

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

December 12, 2011 Session

STEPHEN WHEELER v. CLEO WRAP, INC. ET AL.

**Appeal from the Chancery Court for Shelby County
No. CH-07-2084-3 Kenny Armstrong, Chancellor**

No. W2011-00336-SC-WCM-WC - Mailed March 27, 2012; Filed May 16, 2012

In this workers' compensation action, the employee suffered a fractured wrist as a result of a workplace accident. He contended that he also sustained a neck injury and post-traumatic stress disorder from the accident. The trial court awarded benefits for the wrist injury only, and the employee has appealed. We affirm the judgment.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J. and TONY A. CHILDRESS, SP. J., joined.

Steve Taylor, Memphis, Tennessee, for the appellant, Stephen Wheeler.

Kevin W. Washburn, Memphis, Tennessee, for the appellees, Cleo Wrap, Inc. and St. Paul Travelers.

MEMORANDUM OPINION

Factual and Procedural Background

Stephen Wheeler was employed as a driver by Cleo Wrap, Inc. ("Cleo Wrap"). His job consisted of driving a vehicle called a "hostler," transferring trailers on Cleo Wrap's premises. On June 6, 2006, the load on a trailer he was moving shifted, causing his vehicle and the trailer to overturn. As he attempted to get out of the hostler, he saw fuel leaking and feared that he would be trapped in the vehicle and burned to death. He was safely extricated from the vehicle and taken to a local emergency room where it was determined that his right

wrist was fractured. Mr. Wheeler filed a complaint for workers' compensation benefits in the Chancery Court for Shelby County on October 23, 2007.

After the June 6, 2006 incident Mr. Wheeler was referred to Dr. William Bourland, an orthopaedic surgeon, for treatment. Dr. Bourland fixed the fractured wrist with metal pins, which were removed some months later. He released Mr. Wheeler to return to work without restrictions on September 28, 2006, and assigned a permanent anatomical impairment of 8% to the right upper extremity.

Mr. Wheeler also complained of back and neck pain after his injury. He was ultimately referred to Dr. John Brophy, a neurosurgeon, for authorized medical treatment. Dr. Brophy treated Mr. Wheeler from October 16 until December 11, 2006. Dr. Brophy's diagnosis was myofascial pain associated with spondylosis of the cervical and lumbar spine. Dr. Brophy described spondylosis as "arthritis of the spine," and myofascial pain as "soft tissue pain." Dr. Brophy prescribed anti-inflammatory medication and a home exercise program to treat these conditions. According to Dr. Brophy, there was no evidence of radiculopathy (nerve root compression) or myelopathy (spinal cord compression). Mr. Wheeler reported that he did not participate in the home exercise program. Dr. Brophy released Mr. Wheeler to return to full-duty work on December 11, 2006.

Mr. Wheeler returned to Dr. Brophy in June 2007 after an incident in May of that year, when he felt a popping sensation in his neck while pulling a fifth wheel pin on a trailer at work. Dr. Brophy ordered additional tests and prescribed temporary work restrictions. He released Mr. Wheeler from his care in August 2007. He placed no permanent restrictions upon Mr. Wheeler's activities and testified that in his opinion Mr. Wheeler had not sustained a permanent impairment because there was no evidence of an anatomical change in his cervical spine and the radiographic studies were all within normal limits.

In November 2006, Mr. Wheeler was referred to Dr. Tewfik Rizk, a physiatrist, by his attorney. Mr. Wheeler saw Dr. Rizk regularly until July 2010. Dr. Rizk prescribed medications, primarily Percocet, a narcotic pain medication, and Soma, a muscle relaxer, to treat Mr. Wheeler's symptoms of neck and back pain. Dr. Rizk's final diagnoses, in addition to the wrist injury, were disk protrusions at the C3-4, L4-5, and vertebral spaces. Based upon the history given to him by Mr. Wheeler, Dr. Rizk attributed these conditions to the June 2006 work injury. In Dr. Rizk's opinion, Mr. Wheeler retained a 19% anatomical impairment to the body as a whole due to those conditions. He recommended that Mr. Wheeler avoid "any kind of activity which necessitates repetitive cervical or lumbar spine movement as well as lifting, pushing, or pulling more than 10 pounds."

On cross-examination, Dr. Rizk testified that he was unaware that, during his course of treatment, Mr. Wheeler was seeking and receiving Lortab, a narcotic pain medication, Soma, and other medications from his primary medical provider, Getwell Community Clinic. He was also unaware that Mr. Wheeler had twice been hospitalized for drug and alcohol addiction. Dr. Rizk stated that it was a violation of state law for Mr. Wheeler to seek medication from two providers. He was aware that Mr. Wheeler had received treatment from Dr. Brophy, but he was unaware that Dr. Brophy was treating Mr. Wheeler during the same time frame. Dr. Rizk was also unaware Mr. Wheeler told his caregivers during a hospitalization in April 2006 “that his back was shot and he didn't know if he could continue driving a truck.” On redirect examination, Dr. Rizk stated that the information concerning Mr. Wheeler’s prior medical history and abuse of medication had not changed his opinions concerning causation and impairment.

Dr. Rizk referred Mr. Wheeler to Dr. Glenn Crosby, a neurosurgeon, concerning his back and neck symptoms. Dr. Crosby examined Mr. Wheeler in July and August of 2007, and again in May and June of 2010. In Dr. Crosby’s opinion, the “pain in [Mr. Wheeler’s] neck and his lower back were due to an aggravation of an underlying spondylosis,” and his “injuries were caused by his work accident in June of 2006.” This opinion was based upon the history that he received from Mr. Wheeler. Dr. Crosby testified that he did not assign impairment ratings as part of his normal practice but agreed with the impairments assigned by Dr. Rizk. On cross-examination, he stated that he had no information concerning the condition of Mr. Wheeler’s back prior to June 2006. He stated that most of Mr. Wheeler’s lumbar spine problems were “degenerative in nature.”

Dr. Ross Collins, a psychiatrist, testified by deposition at the request of Cleo Wrap. Dr. Collins was the Medical Director of Adult Services at Parkwood Behavioral Health Systems in Olive Branch, Mississippi, for approximately nine years. He testified that Mr. Wheeler had been admitted to Parkwood on two occasions, first in January of 2000 and again in April 2006. Dr. Collins was the treating physician on both occasions. The admission in 2000 was for major depression and alcohol and cannabis dependence. He was treated as an inpatient for one week, then as an outpatient for an additional week.

In April 2006, Mr. Wheeler was readmitted to Parkwood. His admission diagnoses were major depression, recurrent and severe, possible bipolar disease, alcohol dependence and generalized anxiety disorder. At the time of his admission, he was taking Paxil, an antidepressant, and Xanax, an antianxiety medication, apparently by prescription from a physician. He was also using hydrocodone, a narcotic pain medication. It was unclear whether the hydrocodone was being taken pursuant to a prescription. Mr. Wheeler gave a history of headaches and back pain at that time. He was discharged from inpatient treatment on April 12, 2008. At that time, his diagnoses were bipolar disorder and alcohol dependence.

Dr. Collins testified that Mr. Wheeler's Global Assessment of Functioning ("GAF") was 40, which meant that he was "safe to function in the outpatient setting but needed ongoing outpatient treatment." Mr. Wheeler was placed in an outpatient treatment program and was prescribed several non-narcotic medications, including Seroquel, an antipsychotic medication, Neurontin, a medication for chronic pain and anxiety, and Celebrex, an anti-inflammatory medication.

Mr. Wheeler was discharged from outpatient care on April 25, 2006. His medications at that time were Effexor, an antidepressant, Seroquel, and Neurontin. On May 15, 2006, Dr. Collins measured Mr. Wheeler's GAF score as 40, which Dr. Collins described as "about as poor as it can be and someone still be in the outpatient setting." At that time, Dr. Collins added Tranxene, an anti-anxiety medication, to Mr. Wheeler's regimen. Records of Mr. Wheeler's 2006 treatment, introduced as exhibits to Dr. Collins' testimony, included statements by a therapist that Mr. Wheeler was "focusing excessively on acquiring his disability benefits rather than focusing on his recovery[,] and that he "complained about his back being shot." On cross-examination, Dr. Collins stated that he had not seen Mr. Wheeler since May 15, 2006, and had no knowledge of his condition thereafter.

Dr. Randall Moskowitz, also a psychiatrist, was the only physician who testified in person at the trial. He examined Mr. Wheeler on several occasions at the request of Mr. Wheeler's attorney. He testified that in his opinion, Mr. Wheeler suffered from post-traumatic stress disorder and major depression as a result of the June 2006 work accident. He believed that Mr. Wheeler had a class III psychiatric impairment pursuant to the AMA Guides, which he quantified as 40%. He was critical of Dr. Collins' choice of medications to treat Mr. Wheeler in 2006. He asserted that Dr. Collins' assessment of Mr. Wheeler's GAF score at 40 in April 2006 was incorrect, and was the result of the effects of those medications. He stated that he estimated that Mr. Wheeler's correct GAF at that time was 60 to 65. He based that assessment in part upon the statements of Mr. Wheeler's wife that Mr. Wheeler was much better after being treated by Dr. Collins. Dr. Moskowitz's assessment of Mr. Wheeler's GAF score in June 2010 was 55.

On cross-examination, Dr. Moskowitz stated that he did not think Mr. Wheeler would have been able to "carry on his job" while taking the dosages of medication prescribed by Dr. Collins. He stated that he only had Dr. Rizk's records from 2007 and was unaware of Mr. Wheeler's use or abuse of pain medication thereafter. He had not seen the records of Getwell Community Clinic and was unaware that Mr. Wheeler had obtained prescriptions for pain medications and muscle relaxers from both Dr. Rizk and that facility regularly from 2007 into 2010. According to Dr. Moskowitz's testimony, his understanding was that Mr. Wheeler was not taking any type of pain medication at the time of his evaluations. He acknowledged that the April 2006 records of Parkwood Hospital stated that Mr. Wheeler had anxiety and panic

attacks at that time and that those are also symptoms of post-traumatic stress disorder. Dr. Moskovitz testified that Mr. Wheeler's anxiety after his work accident was "different," apparently because Mr. Wheeler reported having "flashbacks." Dr. Moskovitz conceded that medical records from Parkwood showed that Mr. Wheeler had many other symptoms, such as sleeplessness, lethargy, and depression, prior to his work injury.

Dr. Moskovitz confirmed that Mr. Wheeler told him that, immediately prior to the work accident, he was "he was doing fine and taking no medication." He acknowledged the record of the Baptist Hospital emergency room from the day of the work injury and Dr. Bourland's records two days later, stating that Mr. Wheeler was taking "Effexor, Seroquel, Xanax, [and] Percocet," but questioned the accuracy of those records. Dr. Moskovitz was aware that Mr. Wheeler had not requested psychiatric care from Cleo Wrap or its workers' compensation insurer at any time after his injury.

Mr. Wheeler testified that he was forty-nine years old. He had completed the ninth grade and later obtained a GED. He admitted that he had obtained pain medication from Dr. Rizk and Getwell Community Clinic at the same time. He felt the additional medication was necessary because of his severe neck and back pain. He had returned to work for Cleo Wrap after his injury and worked there until May 2010, when he was discharged.¹ At the time of the trial, he was working as an instructor at a school for truck drivers. Mr. Wheeler testified that, since his work injury, he had nightmares and flashbacks about fuel leaking from the truck, and the possibility of being trapped and burned. He also testified that he had constant pain in his neck and back, which caused difficulty with sitting, standing or walking for extended periods. He also reported depression and difficulty sleeping.

On cross-examination, Mr. Wheeler acknowledged that on March 5, 2010, as part of a physical examination, he had signed a medical questionnaire stating that he had no sleep disorders, no spinal injuries, and no chronic low back pain. He testified that this information was false and that his wife had actually provided the answers on the document. Wheeler further testified that he had not requested psychiatric care from his employer or its insurer, either directly or through counsel. He admitted that he was taking hydrocodone at the time of the accident and that it was not permissible to operate a vehicle while using that medication. He did not dispute the correctness of records from his April 2006 admission to

¹ Cleo Wrap contended that Mr. Wheeler's discharge was the result of a misrepresentation made by Mr. Wheeler to a medical examiner concerning medications he was taking. Mr. Wheeler initially argued that his termination was related to his work injury, and he was therefore eligible for an award of up to six times the medical impairment, pursuant to Tennessee Code Annotated section 50-6-241(d). At the close of his proof, however, and prior to the presentation of any evidence on the subject by Cleo Wrap, Mr. Wheeler stipulated that his termination was for misconduct, and his recovery was therefore limited to one and one-half times the medical impairment.

Parkwood Hospital reporting that he had stated his back was “shot” and he did not know if he would be able to continue truck driving. Mr. Wheeler also admitted that he had injured his back while pulling a large branch from his yard to the street at an unspecified time after his work injury. He confirmed that he had returned to work for Cleo Wrap on a full-duty basis in October 2006, had pay increases, and had often worked overtime until his termination in May 2010.

Dr. David Strauser conducted a vocational evaluation of Mr. Wheeler at the request of his attorney. He testified that Mr. Wheeler retained a vocational impairment of 92% based upon the restrictions imposed by Drs. Rizk and Crosby. He further opined that if Dr. Moskovitz’s opinions were also considered, Mr. Wheeler was unable to work. However, based upon the medical opinions of Drs. Bourland and Brophy, Mr. Wheeler had no vocational disability.

Ms. Venita Wheeler, Mr. Wheeler’s wife, testified that Mr. Wheeler had been “a new person” after his release from Parkwood Hospital in April 2006. She stated that after the work accident, he had physical limitations in his ability to stand, walk or lift. She stated that he also displayed depression and did not sleep well. She denied that he had significant back or neck pain prior to his work injury. On cross-examination, she testified that all of Mr. Wheeler’s psychological problems prior to his work injury were due to alcoholism. She denied that he was lethargic immediately prior to the April 2006 hospitalization. She was unaware of her husband’s meeting with Dr. Collins on May 15, 2006, and denied that he was having any of the symptoms or problems described in Dr. Collins’ note concerning that appointment.

The trial court found that Mr. Wheeler had sustained a compensable injury to his right arm and an impairment of 8% to the right arm as a result of that injury. Based upon the stipulation of the parties that Mr. Wheeler’s recovery was limited to one and one-half times the impairment rating, it awarded 12% permanent partial disability benefits to the right arm. The court further found that Mr. Wheeler suffered from depression and anxiety prior to his work injury and the medical evidence was insufficient to determine that any “measurable change” had occurred as a result of the injury. Finally, the court adopted Dr. Brophy’s opinion that Mr. Wheeler had sustained 0% impairment as a result of his alleged back and neck injuries. Judgment was entered in accordance with these findings. Mr. Wheeler has appealed, contending that the trial court erred by denying his claim for psychiatric injuries and his claim for neck and low back injuries.

Standard of Review

This workers' compensation 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. Tenn. Sup. Ct. R. 51. The standard of review of issues of fact is 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(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A 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).

Analysis

Mr. Wheeler contends that the trial court erred by ignoring the testimony of Drs. Rizk and Crosby that Mr. Wheeler had sustained injuries to his neck and back as a result of the June 2006 accident. In addition, he argues that the court erred by accepting the testimony of Dr. Collins, who did not examine Mr. Wheeler after the work accident, over the testimony of Dr. Moskovitz, who examined Mr. Wheeler after the accident.

Neck and Back Injuries

The trial court noted that Dr. Brophy's found "no herniated disc, no nerve root compression, no spinal cord instability, no radicular pain, no radiculopathy, normal sensory exam, tendon reflexes within normal limits, no anatomic changes in the cervical lumbar spine, and radiographic studies within normal limits." It also observed that Dr. Rizk's impairment rating was based upon a section of the AMA Guides that required findings of "significant signs of radiculopathy, sensory loss, loss of relevant reflexes, loss of muscle strength, or history of herniated disc or individuals who had surgery for radiculopathy." The trial court noted that neither Dr. Rizk nor Dr. Crosby testified to or noted in their records that Mr. Wheeler had any of the symptoms specified in the Guides. On that basis, it implicitly found the opinion of Dr. Brophy to be more consistent with the evidence presented than the opinions of the doctors who testified on behalf of Mr. Wheeler.

A trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). We have examined the testimony of Dr. Rizk and Dr. Crosby, and consistent with the trial court's assessment, we are able to find only passing and indirect references to radiculopathy, sensory loss, loss of reflexes or loss of motor function. Although Dr. Crosby discussed disc protrusions in his testimony it is not clear that he considered Mr. Wheeler's work accident to be the cause of that finding. Moreover, Dr. Crosby testified that Mr. Wheeler's spinal problems were primarily degenerative in nature. Therefore, the trial court's observation that there was no basis for Dr. Rizk's opinion concerning impairment is consistent with the evidence in the record.

Insofar as Mr. Wheeler's claim for spinal injuries is based upon an alleged aggravation of his preexisting conditions, both Dr. Rizk and Dr. Crosby testified that their opinions were premised upon the accuracy of the information provided to them by Mr. Wheeler. It is clear that Mr. Wheeler did not provide accurate or complete information to those doctors or to any of the other doctors who treated him during this period. It appears that he deliberately concealed information concerning both prior and contemporaneous medical treatment from Dr. Rizk. Because the medical opinions relied upon by Mr. Wheeler were based in part upon inaccurate information, the trial court did not err by choosing to accredit Dr. Brophy's opinions instead of them.

Psychiatric Claim

Mr. Wheeler's second contention is that the trial court erred by ignoring the testimony of Dr. Moskovitz, whose opinion was that Mr. Wheeler developed post-traumatic stress disorder as a result of the work accident. He points out that Dr. Collins, whose testimony was submitted by Cleo Wrap, saw and treated Mr. Wheeler only before the work accident. He argues that Dr. Collins' testimony, therefore, has little or no relevance on the subject of the psychiatric effect of that event. From that premise, he argues that the opinion of Dr. Moskovitz is the only relevant evidence on that subject. We disagree.

The evidence supports the conclusion that Mr. Wheeler had several serious psychiatric problems prior to June 6, 2006. These included depression, anxiety, panic attacks, and alcohol and drug abuse. These problems were sufficiently severe to require two hospitalizations, the second of which occurred less than two months prior to accident. The gist of Dr. Moskovitz's testimony is that Mr. Wheeler had recovered completely, or nearly so, prior to June 6th. Dr. Moskovitz did not meet or examine Mr. Wheeler, however, until four months after the accident. His opinion concerning the state of Mr. Wheeler's mental health prior to the accident was based upon information obtained from three sources: Mr.

Wheeler, his wife, and the medical records of Dr. Collins and Parkwood Hospital. Dr. Moskowitz testified, in essence, that he accepted the statements of Mr. Wheeler and his wife at face value. Those statements frequently conflicted with the medical records, and in those instances, Dr. Moskowitz asserted that the records were inaccurate or incorrect. The testimony of Dr. Collins is relevant because it undermined the inferences and assumptions that were the bases of Dr. Moskowitz's conclusions.

Dr. Collins' testimony establishes that Mr. Wheeler had severe psychiatric problems at the time of his discharge from Parkwood's outpatient program on April 25, 2006. He had not improved significantly by May 15, 2006, when Dr. Collins examined Mr. Wheeler again. We find no basis in the record to discredit that testimony except for Dr. Moskowitz's assertion that Dr. Collins' assessment was erroneous or the result of excessive medications. Dr. Moskowitz's opinion that Mr. Wheeler had completely recovered from those problems by June 6 was based upon information that Mr. Wheeler had discontinued taking the medications prescribed by Dr. Collins and that he had dramatically improved thereafter. His belief that Mr. Wheeler was no longer taking medication by that date is inconsistent with the evidence contained in the emergency room records of Baptist Hospital from the date of the accident and is inconsistent with information provided Dr. Bourland's office two days later. We conclude that the trial court's finding that Dr. Moskowitz's testimony was unpersuasive not only is entitled to great deference because Dr. Moskowitz testified live at trial, but is amply supported by the record before us.

Conclusion

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

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STEPHEN WHEELER v. CLEO WRAP, INC. ET AL.

**Chancery Court for Shelby County
No. CH072084III**

No. W2011-00336-SC-WCM-WC - Filed May 16, 2012

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Stephen Wheeler pursuant to Tenn. Code Ann. § 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 Stephen Wheeler and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

JANICE M. HOLDER, J., NOT PARTICIPATING