

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 2001 Session

**KHYVA PHIPPS v. INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA , ET AL.**

**Direct Appeal from the General Sessions Court for Warren County
No. 6840-GSWC Larry Ross, General Sessions Judge**

**No. M2000-01962-WC-R3-CV - Mailed - December 18, 2001
Filed - January 22, 2002**

This workers' compensation appeal has been referred to the Special Workers' Compensation Panel of the Supreme Court in accordance with *Tennessee Code Annotated* § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the appellants, Insurance Company of the State of Pennsylvania and Carrier Corporation insist that: 1) the trial court erred in excluding the medical records of Dr. Robert Cannon, M.D. documenting the employee's treatment for injuries sustained in a previous car accident, which was offered into evidence by appellant through the deposition of the physician's custodian of records; 2) the evidence preponderates against the trial court's finding that the plaintiff suffered a compensable injury to her back under the Workers' Compensation Act; and 3) the trial court erred in its application of the burden of proof as provided by the Workers' Compensation Act. After a complete review of the entire record, the briefs of the parties, and the applicable law, we affirm the judgment of the trial court.

Tenn. Code Annotated § 50-6-225(e)(1999) Appeal as of Right; Judgment of the General Sessions Court Affirmed.

WEATHERFORD, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and JOE C. LOSER, JR., SP.J., joined.

B. Timothy Pirtle, McMinnville, Tennessee, for the appellants Insurance Company of the State of Pennsylvania and Carrier Corporation.

William Joseph Butler and Frank D. Farrar, Lafayette, Tennessee for the appellee, Khyva Phipps.

MEMORANDUM OPINION

Mrs. Khyva Phipps was 59 years old at the time of the trial. She completed the eleventh grade, but had no further formal education. She had taken the GED examination, but did not pass it.

Mrs. Phipps had worked for Carrier Corporation for about 22 years, first as an assembly line worker and later as a janitor. Prior to working for Carrier, Mrs. Phipps had held factory jobs where she folded shirts and had also worked as a waitress.

In September of 1991, Mrs. Phipps was involved in an automobile accident, for which she sued and received payment for injuries. She received treatment for these injuries from Dr. Robert Cannon, M.D., until 1993.

According to Mrs. Phipps, on March 26, 1998, she was pulling a garbage liner out of a 55 gallon garbage can when she felt her low back stinging and burning. She started having pain in her leg approximately 2 weeks later. On April 14, 1998, Mrs. Phipps reported this incident to Fay Glasgow, a nurse at Carrier Corporation. Mrs. Phipps filled out an "Employee Statement of Injury" form describing the accident as follows: "I Khyva Phipps was emptying garbage into a dumpster I was throwing it up & felt something in my back pulling & burning right side up my back & lower part."

Carrier referred Mrs. Phipps to Dr. Chastain for treatment. On April 15, 1998, Dr. Chastain examined Mrs. Phipps, who reported "intermittent pain radiating down the right leg but primarily the pain is in the right lumbar and mid-back." According to Dr. Chastain's report, Mrs. Phipps "has no previous back problems."

Mrs. Phipps also saw Dr. Zwemer and Dr. Vaughn before being referred to Dr. Michael Moran M.D., neurosurgeon, for further treatment. On September 14, 1998, Dr. Moran examined Mrs. Phipps, who reported that her symptoms began 6 to 7 months ago after lifting a garbage bin. Dr. Moran noted that "she experienced immediate burning pain in her low back. This soon progressed down to radiate into her buttocks and down the posterolateral aspect of both lower extremities. Leg pain is in the sciatic type of distribution. The right is worse than the left." Dr. Moran also found decreased range of motion.

Dr. Moran's records did not contain any history of low back pain prior to March of 1998. Dr. Moran reviewed an MRI that revealed bulging discs and stenosis. He found that she had a positive straight leg raise of 90 degrees, but no neurologic deficits.

Dr. Moran diagnosed "some radicular complaints [leg pain] and some back pain likely secondary to her spinal stenosis and foraminal stenosis." Dr. Moran treated Mrs. Phipps, from September 1998 through April 1999 with physical therapy and injections to relieve suspected nerve root irritation. They also discussed spinal surgery. Dr. Moran stated that she had a 5% anatomical impairment based on continued pain without neurologic deficits which placed her in DRE Category II according to the AMA Guides.

After reviewing Dr. Canon's (Mrs. Phipps' treating physician after the 1991 car accident)

records¹, Dr. Moran stated that he would have placed Mrs. Phipps in the same category with the same impairment rating at that time as well based on her symptoms and the exam findings. Dr. Moran concluded that Mrs. Phipps did not suffer an aggravation of her pre-existing condition as defined by the AMA Guides to the extent of causing an additional 3% impairment. When asked to compare the 1993 MRI report from Dr. Cannon's records with the 1998 MRI report, Dr. Moran found that the changes "would be more indicative of a degenerative process" rather than a traumatic process.

In reviewing Dr. Canon's last note of treatment dated 10/7/93, Dr. Moran stated that it did not indicate a radicular component to back pain. Dr. Moran agreed that both Dr. Chastain's and Dr. Vaughn's records indicated that Mrs. Phipps had a radicular component to her symptoms after the incident at Carrier in March of 1998.

Dr. Moran agreed that Mrs. Phipps had previous lumbar stenosis, then received a soft-tissue injury of March of 1998 and started having radicular components to her injury that she had not had since the early 1990's. Dr. Moran acknowledged that it would not be unreasonable to allow Mrs. Phipps a 5% impairment for this injury.

Dr. Moran found Mrs. Phipps to be honest, trustworthy and had no indication she was being misleading or deceptive about her symptoms.

On August 31, 1999, Mrs. Phipps saw Dr. C. Robinson Dyer, M.D., orthopedic surgeon, for an independent medical evaluation. She continued to report "numbness and tingling in the right leg,... weakness in the right leg, ... dull pain in the buttocks and the posterior right thigh. She has not reported any other types of back injuries before this."

Dr. Dyer found limitation of motion in her lumbrosacral spine and palpable muscle tightness in her back when attempting to bend forward or move in extension. Dr. Dyer found that Mrs. Phipps condition was permanent as it had been 18 months since her initial episode, and she had had a long trial of conservative care and 3 epidural injections. He also noted that she might be a candidate for spinal surgery in the future.

Dr. Dyer found that her current complaints were caused by her lifting injury at Carrier in March 1998 and assigned an 8% permanent partial impairment rating to the body as a whole based Table 75 page 113 for specific spinal disorders (intervertebral disk or other soft tissue lesions)of the AMA Guides.

He also assigned permanent restrictions of no lifting over 35 pounds maximally, 25 pounds,

¹During Dr. Moran's deposition, plaintiff's counsel objected to Dr. Canon's notes being considered as substantive evidence stating that it was merely evidence being considered by Dr. Moran in the deposition. In its reply brief, Defendant's counsel acknowledges that these documents were not offered as substantive evidence.

frequently; no repetitive lifting; alternate sitting and standing with no more than 30 minutes of sitting or standing at any one time; no more than 3 hours each sitting or standing in an 8 hour day; only occasional bending, stooping or squatting; no kneeling climbing, crouching or crawling.

At the time of trial, Mrs. Phipps was still working at Carrier as a janitor. She indicated that some aspects of her job that involved bending over or lifting more difficult, but she was able to work within her restrictions. She testified that after her injury she is unable to wash her car, clean or vacuum her carpets, or clean her commodes at home due to back and leg pain. She also stated that her husband does the shopping since her injury because the lifting “hurts my back and my legs.” She now uses a TENS unit, back brace and magnets to get relief from symptoms.

In response to interrogatories during discovery, Mrs. Phipps answered “No” when asked if she had had any previous injuries to her back. According to Mrs. Phipps, she injured her neck and shoulder in the car accident. She maintained she was unaware that Dr. Cannon’s records indicated she had a low back problem until just prior to the trial of this case. She acknowledged that after completing treatment with Dr. Cannon in 1993, Mrs. Phipps stated she wasn’t having any problems with her back.

Ms. Phipps stated in her deposition that in December 1997, she went to see Dr. David Florence, M.D., “because my back was bothering me.” Mrs. Phipps saw Dr. Florence, her personal physician, for low back pain in late 1997 and early 1998. Mr. Troy Brown, Dr. Florence’s office manager testified at trial that these records did not indicate that Mrs. Phipps had ever complained of pain radiating down into her legs prior to March 26, 1998.

Mrs. Phipps did not remember telling Dr. Chastain or Dr. Dyer that she had no previous back problems. Several times during her testimony, she stated she was “confused” or “mixed-up.” When Mrs. Phipps was being questioned by her own counsel on re-direct examination regarding whether she had reported any prior back injuries to Dr. Dyer the trial transcript reads as follows:

THE COURT: Well, I don’t know whether she said that she didn’t remember saying that or not, she has said she didn’t remember on so many different things.

THE WITNESS: I know. I know. I get mixed up on all these dates.

Defendant’s counsel sought to introduce records from Dr. Cannon’s office via the deposition of Ms. Sherry Ferrell identified as custodian of these medical records. Citing *Tennessee Code Annotated* § 24-9-101 and *Tenn. R. Civ. Proc.* 32, the trial court excluded these records from evidence.

The trial court found that Mrs. Phipps had degenerative disease that existed before the injury at Carrier in March of 1998; and that she sued and was paid for permanent bodily injuries sustained

in a car accident in 1991. Based on the testimony of Mrs. Phipps and Dr. Dyer, the trial court found that Mrs. Phipps had sustained a work related injury as a result of the incident at Carrier in March of 1998 and retained a 9% vocational disability.

ANALYSIS

Review of findings of fact by the trial court shall be *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)*. *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

The appellant first raises the following issue:

Whether the trial court erred in excluding from evidence the medical records of Dr. Robert Cannon, M.D., offered by appellant through the deposition of his custodian of records.

Defendant's counsel sought to introduce the deposition of Sherry Ferrell identified as custodian of medical records from Dr. Cannon's office with the records attached as an exhibit to this deposition.

The testimony from Ms. Ferrell's deposition is as follows:

Q: Ms. Ferrell, you're the custodian of the records for Dr. Canon?

A: Right.

Q: And you have handed my a yellow chart that contains his records of Khyva Phipps?

A: Yes

Q: And also an envelope that contains a file and copies of the chart?

A: Yes

Q: Does the envelope contain a copy of everything in the chart?

A: It's all his records.

MR PIRTLE: Okay. And I would ask you, if you would, to make a copy of his chart as an exhibit to this . Thank you . That's all. ...

Tennessee Rule of Civil Procedure 32.01 addresses use of depositions at trial and provides:

...[A]ny part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: ... (D)... the witness is exempt from subpoena to trial under T.C.A. § 24-9-101.

Tennessee Code Annotated § 24-9-101 provides in pertinent part:

Deponents exempt from subpoena to trial but subject to subpoena to a deposition are:

(8) A custodian of medical records, if such custodian files a copy of the applicable records and an affidavit with the court and follows the procedures provided in title 68, chapter 11, part 4, for the production of hospital records pursuant to a subpoena duces tecum.

The Hospital Records as Evidence Act, *Tenn. Code Ann.* § 68-11-401 *et seq.* defines "records" as "'hospital records' as defined in § 68-11-302." *Tenn Code Ann.* § 68-11-401(2)(A). *Tennessee Code Annotated* § 68-11-302 (5)(A) defines hospital records as those made or maintained in hospitals pertaining to hospital services rendered to patients admitted to hospitals.

Dr. Canon's records are those of a physician and do not meet the definition of hospital records as provided in the statute. In any event, the plaintiff did not file an affidavit with the court as required by § 24-9-101(8). *See* 1995 Tenn. LEXIS 697, *Shiple v. Insurance Co. Of North America.*, No. 03S01-9502-CH-00019 (Tenn. 1995)

Tennessee Code Annotated § 68-11-405(a) requires that among other things the affidavit shall state:

(1) That the affiant is duly authorized custodian of the records and has authority to certify the records;

(3) That the records were prepared by the personnel of the hospital or community

mental health center, staff physicians, or persons acting under the control of either, in the ordinary course of hospital or community mental health center business at or near the time of the act, condition or event reported therein; ...

Tenn. Code Ann. § 68-11-405(a).

Ms. Ferrell's testimony does not address these matters and neither does it qualify Dr. Cannon's records as business records according to *Tennessee Rule of Evidence* 803(6) which provides the following exception to the hearsay rule:

(6) Records of Regularly Conducted Activity. - Records of Regularly Conducted Activity - A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used on this paragraph includes every kind of business, institution, profession, occupation, and calling of every kind, whether or not conducted for profit.

We find no error on the part of the trial court in excluding from evidence Ms. Ferrell's deposition with Dr. Cannon's records attached as an exhibit. This issue is without merit.

We will address the appellant's two remaining issues together:

Whether the evidence preponderates against the trial court's finding that the plaintiff suffered a compensable injury to her back under the Workers' Compensation Act and whether the trial court erred in its application of the burden of proof as provided by the Workers' Compensation Act.

The employee has the burden of proving every essential element of his claim. *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992).

Except in the most obvious and routine cases, the claimant in a workers' compensation action must establish causation by expert medical evidence. *Orman v. Williams Sonoma, Inc.* 803 S.W.2d 672, 676 (Tenn. 1991)

To be compensable, the pre-existing condition must be advanced, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. *Sweat v. Superior Industries Inc.*, 966 S.W.2d 31, 33 (Tenn. 1998).

An employer takes the employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if she had not had the pre-existing conditions. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996).

Three physicians who treated Mrs. Phipps noted a radicular component to her symptoms after March 1998. Dr. Moran found radicular pain and decreased range of motion. His MRI report indicated bulging discs and stenosis. He assigned a 5% anatomical impairment based on continued pain with no neurologic deficits. After reviewing Dr. Cannon's records Dr. Moran stated he would have assigned the same impairment rating to Mrs. Phipps at that time based on her symptoms and the exam findings. In his opinion, Mrs. Phipps did not have an aggravation of her pre-existing condition as defined by the AMA Guides as causing more than 3% additional impairment.

Dr. Dyer found her condition permanent as she still had symptoms 18 months since the incident at Carrier. He found limitation of motion and muscle tightness. Dr. Dyer found that her current complaints were caused by her lifting injury at Carrier in March 1998 and assigned an 8% permanent partial impairment rating.

The trial court found that Mrs. Phipps had a pre-existing condition. The trial court recognized that Dr. Dyer was not aware of Mrs. Phipps prior back problems and took this into account when evaluating his testimony.

The trial court has the discretion to accept the opinion of one medical expert over another medical expert *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

The claimant's own assessment of her physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

Mrs. Phipps testified that bending over or lifting is more difficult but that she is able to work within her restrictions. She also testified everyday activities that cause her back and leg pain.

In its ruling, the trial court noted that it had some concerns with Mrs. Phipps' testimony:

Mrs. Phipps, I had a real problem resolving the problems in you favor of disclosure of prior injuries. I went back over that time and time again, that you did not tell about injuries in '90,'91, went back to the doctor in '93,'95, and even in '97. That caused me real problems.

Bottom line is I had questions. You got on the stand and made a terrible witness, ma'am. I don't think you were lying, trying to lie, but you were difficult to follow. I don't remember answers that just came and came and time after time about not remembering, and maybe there is a reason. And again, still through all of that, I still have to make a decision.

In ruling on the Defendant's Motion to Alter or amend the judgment or in the Alternative for a New Trial, the trial court addressed the issue of witness credibility as follows:

...Gentleman, this case troubled me from the start. It troubled me during the trial; it troubles me now, it troubled me after the decision, particularly concerned about this lady's testimony when I read it in the deposition, but after she got on the stand and I listened to her testimony, I did not find that there was a lack of credibility on her part and I found that she was confused about a lot of issues. I don't think she intentionally tried to mislead the doctors or any anyone else, because on the stand, she was still having difficulty, for some reason, and was confused.

...[B]ut this lady herself, after I read the depositions, I thought we were going to have a real problem with her credibility, specifically from the tone and tenor of the deposition, but as I listened to her on the stand, I didn't find that same problem with her credibility that I did in the deposition, which says something about live testimony, I suppose.

After reviewing the trial transcript, it is obvious that there would be great concerns about the credibility of this witness. Numerous times during her testimony she maintained she "could not remember" or did not know dates of events, what she told doctors about previous back pain, whether she was being treated for low back pain, etc.

In evaluating the transcript of Mrs. Phipps' testimony we find ourselves in the same position as the trial court, who thought there would be "real problems" with credibility as he reviewed her deposition prior to trial. However, after hearing her live testimony the trial court resolved this issue in favor of Mrs. Phipps. The trial court, who saw and heard her testimony, was in the best position to determine whether Mrs. Phipps was being evasive and misleading or was genuinely confused and having difficulty. We find no error on the part of the trial court in evaluating Mrs. Phipps' testimony.

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Systems, Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997).

In its ruling the trial court did summarize the above case law that even in the face of some uncertainties, reasonable doubt as to causation is to be resolved in favor of the employee. The trial court indicated it used the preponderance of the evidence standard for this case. We find no error in the trial court's application of the burden of proof in this case.

After reviewing the record in this case, we find that the evidence does not preponderate against the finding of the trial court.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to the appellant.

JAMES L. WEATHERFORD
SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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JUDGMENT

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 will be paid by the appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM