IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 25, 2002 Session

ELIZABETH ANN CROLEY v. LEVI STRAUSS & CO.

Direct Appeal from the Chancery Court for Hickman County
No. 95-11299 Jeffrey S. Bivins, Chancellor

No. M2001-01481-WC-R3-CV - Mailed - February 11, 2003
Filed - March 14, 2003

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 to the Supreme Court of findings of fact and conclusions of law. In this case, the employee slipped and fell on a wet floor as she was entering the workplace. The chancellor, who had presided over the trial in this matter, left office before rendering a decision. The employee contends that the chancellor did not have jurisdiction to decide the case because the 60 day time period provided under *Tennessee Code Annotated* § 17-1-304(b) for judges who have vacated office to conclude pending cases had expired prior to the entry of an order by the Chief Justice of the Tennessee Supreme Court ordering the former chancellor to conclude the case. The employee also contends that the trial court erred: 1) in finding that the plaintiff failed to prove that her work-related accident caused a permanent right shoulder injury; and 2) by designating a faxed copy of an order as the original. We hold that the evidence does not preponderate against the trial court's finding as to causation. We also find that the trial court did have proper jurisdiction in this case and did not err in designating a faxed copy of an order as the original when the original order was lost. Accordingly, the panel has concluded that the judgment of the trial court should be affirmed.

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

JAMES L. WEATHERFORD, SR.J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and JOE C. LOSER, JR., SP.J., joined.

Wm. Landis Turner, Hohenwald, Tennessee, for the appellant, Elizabeth Ann Croley.

Patrick Alan Ruth, Nashville, Tennessee, for the appellee, Levi Strauss & Co.

MEMORANDUM OPINION

Mrs. Elizabeth Ann Croley was 62 years old at the time of trial. She completed the 8th grade in school and had no vocational training. She is married with grown children and has legal custody of a grandchild. She had not worked outside the home for 8 or 9 years prior to starting work for Levi Strauss on March 22, 1993, where she operated a machine that placed rivets on blue jeans.

On September 9, 1993, Mrs. Croley slipped and fell on a wet floor as she was entering the Levi Strauss plant. According to Mrs. Croley, she reported to the nurses' station where she told the plant nurse her shoulder, elbow, and neck were hurting. She signed an Employee Report of Injury form indicating primary injuries to her right elbow and hip with secondary injuries to her back and neck. She did not indicate an injury to the shoulder on the form.

She chose Dr. Jeffrey T. Adams, orthopedist, from a panel of three physicians offered by Levi Strauss. Later that same day, Dr. Adams examined her and found neck pain and tenderness in her lower back. She had a normal neurologic exam of her upper and lower extremities. When asked whether there was any concern about Mrs. Croley's shoulder in the course of his examination, Dr. Adams responded: "No, she had full motion of her shoulders at that time. She really – her main complaint was in her neck and in her lower back, [those were] her two areas of peak complaints."

Dr. Adams prescribed muscle relaxers, physical therapy and placed her on work restrictions. Mrs. Croley continued working for Levi Strauss until November 7, 1993, when she took sick leave for unrelated medical problems. On April 28, 1994, Levi Strauss terminated her employment when she did not return to work after being released to return to work by her gynecologist.

Dr. Adams treated Mrs. Croley until September 8, 1994. During that time she underwent a Functional Capacity Evaluation which indicated symptom magnification, MRIs, an EMG conduction study and a psychological evaluation. According to Dr. Adams, she initially started getting better and then "her symptoms suddenly changed gear and got progressively worse and markedly magnified." He concluded based on these tests that there was a psychological component that carried her symptoms to this point.

Dr. Adams stated that the only reference to shoulder pain during his treatment of Mrs. Croley did not involve the shoulder joint, but referred to the back of the neck and shoulder blade. In Dr. Adams' opinion, Mrs. Croley did not sustain a rotator cuff tear or other significant shoulder trauma from the September 9, 1993 fall:

> No. She had no signs of a rotator cuff tear. I saw her hours after her injury, and she could pick her arm up all the way over her head (indicating). With a complete rotator cuff tear, you are extremely

> weak at the time of the initial injury; severe pain. It will not allow any motion of the shoulder.
>
> She had full motion of her shoulder and we documented it in the record. She never really complained to me about shoulder joint or rotator cuff pain. It was all in the posterior shoulder girdle, which is consistent with the neck and muscular type of pain.

Dr. Adams did not assign an impairment rating. In his opinion, "She had so many nonanatomic findings and symptom magnification, it was really impossible to say that she had a documentable objective impairment."

In March of 1995, Mrs. Croley saw Dr. Robert T. Cochran, an internist who treats pain disorders. He found that Mrs. Croley's account of the fall in 1993 was consistent with her complaints of shoulder pain. Dr. Cochran diagnosed a "myofascial type pain syndrome, post traumatic in origin." He treated her with medication for several years. Dr. Cochran assigned a 5% impairment rating to the body as a whole based on an intervertebral disk spinal disorder with pain without demonstrative degenerative changes. In relation to causation, Dr. Cochran stated: "My supposition is [the pain syndrome] was related to the fall. That was the history she gave me. That's as far as I can go with that."

On June 12, 1995, Mrs. Croley was referred to Dr. William H. Ledbetter, orthopedic surgeon, with complaints of pain about her right shoulder she related to the fall in 1993. After a course of conservative treatment, an MRI revealed findings consistent with impingement and a complete rotator cuff tear. They discussed the possibility of surgery. A year passed before Mrs. Croley returned to see Dr. Ledbetter still complaining of shoulder pain. On November 22, 1996, Dr. Ledbetter performed surgery to repair the rotator cuff.

On December 28, 1998, he found she had reached maximum medical improvement and assigned a 20% impairment rating to the upper extremity. Dr. Ledbetter could not determine from his observations during surgery whether the rotator cuff injury resulted from the fall or from an unrelated degenerative process. According to Dr. Ledbetter, the MRI revealed "impingement [which] usually relates to some element of degenerative change."

Dr. Ledbetter, who did not have access to Dr. Adams' records, agreed that if the fall caused the injuries he found during surgery, he would have expected to see an onset of pain in the shoulder closely following the event. Dr. Ledbetter reviewed an emergency room report dated November 9, 1993, in which Mrs. Croley described pain radiating between her shoulder blades. In Dr. Ledbetter's opinion, her description of pain did not "really relate specifically to the shoulder joint itself in the area of the rotator cuff."

This case was tried on April 11, 2000, before Chancellor Jeffrey Bivins. On April 19, 2000, counsel for Mrs. Croley filed a motion to re-open proof to allow introduction of a transcript of a December 16, 1993, telephone interview between Mrs. Croley and a Levi Strauss employee. On August 31, 2000, before the chancellor ruled on the pending motion or issued a decision, the chancellor's term of office ended.

On December 7, 2000, the Chief Justice of the Tennessee Supreme Court issued the following order regarding this case as well as two other cases in the Hickman County Chancery Court:

> In the interest of the efficient and orderly administration of justice, the Chief Justice, exercising his statutory and inherent powers pursuant to Title 17, Part 2, Sections 201 and 202 of the provisions of Tennessee Code Annotated, and Rule 11 of the Rules of the Supreme Court, hereby designates and assigns the Honorable Jeffrey S. Bivins, former circuit judge of the 21st Judicial District, to hear the above-styled cases to their conclusion.

On May 9, 2001, Judge Bivins signed an order finding that Mrs. Croley had failed to carry her burden of proof that she had sustained a permanent injury due to the fall in September 1993 at the Levi Strauss plant.[1]

On June 5, 2001, Judge Donald P. Harris of the 21st Judicial Circuit, after finding that the original order issued by Judge Bivins had been lost before reaching the office of clerk and master, ordered that a faxed copy of the order filed May 9, 2001, be designated as the original order.

Counsel for Mrs. Croley filed a notice of appeal stating among other grounds that the trial court lacked jurisdiction to render a judgment as set out in *Tennessee Code Annotated* § 17-1-304(b).

ANALYSIS

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann.* § 50-6-225(e)(2). 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. *See Corcoran v. Foster Auto GMC, Inc.*,746 S.W.2d 452, 456 (Tenn. 1988). Conclusions of law are reviewed *de novo* without any presumption of correctness. *Ivey v. Trans*

[1]The trial court granted the motion to enter the telephone transcript into evidence. In December 1993, Mrs. Croley made a recorded statement describing shoulder pain and the nurse's treatment of her shoulder pain on the day of the fall.

Global Gas & Oil, 3 S.W.3d 441, 446 (Tenn. 1999).

I. Whether the trial court's jurisdiction had terminated, pursuant to *Tennessee Code Annotated* § 17-1-304(b), prior to entry of its judgment on June 5, 2001

Tennessee Code Annotated § 17-1-304 provides:

> (a) Whenever any trial judge shall vacate the office of judge for any cause whatsoever other than the death or permanent insanity of such judge, the judge shall have and retain, as to cases pending before the judge, the trial of which has begun prior to the judge's vacation of office, all the powers in connection with the cases which the judge might have exercised therein, had such vacation of office not occurred.
>
> (b) the judge's powers in this respect shall not extend beyond sixty (60) days from the date of such vacation of office.

Tenn. Code Ann. § 17-1-304(a)-(b).

In August of 2000, Chancellor Bivins did not win re-election and his term of office ended before he had issued a decision in this case. On December 7, 2000, (after the 60 day time limitation contained in section 304(b) had expired), the Chief Justice of the Tennessee Supreme Court issued an order assigning former Chancellor Bivins to hear the cases to its conclusion.

Tennessee Code Annotated § 16-3-501, *et seq.*, enumerates the inherent powers and supervisory authority of the Supreme Court with respect to the lower courts. *State v. Brown,* 644 S.W.2d 418, 420 (Tenn. Crim. App. 1982).[2]

Tennessee Code Annotated § 17-2-109(a)(2) provides:

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[2]..., the Supreme Court has supervisory powers over all inferior courts of this state TCA § 16-3-501. Among the enumerated powers is the power to "designate and assign temporarily any judge or chancellor to hold...any court of comparable dignity or equal higher level, for any good and sufficient reason". TCA § 16-3-502(1)... the general power to "take all such other, further and additional action as may be necessary to the orderly administration of justice within the state, whether or not herein or elsewhere enumerated" is also granted by statute to the Supreme Court. TCA §16-3-502(6). The powers of the Supreme Court are full, plenary and discretionary. TCA § 16-3-504. The Court has all the inherent powers of a court of last resort. TCA § 16-3-503.

State v. Brown, 644 S.W.2d at 420.

> Whenever litigation in any chancery or circuit court of this state shall become congested,...or whenever delay in the disposition of litigation becomes imminent for any reason, the chief justice of the supreme court may assign a former chancellor or judge to assist in the removal of such congestion or delay.

Tenn. Code Ann. § 17-2-109(a)(2).

The appellant argues that the chancellor did not have jurisdiction because the chancellor's power to dispose of this case had terminated pursuant to section 304(b) before the order from the Chief Justice was filed.

The 60 day statutory time limit in section 304(b) has been construed as directory and not mandatory in several cases. *Bedford County Hosp. v. County of Bedford*, 304 S.W.2d 697, 703 (Tenn. Ct. App. 1957); *State v. Brown*, 644 S.W.2d 418, 420-21 (Tenn. Crim. App. 1982); *Williams v. Daniel*, 545 S.W.2d 120, 123 (Tenn. Ct. App. 1976).

In *Williams*, the chancellor's term of office expired before he issued a decision in a case he presided over at trial. Forty-seven days later, the Chief Justice assigned the case to the chancellor by letter. The appellant asserted that the Chief Justice did not have authority to grant the chancellor an extension beyond the sixty-day statutory limitation. *Williams*, 545 S.W.2d at 122.

The appellate court concluded that the time limitation was directory only. *Id.* at 123. In support of its ruling, the appellate court cited *Bedford v. County of Bedford*, which found this to be the only reasonable construction of the statute: "Surely the statute should not be construed so as to require the case to be put on the trial docket just like it had never been tried and have the case heard again from the beginning." *Id.* (quoting *Bedford*, 304 S.W. 2d at 703). Moreover, "the general rule undoubtedly is that those statutory provisions which relate to the mode, or time of doing the act to which the statute applies, are not held to be mandatory, but directory only." *Trapp v. McCormick et ux*, 130 S.W.2d 122, 125 (Tenn. 1939)(holding 30 day statutory time limit to enter decree following trial is directory).[3]

In *State v. Brown*, the appellants claimed the Chief Justice did not have jurisdiction to designate the former trial judge to hear the case since the designation occurred more than 60 days after the trial judge resigned his position. *Brown*, 644 S.W.2d at 420. The court rejected the argument that the trial court had no jurisdiction to hear a motion for a new trial:

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[3] *See also, Schaeffer v. Richard*, 306 S.W.2d 340, 343 (Tenn. Ct. App. 1956) (holding that *Tenn. Code Ann.* § 20-1322, which directed judges to render decisions in non-jury trials within sixty days after trial, was directory only).

> As the state points out in its brief, to suggest that after the expiration of the sixty day time period that the Chief Justice could not designate a judge to hear the motion would be a finding that the motion could not be heard at all. As the state further points out, this would be an absurd result and certainly would be detrimental to the appellant, since without action on the motion he could neither get a new trial nor pursue his appeal. *Rule* 33(a), *T.R.Cr.P.*, *Rule* 3(e) *T.R.A.P.*
>
> Judge Cornelius was the logical candidate for this designation, since he presided at the trial and was therefore familiar with both the law and the facts applicable to this case. The Chief Justice had the power to designate and properly designated Judge Cornelius. Thus, the trial judge had jurisdiction to act on the motion, and this issue has no merit.

Brown v. State, 644 S.W.2d at 420-21.

The cases cited by appellant regarding section 304(b) are distinguishable from the present case because in those cases: 1) there was no order from the Chief Justice appointing the retired or former judge to conclude the case; and 2) the judges who had presided over the criminal trials heard the motion for new trial after the 60 day time period had expired. In both cases, the appellate courts held that there was nothing in the record granting the retired or former judge authority to act on the case after the statutory period had expired. *See White v. State,* 542 S.W.2d 628, 629 (Tenn. Crim. App.1976); *Williams v. State,* 550 S.W.2d 246, 247 (Tenn. Crim. App. 1976) (State conceded conviction must be reversed as judge did not have authority to act on motion for new trial more than 60 days after his resignation).

In the present case, the Chief Justice appointed Chancellor Bivins to decide the case pursuant to the inherent power and supervisory authority of the Supreme Court which we find is not superseded by the directory 60 day time requirement contained in *Tennessee Code Annotated* § 17-1-304(b). We find that Chancellor Bivins did have proper jurisdiction over this case as granted by the order of the Chief Justice of the Supreme Court of Tennessee. This issue is without merit.

II. Whether the trial court erred in finding that Mrs. Croley failed to carry the burden of proving that she suffered any permanent disability as a result of her fall in September, 1993

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).

In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." *Tenn. Code Ann.* § 50-6-102(12). The phrase "arising out of" refers to

causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight System, Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997)(citations omitted).

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*, at 938 S.W.2d 692 (Tenn. 1997)(citations omitted).

When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Jones v. Sterling Last Corp.* , 962 S.W.2d 469, 471 (Tenn. 1998).

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).

Three physicians testified in this case but none agreed upon the cause of the injury. First, Dr. Jeffrey Adams, the employee's initial treating physician who saw her hours after the accident, found that she had no signs of a rotator cuff tear. Dr. Adams did not assign a permanent disability rating to the employee, stating it was impossible to find that she had a documentable objective impairment because of her symptom magnification.

Dr. Robert Cochran diagnosed a myofascial type pain syndrome. He found that Mrs. Croley's account of the fall in 1993 was consistent with her complaints of shoulder pain. He based this conclusion on the information the patient had given him. He assigned a 5% impairment rating to the body as a whole based on an intervertebral disc disorder. In relation to causation, he could only state, "My supposition is [her pain syndrome] was related to the fall. That was the history she gave me. That's as far as I can go with that."

Dr. Ledbetter could not determine whether the rotator cuff injury resulted from the fall or from an unrelated degenerative process. He did state that a lack of complaint of shoulder pain in the months following the fall would minimize the likelihood that the fall was the cause of her shoulder condition. Also, Dr. Ledbetter stated that the location of shoulder pain Mrs. Croley described to emergency room personnel two months after the accident did not relate to the shoulder joint or rotator cuff.

The trial court specifically found Dr. Cochran's opinion "insufficient to carry the plaintiff's burden of proving permanent impairment." The trial court noted that Dr. Cochran "admitted that he expressed his opinion on causation merely based on the Plaintiff's description of her history."

The trial court has the discretion to accept the opinion of one medical expert over 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).

The trial court found that Mrs. Croley "exhibited demonstrable signs of symptom magnification and other psychological problems unrelated to the work-related injury which lessens the Plaintiff's objectivity and credibility in this matter." The trial judge was in the best position to judge the credibility of the witnesses.

While acknowledging that the workers' compensation laws "are to be construed liberally in favor of the worker," the trial court concluded that Mrs. Croley had not sustained her burden of proof that she suffered a permanent disability as a result of the fall.

Upon reviewing the medical testimony and considering the trial court's findings regarding Mrs. Croley's credibility, we find that the evidence does not preponderate against the finding of the trial court that Mrs. Croley failed to carry her burden of proof that she suffered a permanent injury as a result of her fall at the Levi Strauss plant in September of 1993.

III. Whether the trial court erred in designating a faxed copy as the original order of the trial court

Appellant argues in its brief that "[t]here is no authority for treating a copy, by facsimile or otherwise, as an effective substitute to the original" for purposes of complying with *Tenn. R. Civ. P.* 58 which provides that entry of a judgment is effective when a judgment containing the signature of the judge is filed with the clerk. The appellant does not challenge the authenticity, content, or signature of the judge in the faxed copy itself.[4]

On June 5, 2001, the same day as the notice of appeal in this case was filed,[5] Judge Donald P. Harris issued the following order:

> It appearing to the court that the original order in this cause was lost before reaching the office of clerk and master, and it further appearing that the judge who heard this case is no longer a judge in the 21st Judicial

[4]The courts may implement procedures for transmitting documents by facsimile. *Tenn. Code Ann.* § 16-1-113 (2001). Specifically, the Supreme Court "is urged to develop court rules and procedures to control the process of courts using fax transmissions of documents." *Tenn. Code Ann.* § 16-3-408(2001).

[5]The record contains a letter dated 11/16/2001 from the clerk and master of the trial court to the Supreme Court Clerk requesting additional time to reconstruct the lost file in this case to complete the record for filing on appeal.

Circuit, therefore the faxed copy of this order filed
May 9, 2001, shall be designated to be the original order.

Generally, trial courts have the inherent power and authority to supply lost or destroyed records. *See Tenn. Code Ann.* § 24-8-109 ("Any record, proceeding, or paper filed in an action, either at law or equity, if lost or mislaid unintentionally, or fraudulently made away with, may be supplied, upon application, under the orders of the court, by the best evidence of which the nature of the case will admit"); *Western Union Tel. Co. v. Ordway, Gordon & McGuire*, 76 Tenn. 558, 562 (1881). Clerical mistakes in judgments, orders, or other parts of the record, and errors arising from oversight or omissions, may be corrected by the trial court at any time on its own initiative. *Tenn. R. Civ. P.* 60.01. Where a matter is omitted from the record or included in error, the record may be corrected or modified to conform to the truth. Absent extraordinary circumstances, the determination of the trial court is conclusive as to whether the record accurately discloses what occurred in the trial court. *Tenn. R. App. P.* 24(e)(2001).

We find that the faxed copy of former Chancellor Bivins' order to be a valid substitution for the original lost order. We find no error on the part of the trial court. This issue is without merit.

CONCLUSION

The judgment of the trial court is affirmed. The costs are taxed to the appellant, Elizabeth Ann Croley.

JAMES L. WEATHERFORD, SENIOR JUDGE

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

ELIZABETH ANN CROLEY v. LEVI STRAUSS & CO.

Chancery Court for Hickman County
No. 95-11299

No. M2001-01481-WC-R3-CV - Filed - March 14, 2003

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, Elizabeth Ann Croley, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM