IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
(December 14, 2000 Session)

MARY JANE CAMPBELL v. The TRAVELERS INSURANCE COMPANY

Direct Appeal from the Circuit Court for Knox County
No. 1-254-97 Dale C. Workman, Circuit judge

Filed February 7, 2002

No. E2000-01894-WC-R3-CV
Decided

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated §50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employee appeals the trial court dismissal of her claims that a chemical exposure at work caused her disability. We affirm.

Tenn. Code Ann. ' 50-6-225(e) (1999) Appeal as of Right; Judgment of the Knox County Circuit Court is Affirmed.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and JOHN K. BYERS, SP. J., joined.

Edward A. Slavin, St. Augustine, Florida, for the Appellant, Mary Jane Campbell.

Clint J. Woodfin, Spicer, Flynn & Rudstrom, Knoxville, Tennessee, for the Appellee, The Travelers Insurance Company.

MEMORANDUM OPINION

I. BACKGROUND FACTS

On April 29, 1996, Mary Jane Campbell (Campbell) was employed by Southern Insurance Specialists, Inc. (SIS) as an account representative. When Campbell came to work that Monday morning, she noticed a strong chemical odor that others, including Mr. Ron Miller, president of SIS, noticed as well. Towards the rear of the SIS offices, Campbell noticed numerous dead ants. Campbell began coughing and for the rest of the week experienced lethargy at work and home. Additionally, she complained of a sore throat and dry mouth. Campbell reported that her ability to concentrate and remember tasks declined as well. The next workweek, she began experiencing tremors. At this time, Campbell went to see her family physician, but the treatment she received was not beneficial. As her symptoms continued, Campbell went to see another primary physician who prescribed an asthma inhaler, which was of some benefit. Significantly, she was also referred to another physician who ran tests for reactions to pesticides and those tests came back negative.

Campbell did not file a workers' compensation claim until encouraged to do so by Mr. Miller. SIS's insurer, the Travelers Insurance Company (Travelers), then began to arrange medical care for Campbell. In July 1996, Campbell saw Dr. Philip Edelman, a specialist in occupational and environmental medicine. During his initial examination, Dr. Edelman noticed some minor tremors in Campbell. He also ordered numerous blood tests to be performed, including tests specifically designed to detect the presence and effects of the chemical pesticide class known as organophosphates, of which Diazinon is a member. All of these tests came back negative.

At some point prior to her visit with Dr. Edelman, Campbell came to suspect she was exposed to Diazinon on April 29, 1996 while at work at SIS. This belief is apparently founded on the chemical smell and the dead ants noticed that day.

In later visits, Dr. Edelman continued to notice the tremors in Campbell, but felt that those tremors could not be related to Diazinon exposure because of the way in which the body responds to Diazinon exposure. In essence, Diazinon destroys an enzyme, cholinesterase, in the body, that affects neurological functioning; over time, that enzyme returns to the pre-exposure levels. Campbell's cholinesterase levels had returned to and remained at normal level. Campbell had been back for half a day in the office area where she noticed the chemical odor just prior to seeing Dr. Edelman on July 11, 1996. Accordingly, Dr. Edelman ruled out Diazinon as the cause of Campbell's continued medical difficulties.

Campbell continued to explore the Diazinon possibility and through contact with the Chemical Injury Information Network, learned of Dr. Allan Lieberman at the Center for Environmental and Occupational Medicine in South Carolina. She first saw Dr. Lieberman on January 8, 1997. Dr. Lieberman diagnosed Campbell as being genetically "hypersensitive" to organophosphates, which he claims explains her symptoms despite the lapse of time from her alleged exposure. Dr. Lieberman stated that Campbell had autoimmune markers that indicated

Diazinon exposure. Dr. Lieberman then began treating Campbell with a regime he refers to as "biodetoxification" which consists of vitamins, Alka-Seltzer Gold, deep tissue massage, and a weekly two-hour session in a sauna. Campbell claims these treatments offer her some degree of temporary relief. Dr. Lieberman's testimony was presented by deposition.

Dr. Edelman testified at trial and was asked about Dr. Lieberman's diagnosis and treatment. In Dr. Edelman's medical opinion, "biodetoxification" was not a medically necessary or even beneficial treatment. Dr. Edelman also opined that there is no demonstrated relationship between the autoimmune markers Dr. Lieberman's tests found and exposure to Diazinon or any other organophosphate. Further, Dr. Edelman testified that there was no medical evidence of genetic "hypersensitivity" to Diazinon, as asserted by Dr. Lieberman.

The trial court found that Campbell had not presented proof of the cause of her injury, in that no connection to Diazinon was made except for it being a common pesticide. Additionally, testimony was presented concerning the extent to which Campbell was vocationally disabled as a result of her present medical condition. The trial court found she was not.

STANDARD OF REVIEW

The plaintiff in a worker's compensation suit bears the burden of proving every element of the case by a preponderance of the evidence, including the existence of a work-related injury by accident. *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997); *Talley v. Virginia Ins. Reciprocal*, 775 S.W.2d 587, 591 (Tenn. 1989). An injury must both "arise out of' as well as be "in the course of " employment to be compensable. An accidental injury arises out of and is in the course and scope of employment if it has a rational connection to the work and occurs while the employee is engaged in the duties of employment. *Orman v. Williams Sonoma*, 803 S.W.2d 672, 676 (Tenn. 1991). Except in the most obvious and routine cases, the plaintiff in a worker's compensation suit has the burden of establishing causation by expert medical evidence. *Id.* Causation cannot be based upon speculative or conjectural proof, however, absolute certainty is not required and reasonable doubt is to be construed in favor of the employee. *White v. Werthan Indus.*, 824 S.W.2d 1158, 159 (Tenn. 1992).

DISCUSSION OF ISSUES

Counsel for Ms. Campbell has raised a number of issues, which we discuss in the order in which they were raised.

1. Was the trial court's judgment contrary to law and the weight of the evidence and is Ms. Campbell entitled to permanent total disability benefits?

The pivotal issue in this case is not whether Ms. Campbell is disabled; the dispute is whether her disability is causally related to her employment, and specifically, whether a chemical pesticide, Diazinon was sprayed in the office where she worked and caused her disability. Dr. Lieberman was the only expert witness to establish a causal connection to Ms. Campbell's work. He testified that his opinion was based on Ms. Campbell's history of "exposure in the workplace to an organophosphate pesticide which was known as Diazinon."

Ms. Campbell also told Dr. Edelman that she was exposed to Diazinon in the workplace. Neither Ms. Campbell nor any other witness testified to any personal knowledge concerning the identity of the product or substance that produced the odor at her place of employment. Ron Miller, owner of SIS, which was Ms. Campbell's employer, testified that someone, not associated with his company, had sprayed something in the foyer of the building and there were dead ants around some trees and plants in the building. He described the odor "as a chemical smell. I can't tell you specifically. It just smelled - - it was strong. It may have been a bug spray. It smelled like a chemical smell." He did not attempt to find out what caused the odor.

At one point in the proceedings, the trial judge commented, "To this point I have heard no proof from anybody as to what spray was applied in this office." No proof was subsequently presented to establish the identity of the substance that caused the offensive odor. In the absence of proof that the source of the odor was Diazinon, or some similar organophosphate, Dr. Lieberman's opinion as to a causal connection to the work has no value.

The trial judge was faced with (a) the testimony of Dr. Lieberman who established a causal connection to the work based on his assumption that Ms. Campbell was exposed to Diazinon and (b) the testimony of Dr. Edelman that the symptoms displayed by Ms. Campbell were not caused by an organophosphate such as Diazinon. Neither this Court, nor the trial judge, were able to see and hear Dr. Lieberman testify, but the trial judge did see and hear Dr. Edelman and expressly found him to be a credible witness. When medical testimony differs, it is within the discretion of the trial court to accept the opinion of one medical expert over that of another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990). In view of the fact that Dr. Lieberman's opinion was based on an assumed fact not proved, we are unable to find that the trial court abused its discretion in accepting the testimony of Dr. Edelman.

Because we find no error in the determination of the trial court that Ms. Campbell failed to prove a causal connection to her employment, we find the judgment is not contrary to law and the weight of the evidence.

2. Did the trial court err by making himself a trial witness regarding vocational disability?

Counsel for Ms. Campbell asserts that the trial judge substituted his own observations for the vocational and medical evidence in the record. In the course of ruling at the conclusion of the trial of this case, the trial judge commented on the quality of Ms. Campbell's testimony as showing she did have the ability to concentrate, and that he had observed her assisting in the presentation of the case by passing notes to her counsel, which he found contradicted some of the testimony regarding her disability. In view of Ms. Campbell's failure to establish that her disability has a causal connection to her employment, the comments did not impact the result in the case, and this issue is moot.

3. Did the Court err by refusing to allow new evidence and by thwarting presentation of rebuttal testimony?

At the close of proof, Ms. Campbell attempted to hold the proceedings in recess because "I (counsel for Campbell) don't think he (rebuttal witness) is going to be available this late in the afternoon because he teaches." The trial court responded, "Now, Counsel, this case is set for today." Counsel for Ms. Campbell contends that the trial court erred by not delaying the case until the next day. If a party wishes to offer rebuttal testimony, it is that party's responsibility to see that the witness is available at the time when rebuttal evidence is to be presented. The rebuttal witness is not identified in the record, nor was the trial court advised of the content or nature of his testimony. Although counsel for Ms. Campbell filed a lengthy motion for new trial followed by a corrected motion for new trial, no affidavit of the rebuttal witness was offered or made part of the record. Whether to allow the presentation of additional proof after a party has closed is a matter of discretion with the trial court. *Simpson v. Frontier Comm. Credit* Union, 810 S.W.2d 147, 149 (Tenn. 1991); *Russell v. Crutchfield*, 988 S.W.2d 168 (Tenn. Ct. App. 1998). In the absence of some means to determine the nature or value of the rebuttal testimony, we are unable to find the trial judge abused his discretion.

Ms. Campbell also asserts that she should have a new trial because

> "there is now a biomarker available for detecting organophosphate exposure, as reported two days ago by the British Broadcasting Corporation (BBC Online). See Alex Kirby, "Nerve poison leaves telltale evidence." April 18, 2000, posted on the web at the BBC Online website: http://news.bbc.co.uk/hi/english/sci/tech/newsid_708000/70839.stm A biomarker test, brain injury test and other tests and examinations are planned; toxicologists' expert testimony should be heard by the Trial Court. A toxicologist is currently treating Ms. Campbell for 'severe toxicity due to organophosphate poisoning.'"

Counsel for Ms. Campbell failed to produce any expert affidavit or evidence showing that the alleged newly discovered evidence would change the result in Ms. Campbell's case. A new trial can be granted because of newly discovered evidence only when it is clear that introduction of the new evidence will produce a different result at a subsequent trial. *Collins. v. Greene County* Bank, 916 S.W.2d 941, 944 (Tenn. Ct. App. 1995); *Wright v. Quillen*, 909 S.W.2d 804, 810 (Tenn. Ct. App. 1995). We find no error in the refusal of the trial court to grant a new trial.

4. Did the trial court err by not ruling on Ms. Campbell's *Daubert* motion and striking Dr. Edelman's testimony?

We have previously discussed the trial court's discretion in weighing testimony of experts in worker's compensation cases and found no error. Dr. Edelman testified that he was board certified in the areas of occupational and environmental medicine by the American Board of Preventative Medicine and also board certified in medical toxicology, and that he ran the Regional Poison Control Center in California for 11 or 12 years as the medical director and

submitted a curriculum vitae. Counsel for Ms. Campbell was invited to *voir dire* Dr. Edelman and stated, "We would have no objection to his being tendered as an expert, but I don't think they have laid the foundation for an expert on pesticides." The trial judge then announced that Dr. Edelman was accepted in the field of toxicology and vocational and environmental health. Campbell first raised the issue of exclusion of Dr. Edelman's testimony under Rules 403, 702 and 703 of the Tennessee Rules of Evidence and *Daubert v. Merrill –Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) in the motion for new trial. We conclude that Ms. Campbell, having consented to Dr. Edelman testifying as an expert, is precluded from having the testimony stricken, and the trial judge could properly consider the testimony and weigh it as he would that of any other expert.

5. Did the trial court err by concluding Ms. Campbell never requested medical treatment?

It is alleged that the trial court erred in concluding that Ms. Campbell never requested treatment. Ron Miller, the owner of Campbell's employer, testified that he told Campbell to file a worker's compensation claim when it looked like there might be a connection "between the smell and her condition." Travelers, the employer's carrier, sent Campbell to Dr. Edelman for examination and he found no connection between her medical condition and her employment. Travelers subsequently denied the claim. In the absence of proof of a causal connection to the employment, it matters not whether medical treatment was requested by Mrs. Campbell.

6. Did the trial court err by refusing to discuss or find bad faith by defendant?

Counsel for Ms. Campbell contends that the trial judge erred by refusing to discuss the bad faith refusal to provide medical treatment to Ms. Campbell. In view of the fact that the trial court found that Campbell had failed to establish a causal connection between her complaints and her employment and that the claim should be dismissed, there was no occasion or reason to discuss bad faith, and no error in refusing to do so.

7. Did the trial court err by refusing to enforce subpoena?

Ms. Campbell contends the trial judge abused his discretion in refusing to enforce a subpoena for the defendant's records. From the trial transcript, it appears that the trial court ruled that a subpoena for the "production" of documents with a return showing it was "left with receptionist" was in the nature of a discovery subpoena and would not be enforced at trial. The trial court ruled that a subsequent subpoena for documents with a return that recited, "faxed" was not properly served under the Tennessee Rules of Civil Procedure. Rule 24 of the Tennessee Rules of Appellate Procedure provides that subpoenas for witnesses are excluded from the record on appeal unless a party files with the clerk of the trial court a written designation that subpoenas are to be included. The subpoenas at issue have not been made part of the technical record or transcript before this Court and we are, on the record before us, unable to find the trial court abused its discretion.

8. Did the trial court err by unduly limiting cross-examination?

Counsel for Ms. Campbell complains that the trial judge *sua sponte* interrupted and limited his cross-examination of the defendant's expert. The placing of limitations on the time and manner of any examination, including cross-examination is within the discretion of the trial judge. *State v. Harris*, 839 S.W.2d 54, 72 (Tenn. 1992); *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708-09 (Tenn. App. 1999). Trial judges have the discretion to limit repetitious and cumulative questioning. *Id.*; Rules 403 and 611, Tennessee Rules of Evidence. Having reviewed the transcript of the testimony of Dr. Edelman, we find that direct examination of Dr. Edelman took approximately 22 pages, and the cross-examination covered more than 60 pages, much of which was repetitious or irrelevant. We find no abuse of discretion by the trial judge.

9. Did the trial court err by refusing to grant a new trial and recuse himself?

Counsel for Ms. Campbell engages in an attack on the trial judge based on counsel's prior experience with the judge when both were practicing attorneys, and based on the manner in which the judge conducted the trial, such as the length of the lunch recess, refusal to carry the trial over to another day, and the reporting of counsel's conduct in the case to disciplinary authorities. Parties must make recusal motions promptly after the facts forming the basis of the motion become known or the right to question a judge's impartiality is waived. *Davis v. Dept. of Employment Sec.*, 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999). Counsel knew the facts of his prior experience with the judge before the trial began and should have raised the issue of impartiality then. The mere fact that the judge ruled adversely to Ms. Campbell does not demonstrate bias. We do not interfere in a judge's decision regarding recusal unless there is a clear showing of abuse of discretion. *Caudill v. Foley*, 21 S.W.3d 203, 215 (Tenn. Ct. App. 1999). The trial judge in a bench opinion ruling on Ms. Campbell's motion for new trial set out very specifically the reasons for his actions, and we find no abuse of his discretion or error.

10. Did the trial judge rush his decision and not adequately read the record on a day when he was admittedly distracted?

Counsel for Ms. Campbell maintains in his brief that because the trial judge's mother was being moved from a hospital to a nursing home on the day of the trial that the judge "took only one hour to consider an enormous record, including Dr. Lieberman's five hours of depositions and voluminous exhibits." He says the judge "shot from the hip" and did not read Dr. Lieberman's deposition. We note that in delivering his oral findings of fact after the trial, the trial judge referred to specific pages of the deposition of Dr. Lieberman, and specifically addressed objections made during the deposition to eight exhibits tendered as part of the deposition. We hardly see how the trial judge could do this without reading the deposition. Additionally, the record supports the trial judge's oral findings of fact. We find the allegations to be without merit.

11. Did the trial judge err by not reasonably accommodating Ms. Campbell's disability by moving the trial to a room with better air quality?

Counsel for Campbell states that Ms. Campbell and counsel were required to enter the trial judge's 'smoke-filled chambers" the morning of trial and that breathing tobacco smoke caused Ms. Campbell distress throughout the morning session of the trial. Counsel asserts that the trial judge's "lifestyle choice and personal opinions should not be permitted to deny Ms. Campbell a fair trial." We find nothing in the record to indicate that Ms. Campbell or her counsel raised an issue at the time of the trial concerning any distress caused her, or requested a delay in the proceedings because she was unable to fully participate in the trial. Having failed to bring the matter to the attention of the trial court at the time of the trial, Ms. Campbell cannot now complain. Issues raised for the first time on appeal are waived. *Norton v. McCaskill*, 12 S.W.2d 789, 795 (Tenn. 2000); *Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996).

CONDUCT OF COUNSEL FOR MS. CAMPBELL

Having discussed the issues raised on this appeal, we cannot avoid the unpleasant task of addressing the conduct of Edward A. Slavin, attorney for Ms. Campbell in this case. We find certain conduct constituting a personal attack on the trial judge by Mr. Slavin to be offensive and improper, such as the following:

(a) In a pleading styled "Plaintiff's Corrected Motion for New Trial" counsel made statements critical of the trial judge without providing any support thereof, including the following:

> (1) "The Trial Court rushed his consideration of this case on a day when he appeared preoccupied. The Trial Judge took a two-hour lunch for personal business. He then unfairly restricted the amount of time for cross examination of the Defendant's medical expert and refused to allow a rebuttal witness to be called on another day. He then took an inadequate amount of time for a rushed reading of the transcript and exhibits to the depositions of the Plaintiff's treating physician and medical expert, Dr. Alan Lieberman."
>
> (2) "The Trial Court erred by mocking and trivializing the treatment provided by Dr. Alan Lieberman, who is a published, Board-certified expert on toxic materials, their effect on the human body, and treatment."
>
> (3) "The Trial Court showed bias and prejudice by making pejorative remarks about 'press releases' that appear to indicate that Judge Workman may recall and resent a prior interaction with Plaintiff's counsel in 1990, when Judge Workman was Knox County Law

Director, regarding a controversial proposal to build a $175 million incinerator."

(4) "The Trial Court rudely interrupted Ms. Campbell in the midst of her testimony, abruptly taking an early lunch and depriving Ms. Campbell of an orderly presentation of her direct testimony about her injury and illness."

(5) "The Trial Court in effect 'shot from the hip' on an occupational disease case."

(6) "(T)he Trial Court made erroneous conclusions, revealing his prejudice and bias, and improperly making himself a witness to the contents of confidential communications."

(7) "It appears that the Trial Court may have permitted his own tolerance for tobacco smoke to color his judicial response to the effect of chemicals upon Mrs. Campbell's health, career and employability. The Trial Courts' lifestyle choice and personal opinions (e.g., about the risks and benefits of ingesting toxic materials) should not be permitted to deny Mrs. Campbell a fair trial."

(b) In the Brief of Appellant Mary Jane Campbell filed in this Court, Mr. Slavin made statements critical of the trial judge unsupported by the record such as the following:

(1) "The Trial Judge based his decision on prejudice: he drove under the inference. The Trial Judge unreasonably based his decision on information he did not know: this is the judicial equivalent of building a skyscraper upon a House of Cards."

(2) The Trial Judge's deeply insensitive statements about Ms. Campbell's note taking. . ."

(3) "Here, the Trial Judge's cabined view led him far astray . . ."

(4) "Here, however, the Trial Judge made no intent to hide his intent: to be a 'cat's paw' for Defendant, denying Ms. Campbell a fair trial, even attempting to have her counsel disciplined for filing a Motion for New Trial."

(5) "The Trial Court scorned First Amendment Rights."

(6) "The Trial Judge dispensed 'injustice' though it appears in this case that this was possibly not from a mere 'mischance.'"

These allegations contradict Mr. Slavin's acknowledgment that this was his first worker's compensation case, and his statement that he appreciated the trial judge's "patience in cross

examination and everything else." It appears that Mr. Slavin may not be a seasoned trial attorney familiar with all the nuances of trial practice when he erroneously states in both his Appellant's Brief and Reply Brief filed in this Court that a motion for new trial was a procedural prerequisite for appeal. A motion for new trial is not necessary in non-jury cases, such as worker's compensation claims. Rule 3(e), Tennessee Rules of Appellate Procedure. In addition, Mr. Slavin filed a series of "citations" of supplemental authority in this Court that added nothing new and failed to address the key element of his client's case, i.e. proof that his client was exposed to Diazinon in her workplace.

Seasoned or not, all attorneys practicing in the Court of this State must abide by Tennessee's Code of Responsibility which provides: "In appearing in a professional capacity before a tribunal, a lawyer shall not:

. . . . .

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal."

. . . . .

Rule 8, Rules of the Supreme Court, Canon 7, DR 7-106(C).

We find that Mr. Slavin's conduct in this case violates the word and spirit of Canon 7. Mr. Slavin has previously been the subject of sanctions for misconduct, such as a personal attack maligning adversary counsel's character, by the United States District Court for the Eastern District of Tennessee. See *Lockheed Martin Energy Systems, Inc. v Slavin*, 190 F.R.D. 449 (U.S. Dist. Ct., E.D. Tenn., 1999). The District Court judge noted that Mr. Slavin had been barred from appearing before two different Administrative Law Judges for engaging in abusive personal attacks on the judges. This type of repetitive misconduct can neither be tolerated nor ignored. The Clerk of this Court shall furnish a copy of this opinion, and make available the court file in this cause, to the Board of Professional Responsibility of the Supreme Court of Tennessee for appropriate action.

CONCLUSION

The judgment of the trial court dismissing Ms. Campbell's claim for worker's compensation benefits for failure to establish her claimed disability is causally related to her employment is affirmed. Costs of the appeal are taxed to Ms. Campbell and her surety, for which execution, if necessary, may issue.

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Howell N. Peoples, Special Judge

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AT KNOXVILLE

MARY JANE CAMPBELL v. THE TRAVELERS INSURANCE COMPANY

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No. E2000-01894-WCM-CV

ORDER

This case is before the Court upon motion fore review filed by the appellee, Mary Jane Campbell, pursuant to Tenn. Code. Ann. § 50-6-225(e)(5)(B) the entire record, including the order of referral to the Special Workers' Compensation Appeal 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 motion for review is well-taken and should be denied; 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 taxed to Mary Jane Campbell.

PER CURIAM