

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

August 21, 2014 Session

C. DOUGLAS JONES v. CVS PHARMACY, INC.

**Appeal from the Chancery Court for Knox County
No. 1823143 Michael W. Moyers, Chancellor**

**No. E2013-02451-SC-R3-WC-MAILED-SEPTEMBER 26, 2014
FILED - NOVEMBER 20, 2014**

The employee alleged that he sustained a compensable back injury when a stool on which he was sitting collapsed, causing him to fall to the ground. His treating physician opined that he sustained permanent impairment as a result of the incident. Two evaluating doctors opined that his symptoms were related to a prior motor vehicle accident. The employee had not informed the treating physician of the prior motor vehicle accident nor of his prior history of back pain. The trial court found that he did not suffer a compensable injury. The employee has appealed. 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013) Appeal as of Right; Judgment
of the Chancery Court Affirmed**

DEBORAH C. STEVENS, SP.J., delivered the opinion of the Court, in which SHARON G. LEE, J., and DON R. ASH, SR.J., joined.

Glen B. Rutherford, Knoxville, Tennessee, for the appellant, C. Douglas Jones.

Timothy W. Conner and J. Matthew Drake, Knoxville, Tennessee, for the appellee, CVS Pharmacy, Inc.

OPINION

Factual and Procedural Background

C. Douglas Jones (“Employee”) alleged that he sustained permanent injuries as a result of a fall at work. CVS Pharmacy, Inc. (“Employer”) denied his claim. The parties were unable to resolve their differences at a Benefit Review Conference held on February 2, 2012. Employee filed this civil action in the Chancery Court for Knox County on February 27, 2012. The matter was tried on September 17, 2013.

On August 9, 2008, Employee was employed by Employer as a “floating” pharmacist. On that date, he was working at a CVS store on Magnolia Avenue in Knoxville. As he leaned back on a stool, all four legs of the stool collapsed and he fell to the floor. Since it was almost closing time, Employee chose to complete his work shift and hoped he would feel better the following morning. The next day, he was “hurting like the devil” and decided to go to the emergency department of Parkwest Hospital. An x-ray was taken and revealed “compression deformities of T10 and T8 [vertebrae], which are most likely chronic [and] [e]xtensive degenerative disc disease.”

Employee returned to work for Employer until September 29, 2008, when he was placed on short-term disability because of a total knee replacement surgery on his right leg on September 29, 2008, and his left leg on December 29, 2008. The parties stipulated that these surgeries were not related to Employee’s work injury. While Employee was on leave, on October 28, 2008, a CT scan was performed on his lumbar spine. The scan revealed a “[c]ompression fracture superior end plate of L1.” The radiologist’s report indicated the age and etiology of the fracture were “uncertain.”

The evidence at trial, including the testimony of Employee, revealed that he had been in a serious motor vehicle accident in 1991. As a result of the motor vehicle accident, he sustained compression fractures of the T7, T8, T10 and L1 vertebrae. He was unable to work for approximately one to two years after the motor vehicle accident.

On March 31, 2009, Employee saw Dr. Edward Kahn, an orthopaedic surgeon, for pain in his middle and lower back. This treatment was authorized by Employer’s workers’ compensation carrier. X-rays taken by Dr. Kahn showed a compression fracture at L1 and grade 1 spondylolisthesis at the L4-5 joint. Dr. Kahn ordered an MRI that showed a healed compression fracture and arthritis at L4-5. Employee told Dr. Kahn that he had no back injuries or problems prior to the August 9, 2008 incident at work. He did not disclose either the injuries he suffered in the 1991 motor vehicle accident or treatment he received for chronic low back pain in 1996.

In 2012, Dr. Kahn performed a laminectomy in which he removed bone spurs to relieve pressure on Employee's spinal nerves. He testified that Employee continued to have chronic back pain into 2013. Based on the history given by the Employee, Dr. Kahn opined that the August 2008 incident caused the L1 compression fracture and aggravated the preexisting arthritis at L4-5 in Employee's spine. He assigned 12% permanent impairment to the body as a whole due to the injury.

During cross-examination, Dr. Kahn stated that his opinions concerning causation and impairment were based on the accuracy of the history provided by Employee. He conceded that the nondisclosure of prior back injuries and treatment for low back pain would have an effect on his ability to accurately assess Employee's impairment. He had not seen or reviewed any medical records concerning Employee for the period prior to August 2008. Dr. Kahn was asked to review a report of Dr. Jeffrey Uzzle, who had conducted a medical record review at the request of Employer. Upon examination of the report, Dr. Kahn stated that it contained information that Employee had not revealed to him. Dr. Kahn then stated that, assuming Dr. Uzzle had correctly summarized the medical information reviewed, Dr. Kahn did not disagree with the report's conclusions. Concerning the healed L1 compression fracture shown in March 2009 x-rays, Dr. Kahn opined it was possible, but not likely, that an August 2008 fracture could have healed in that period of time. He stated he based his opinion as to the cause of the fracture on Employee's insistence that he had not sustained any prior back injuries.

Dr. Uzzle, a physical medicine and rehabilitation specialist, testified by deposition. He reviewed medical records from Summit Medical Group, Farragut Family Practice, St. Mary's Medical Center and its affiliated pain management clinic, Rheumatology Associates of East Tennessee, Diagnostic Health, Focus Physiotherapy, Fort Sanders Parkwest Medical Center, and Tennessee Orthopaedic Clinic. These records included treatment rendered to Employee both before and after August 2008. Dr. Uzzle testified that it was "apparent" from these records that Employee suffered from chronic back pain after the 1991 motor vehicle accident. In support of that conclusion, he noted that Employee had sought pain management treatment from a rheumatologist and also that he had permanent work restrictions prior to 2008. He also stated that the October 2008 CT scan of the spine showed healed fractures at T7, T8, T9 and L1. Based on that information, he opined that the August 2008 work-related incident may have caused sprains of the cervical and thoracic spine but did not result in permanent impairment or the need for additional work restrictions.

Dr. Thomas Koenig, an orthopaedic surgeon who examined Employee at the request of Employee, also testified by deposition. As part of his evaluation, he reviewed the records considered by Dr. Uzzle and additional records, including Dr. Uzzle's report and physical therapy records. He found that Employee had degenerative disc disease at

all levels of the spine. Dr. Koenig stated that the compression fractures caused by the 1991 motor vehicle accident caused degenerative changes in those areas of the spine. Concerning the likely effects of those fractures, he observed, “Almost certainly it is tough for a man to have four compression fractures in the mid and lower lumbar spine and not have some history of pain.” He opined that Employee had suffered temporary strains of the thoracic and lumbar spine, a contusion of the thoracolumbar area, and symptom magnification. He concluded that there was no permanent impairment from the work accident.

John Williams, a pharmacy supervisor for Employer, testified by deposition. He explained that Employee had been terminated after not returning from a disability leave of absence in November 2009. His testimony was presented for the purpose of showing that Employee had a meaningful return to work for purposes of Tenn. Code Ann. § 50-6-241(d). Because we affirm the trial court’s findings on the issue of causation, it is unnecessary to discuss Mr. Williams’s testimony in detail.

The trial court announced its findings from the bench. It found that Dr. Kahn’s opinions were “compromised” because they were based on the incomplete and inaccurate history provided by Employee. The trial court also determined that “Dr. Kahn’s analysis was based on premises that simply are not supported by the facts of the case.” Concluding that Employee had failed to sustain his burden of proof, the trial court entered judgment in favor of Employer. Employee has appealed, asserting that the evidence preponderates against the trial court’s decision.

Analysis

We are statutorily required 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). 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) (internal quotation mark omitted)). Although we accord considerable deference to the trial court’s findings of fact based on its assessment of trial witness testimony, this deference does not extend to findings based on depositions and other documentary evidence. *Padilla v. Twin City Fire Ins. Co.*, 324 S.W.3d 507, 511 (Tenn. 2010) (citing *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 liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. *Crew*, 259 S.W.3d at 664.

Employee asserts that the evidence preponderates against the trial court's finding that he did not sustain his burden of proof. While conceding that Dr. Kahn did not have access to Employee's pre-existing medical problems, Employee points out that Dr. Kahn was his treating physician, who saw and treated Employee on many occasions for nearly four years. Employee argues that Dr. Kahn's opinions concerning causation and impairment should be given greater weight than those of Drs. Uzzle and Koenig.

This argument, however, overlooks a crucial aspect of Dr. Kahn's testimony. Dr. Kahn stated repeatedly that his opinions were based on the assumption that he had received a complete and accurate history from Employee. That assumption, as the trial court found, was disproved by evidence presented during trial. Dr. Kahn understood that Employee had no injuries to his back and no treatments for back pain prior to August 2008. The undisputed evidence, including Employee's own testimony, established that he had been in a very serious motor vehicle accident in 1991 that had caused fractures of four vertebrae. Employee was unable to work for more than one year due to his injuries. In addition, he had sought medical treatment for chronic back pain in 1996 and again in 2006.

All of these facts are contrary to the information on which Dr. Kahn's opinions were based. Tenn. R. Evid. 703 directs trial courts to "disallow [expert] testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness." The trial court did not exclude the proffered testimony but properly chose to give little weight to the opinions of Dr. Kahn. See *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991) (stating that when presented with differing medical opinions, a trial judge may consider, among other things, "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"). That decision was supported by Dr. Kahn's own statement during cross-examination that he did not disagree with Dr. Uzzle's report, if the summary of medical information therein was accurate.

A trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990); *Dorris v. INA Ins. Co.*, 764 S.W.2d 538, 542 (Tenn. 1989) (citing *Combustion Engineering Inc. v. Kennedy*, 562 S.W.2d 202, 204 (Tenn.1978)). In this case, we are unable to find that the trial court abused its discretion by according greater weight to the opinions of Dr. Uzzle and Dr. Koenig than to those of Dr. Kahn. We therefore conclude that the trial court did not err by finding that Employee failed to sustain his burden of proof.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to C. Douglas Jones and his surety, for which execution may issue if necessary.

JUDGE DEBORAH C. STEVENS

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ORDER

This case is before the Court upon the motion for review filed by C. Douglas Jones 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 C. Douglas Jones and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Lee, C.J., not participating