

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

December 10, 2012 Session

LINDA LOU McDOUGAL v. GOODYEAR TIRE & RUBBER COMPANY¹

**Appeal from the Chancery Court for Obion County
No. 28,382 W. Michael Maloan, Chancellor**

No. W2011-02302-WC-R3-WC - Mailed February 4, 2013; Filed March 7, 2013

In this workers' compensation action, the employee alleged that she injured her neck in a forklift accident. Her employer did not deny that the event occurred but contended that her symptoms were caused by preexisting degenerative changes. The employee eventually had surgery and sought workers' compensation benefits. In addition to causation, the employer asserted that the claim was barred by the statute of limitations. The trial court found that the employee had sustained a compensable injury and made a finding concerning the extent of her permanent disability. However, it held the record open to permit the taking of additional proof concerning the statute of limitations. After considering that evidence, the court found that the claim was timely and awarded benefits pursuant to its original ruling. The employer has appealed, challenging the trial court's rulings on the statute of limitations and causation. Pursuant to Tennessee Supreme Court Rule 51, 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. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2012) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

CORNELIA A. CLARK, J., delivered the opinion of the Court, in which DONALD E. PARISH, SP. J., and TONY A. CHILDRESS, SP. J., joined.

W. Lewis Jenkins, Jr., Dyersburg, Tennessee, for the appellant, Goodyear Tire & Rubber Company.

¹ The administrator of the Second Injury Fund of the Tennessee Department of Labor and Workforce Development was a named party below. The Fund was dismissed from the action after trial, and neither side has challenged that dismissal in this appeal.

Jeffrey A. Garrety and Charles L. Holliday, Jackson, Tennessee, for the appellee, Linda Lou McDougal.

MEMORANDUM OPINION

Factual and Procedural Background

In October 2005, Linda Lou McDougal (“Employee”) worked as a forklift driver for Goodyear Tire & Rubber Company (“Employer”). On October 7, she drove her forklift over a wet section of the factory floor, and when the tires reached a dry area, the vehicle stopped abruptly, snapping her head forward. She reported the incident in a timely fashion and was referred to Employer’s onsite clinic for treatment of neck pain. When her symptoms did not improve, she was referred to Dr. Everette Howell, a neurosurgeon, for evaluation. Surgery was recommended based on the results of a diagnostic test known as a discogram. Dr. Dan Spengler, an orthopaedic surgeon, performed a second opinion examination of Employee in June 2006. Dr. Spengler opined that Employee’s condition was primarily caused by her age, recommended against surgery, and condemned the diagnostic value of discograms. In light of Dr. Spengler’s opinion, Dr. Howell reconsidered his initial recommendation and declined to perform surgery.

In July 2006, Employee was referred to Dr. Sean McDonald, also a neurosurgeon, for additional treatment. Dr. McDonald’s diagnosis was a cervical sprain, superimposed on pre-existing degenerative disc disease, and he referred Employee to Dr. Gay Richardson, a pain management specialist, for further treatment.

In December 2006, while Employee was still being treated, her attorney filed with the Department of Labor a request for benefit review conference, noting that the filing was solely for the purpose of tolling the statute of limitations and asking that it be held until Employee completed treatment. Employee’s counsel received a reply letter dated December 29, 2006. However, Employer’s counsel received neither document at that time.

Various medications were prescribed and administered to Employee until May 2008, but her symptoms did not improve. As a result, Dr. McDonald determined that surgery was appropriate, based in part on the discogram ordered by Dr. Howell. On May 27, 2008, Dr. McDonald performed a surgical fusion of Employee’s C4, C5, and C6 vertebrae. During the procedure, he noted both disc herniations and degenerative changes in Employee’s cervical spine. Dr. McDonald and Employee testified that the surgery provided excellent relief of her symptoms.

Dr. McDonald ordered a functional capacity evaluation in October 2008. Based on the results of that test, he recommended that Employee avoid repetitive flexion, extension, and bending of her neck, as well as lifting more than thirty pounds. Employee attempted to return to work at her previous job, but was able to do so for only a short time because of pain that Dr. McDonald considered to be consistent with her injury and surgery. He testified that Employee had reached maximum medical improvement by December 18, 2008, and that she retained a 25% permanent impairment to the body as a whole, based on the Fifth Edition of the AMA Guides. Dr. Apurva Dalal, an orthopaedic surgeon, evaluated Employee in March 2009 at the request of her attorney and opined that she retained a 26% impairment due to her injury and surgery.

It appears that Employee initially filed a workers' compensation action that was dismissed on December 8, 2009, for lack of subject matter jurisdiction because no benefit review conference had been conducted. Employee renewed her request for a benefit review conference, and on January 6, 2010, the conference was held. Because the parties were unable to resolve all the issues between them, the conference ended in an impasse.

On January 8, 2010, Employee filed a complaint in the Chancery Court for Obion County. The complaint referenced as "Exhibit A" the December 29, 2006 letter from the Department of Labor showing proof of receipt of a Request for Benefit Review Conference ("Form C40-B").²

Employer filed its answer on February 11, 2010, asserting as its third defense:

At this time, Goodyear is without sufficient knowledge or information to admit the contents of the document attached to the complaint as Exhibit C to the Complaint (but referenced as Exhibit A). (*See* paragraph seven [7] below.) It is the Plaintiff's burden to demonstrate the timely filing of a benefit review conference request. Investigation is still being performed into this matter and to the extent that this matter [sic] claim was filed beyond the statute of limitations, Goodyear will assert a limitations defense and/or will seek to negate that element of the Plaintiff's claim. Tenn. Code Ann. § 50-6-203; *see also* Tenn. Code Ann. § 50-6-224.

Employee testified in person at the December 9, 2010 trial. A high school graduate, she previously worked at a shoe factory, a florist/catering business, and a pizza restaurant.

² For reasons that are not clear, the exhibits to the complaint are not part of this record. However, the document at the heart of the dispute on appeal has been made an exhibit to several other documents filed in this case.

Employee, who was sixty-one years old at trial, began working for Employer in 1998. After her unsuccessful attempt to return to work after the 2008 surgery, she retired from Employer and was not working at the time of the trial. Employee testified about ongoing stiffness in her neck and difficulty with daily activities, such as carrying groceries. She had also reduced or eliminated her participation in several recreational activities, including camping, boating, gardening, and water skiing. At the time of the trial, she was using a muscle relaxer, Flexeril, once a day, and taking over-the-counter pain medicines from time to time.

In addition to Employee's live testimony, the court was presented with the deposition testimony of Dr. McDonald, Dr. Dalal, Dr. Spengler, and Dr. Manuel Weiss. Dr. Weiss, a neurosurgeon, reviewed medical records provided by Employer, together with the depositions of Dr. Spengler and Dr. McDonald. He opined that Employee was not a good candidate for surgery when Dr. McDonald performed the spinal fusion, that her improvement was due to the placebo effect, and that discograms were "bogus."

The trial court ruled from the bench that Employee satisfied her burden of proof as to causation, that she was entitled to temporary disability benefits, and that she sustained a 60% permanent partial disability to the body as a whole. However, the statute of limitations defense raised by Employer in its answer was not resolved at trial. Employee attempted to address that issue by seeking to introduce an affidavit from Carolyn Kennedy, an employee of the Department of Labor and Workforce Development ("Department"), together with several attachments. Employer objected to the admission of the affidavit on various grounds. The trial court ordered the record held open to permit the taking of additional evidence concerning the matters addressed in the affidavit and attachments.

The parties deposed Ms. Kennedy on February 11, 2011, and presented her deposition testimony to the court at a July 28, 2011 hearing. The court ultimately found that Employee had timely requested a benefit review conference, and thus rejected Employer's statute of limitations defense. Accordingly, judgment on all issues was entered in favor of Employee.

Employer argues on appeal that the trial court erred by admitting Ms. Kennedy's deposition and, as a result, improperly rejected Employer's statute of limitations defense. Employer also contends that the evidence preponderates against the trial court's findings concerning causation and vocational disability.

Standard of Review

Appellate review of workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008 & Supp. 2012), which provides that appellate courts must review findings of fact "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding[s], unless the preponderance of the evidence is otherwise." As the Supreme Court has observed, 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). Evidentiary rulings are reviewed for abuse of discretion. Shipley v. Williams, 350 S.W.3d 527, 567 (Tenn. 2011).

Analysis

Statute of Limitations

Although not clearly articulated in its brief, Employer's primary argument in this case is that Employee's claim was not timely filed under applicable statutes. For claims arising after January 1, 2005, Tennessee Code Annotated section 50-6-203(b)(2) (2008) provides:

(b)(2) In those instances where the employer has paid workers' compensation benefits, either voluntarily or as a result of an order to do so, within one (1) year following the accident resulting in injury, the right to compensation is forever barred, unless a form prescribed by the commissioner requesting a benefit review conference is filed with the division within one (1) year from the latter of the date of the last authorized treatment or the time the Employer ceased to make payments of compensation to or on behalf of the Employee.

The statute of limitations is an affirmative defense, see Tenn. R. Civ. P. 8.03, and Employer bears the burden of proof on this issue, see Reed v. Alamo Rent-A-Car, Inc., 4 S.W.3d 677, 684 (Tenn. Ct. App. 1999); Carr v. Borchers, 815 S.W.2d 528, 532 (Tenn. Ct. App. 1991). Once Employer has established this affirmative defense, however, the burden shifts to Employee to demonstrate a recognized exception. Cloyd v. Hartco Flooring, 274 S.W.3d 638, 647 (Tenn. 2008) (citing Bradshaw v. Claridy, 375 S.W.2d 852, 856 (Tenn. 1964) (holding that where a workers' compensation claim is prima facie barred by the one-

year statute of limitations, the claimant bears the burden of proof to show that his claim falls within an exception that would permit his action to go forward)); cf. Jones v. Coal Creek Mining & Mfg. Co., 180 S.W.179, 182 (Tenn. 1915); Ingram v. Earthman, 993 S.W.2d 611, 633 (Tenn. Ct. App. 1998).

It is undisputed that the surgery at issue in this case was performed May 27, 2008, and it is essentially undisputed that Employee reached maximum medical improvement not later than December 18, 2008. The record also indicates that Employer ceased making medical payments in June 2008. Because the benefit review conference did not occur until January 2010, Employer contends that there is no proof in the record that a timely request was made under Tennessee Code Annotated section 50-6-203(b)(2).

In anticipation of this assertion, Employee has, since she filed her complaint, asserted that her attorney sent the proper written request on her behalf on December 12, 2006, the Department received that request on December 14, 2006, and the Department acknowledged its receipt of the request, as well as the tolling of the statute of limitations, on December 29, 2006—long before the date of last treatment or payment of benefits.

Employer's primary argument on appeal is that the trial court "should have excluded the affidavit of Carolyn Kennedy, which would have resulted in the dismissal of the claim" for failure to prove it was filed timely. As set out above, Employee sought to introduce an affidavit from Ms. Kennedy for the purpose of authenticating her request for a benefit review conference, along with the letter from Employee's attorney to the Department and a response from the Department confirming receipt of the first two documents. Employer objected to the affidavit on several grounds, including its inability to cross-examine Ms. Kennedy. To address these objections, the trial court left the record open to permit counsel to "take the deposition of [Ms. Kennedy] or whatever other evidence they want to present to the Court" on this issue. Ms. Kennedy was deposed, and her deposition was presented to the trial court. In that deposition, Ms. Kennedy testified that she authored the response from the Department

confirming receipt of Employee's request for a benefit review conference.³ On the basis of that testimony, the trial court admitted the letter into evidence.⁴

Employer contends that Ms. Kennedy's testimony is insufficient to authenticate the document for several reasons, noting that it was not maintained in a file in the Dyersburg office of the Department and that she had not obtained a copy of the letter from the officially maintained file in Nashville. In its order, the trial court did not cite a specific provision of the Tennessee Rules of Evidence, but it clearly credited Ms. Kennedy's testimony that she

³ In her deposition, Ms. Kennedy testified, in relevant part, as follows:

- Q. Do you have any knowledge, yourself, of actually preparing this document in this case regarding Ms. Dougal?
- A. Yes.
- Q. You do? Okay. Tell me about that.
- A. Okay, maybe I—maybe I—rephrase your question. Maybe I didn't understand what you asked me.
- Q. Let me ask it a different way. Do you have a specific recollection of preparing this document, this particular document, a copy of which is attached as Exhibit C to your affidavit?
- A. I would say yes, that I prepared this document. This looks like—this is the form letter for the documents that I send out on pending files.
- Q. Okay. And when you say it looks like. And I'm asking you if you have any particular recollection of actually preparing the document in this case?
- A. I guess I would say yes. I mean, this was done in '06, so, you know, I've done a lot of these letters since '06.
- Q. All right. And I want to press you just a little bit and see—you said, "I guess I would say yes." Do you recollect preparing the letter in Ms. McDougal's case, or do you not, specifically?
- A. By the documents that I've seen that come from Nashville, with the stamps on them and the dates, yes, this letter was prepared by me.

⁴ In its "Order on Several Post-Trial Motions," the trial court held, in relevant part:

In reviewing Ms. Kennedy's affidavit and subsequent deposition, the Court finds that Exhibit C to her affidavit was properly admitted into evidence. Exhibit C is the December 29, 2006, letter from the Department of Labor acknowledging a December 14, 2006, Request for a Benefit Review Conference. Ms. Kennedy's statement that she actually prepared the document as part of her official duties satisfies the Court as its truthfulness. The Court, therefore, denies the Defendants' Motion to the extent it seeks to exclude Exhibit C from the evidence. Based on Exhibit C, the Court finds that the statute of limitations was timely tolled in this case and that the Court's original ruling from December 9, 2010, will be entered as the Judgment of the Court.

actually authored the Department's response to the request for a benefit review conference. Accordingly, the document was plainly authenticated under Tennessee Rule of Evidence 901(b)(1):

Rule 901. Requirement of authentication or identification. — (a) General Provision. — The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.

(b) Illustrations. — By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. — Testimony that a matter is what it is claimed to be.

Employer contends, however, that portions of Ms. Kennedy's deposition testimony were responses to leading questions by Employee's attorney, that the trial court should have sustained its objection to those questions, and that if Ms. Kennedy's answers to the leading questions were excluded, no evidence would remain to prove the timeliness of Employee's claim. The trial court did not address this argument in an order resolving post-trial motions. We find these arguments unpersuasive because Ms. Kennedy testified that she authored the December 29, 2006 response during questioning by *Employer's* attorney, *before* Employee's attorney asked any questions at all—let alone leading ones. Even if all answers to contested questions are excluded, there remains ample evidence to support the trial court's finding of authentication. We conclude that the trial court did not abuse its discretion in admitting Ms. Kennedy's letter.

Because the trial court did not err in admitting Ms. Kennedy's December 29, 2006 letter, the trial court correctly rejected Employer's statute of limitations defense.

Causation

Employer also argues that the trial court erred by finding that Employee sustained a permanent impairment and disability as a result of the October 7, 2005 incident and that the May 27, 2008 surgery was necessary. Employer notes that several doctors who examined Employee after the accident and before her surgery agreed that she already had degenerative disc disease in her cervical spine prior to the accident and, on that basis, argues that the work injury merely caused a non-compensable increase in pain. See *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598, 607 (Tenn. 2008).

It is undisputed that Employee had performed all aspects of her job without apparent difficulty prior to October 7, 2005. It is likewise undisputed that an accident occurred on that date and that she promptly reported it. Employee was treated by various physicians for the next three years, underwent numerous tests, and received multiple treatment modalities, including physical therapy, injections, muscle relaxers, and pain medication. None of these treatments were effective, however, and she was unable to work because of her symptoms.

Dr. McDonald testified that these symptoms were a direct result of her work injury. Although initially skeptical about surgical treatment, he eventually determined that a fusion procedure was necessary and performed that surgery. The fusion surgery provided Employee considerable relief from her symptoms but left her with limited range of motion, as well as continuing pain and stiffness. Dr. McDonald opined that this positive outcome justified the surgical intervention, while Dr. Weiss attributed Employee's improvement to the "placebo effect."

All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment must be resolved in favor of the Employee. Phillips v. A. & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). The element of causation is satisfied where the "injury has a rational, causal connection to the work." Braden v. Sears, Roebuck & Co., 833 S.W.2d 496, 498 (Tenn. 1992). In general, treatment rendered by an authorized physician is presumed to be reasonable and necessary. Crump v. B & P Constr. Co., 703 S.W.2d 140, 145-46 (Tenn. 1986). When medical testimony differs, it is within the trial court's discretion to accept the opinion of one expert over the other. Gerdau Ameristeel Inc., v. Ratliff, 368 S.W.3d 503, 510 (Tenn. 2012); Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). Here the trial court accepted Dr. McDonald's testimony that Employee's "symptoms were a direct result of the work injury" and that the treatment he provided was "necessary" as a result of the injury.

We conclude that the evidence does not preponderate against the trial court's finding that Employee sustained a permanent disability as a result of her work injury, for which the surgery performed was reasonable and necessary.

Conclusion

The judgment of the trial court is affirmed in all respects. Costs of this appeal are taxed to Goodyear Tire & Rubber Company and its surety, for which execution may issue if necessary.

CORNELIA A. CLARK, JUSTICE

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

LINDA LOU McDOUGAL v. GOODYEAR TIRE & RUBBER COMPANY

**Chancery Court for Obion County
No. 28,382**

No. W2011-02302-WC-R3-WC - Filed March 7, 2013

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 on appeal are taxed to the Appellant, Goodyear Tire & Rubber Company, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM