on many cases which have held that “an award of benefits may properly be based upon medical testimony to the effect that the employment could or might have been the cause of the worker’s injury when, from other evidence, it can reasonably be inferred that the employment was the cause of the injury.” Clark v. Nashville Mach. Elevator Co. Inc., 129 S.W.3d 42, 47 (Tenn. 2004). Ms. Hawkins also correctly points out that the case law requires that “all reasonable doubts as to the 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). Ms. Hawkins argues that she has satisfied this standard and that the trial court therefore erred in dismissing her claim.

Although Ms. Hawkins's activities on December 16, 2009, as described in her trial testimony, could have caused an injury to her back, the case law does not require a trial court to accept a worker's testimony regarding the cause of a condition at face value and disregard all evidence to the contrary. Evaluation of testimony presented live at trial "is within the peculiar province of the trial court to assess." Roberts v. Worth, Inc., No. 01S01-9412-CH-00157, 1995 WL 593079, at *2 (Tenn. Oct. 5, 1995).

In this case, the proof in the record clearly raises substantial doubts as to Ms. Hawkins's testimony about the cause of her back condition. On December 16, 2009, the alleged date of the injury, Ms. Hawkins specifically denied to Ms. Graves that her injury was work related. Instead, she suggested to Ms. Graves that the resumption of swimming without stretching after having not swum for several days and "overdoing" Christmas decorations were possible causes, while failing to mention a work incident involving pushing desks or lifting chairs. Ms. Hawkins made a similar denial to Dr. Wilburn five days later, on December 21, 2009, and on multiple patient intake forms she completed on subsequent visits to Dr. Wilburn. Specifically, she told Dr. Wilburn that she had been lifting her husband, who had suffered a stroke, and she again did not refer to or attribute her condition to moving desks or chairs at work. She also did not inform her employer of her alleged work injury until January 28, 2010, nearly six weeks after it allegedly occurred.

Ms. Hawkins did not dispute Ms. Graves's statement, nor did she dispute Dr. Wilburn's statement concerning her history of lifting her husband until six months later on June 7, 2010. She explained that she did not do so because she believed that her condition was relatively minor and would be resolved within a short time. This explanation is at odds with her statement to Ms. Graves that her pain level was ten on a scale of one to ten and with her testimony that she never had "back pain like I experienced that day, never in my life." Ms. Hawkins's denial that she ever lifted her husband is also at odds with the letter she handwrote to Ms. Alexander after she filed her Employee Accident Occurrence Report.

Resolution of Ms. Hawkins's conflicting statements to Ms. Graves, Dr. Wilburn, Ms. Weatherford, and Ms. Alexander, as well as her later descriptions of her alleged injury, necessarily involve questions of credibility. In addition, there are numerous contradictions within Ms. Hawkins's own testimony that present similar questions of credibility. Even if a trial court does not make an express finding of fact regarding the

credibility of a witness, such findings “may be inferred from the manner in which the trial court resolves conflicts in the testimony and decides the case.” Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733-34 (Tenn. 2002). Here, the trial court clearly resolved those credibility questions against Ms. Hawkins. We give the trial court’s findings the deference they are due. Tryon, 254 S.W.3d at 327.

Similarly, when the trial court took the medical testimony into account, it clearly found Dr. Wilburn to be more credible. Upon an independent review of the record as well as the experts’ depositions, this Court also finds Dr. Wilburn’s medical opinion deserving of greater weight. While both experts are well qualified orthopedic surgeons, Dr Wilburn had the advantage of hearing the history, examining and treating Ms. Hawkins five days after her alleged injury, and continuing to treat her regularly for a period of ten and a half months as her back condition developed and progressed. Dr. Fishbein, on the other hand, did not treat Ms. Hawkins, heard a different history from her, and evaluated her on only one occasion twenty-two months after her alleged injury. Dr. Wilburn had more information available to him at a much earlier stage and over a longer period of time than Dr. Fishbein.

Given these credibility determinations by the trial court and our review of the record, we conclude that the evidence does not preponderate against the trial court’s decision to dismiss Ms. Hawkins’s case.

III. Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Patricia Hawkins and her surety, for which execution may issue if necessary.

E. RILEY ANDERSON, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**PATRICIA HAWKINS v. MAURY COUNTY BOARD OF
EDUCATION**

**Chancery Court for Maury County
No. 121110**

No. M2013-01083-SC-WCM-WC - Filed October 23, 2014

Judgment Order

This case is before the Court upon the motion for review filed by Patricia Hawkins pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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 Patricia Hawkins and her surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating