IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 12, 2009 Session

FRANKLIN JAMES WILLIAMS v. THE GOODYEAR TIRE & RUBBER COMPANY ET AL.

Direct Appeal from the Chancery Court for Obion County
No. 26,687 William Michael Maloan, Chancellor

No. W2008-00640-SC-WCM-WC - Mailed April 14, 2009; Filed August 20, 2009

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee alleged that he developed carpal tunnel syndrome as a result of his work for Employer. Employer denied the claim. At trial, an evaluating physician opined that the condition was work-related but admitted that he had no specific knowledge of the tasks performed by Employee in the course of his job. Employer sought to exclude the testimony of the physician, contending that it was based upon speculation. The trial court admitted the testimony, found the condition to be compensable, and awarded benefits. On appeal, Employer contends that the trial court erred by admitting the physician's testimony, that the evidence preponderates against the judgment, and by not applying the missing witness rule as to the treating physician, who did not testify. Further, Liberty Mutual contends that there is no evidence in the record that it was Employer's insurer at the time of this injury. We dismiss the complaint against Liberty Mutual and otherwise affirm the judgment.

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

D. J. ALISSANDRATOS, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., joined. TONY CHILDRESS, SP. J., not participating.

W. Lewis Jenkins, Jr. and Dean P. Dedmon, Dyersburg, Tennessee, for the appellants, Goodyear Tire & Rubber Company and Liberty Mutual Insurance Company.

Jay E. DeGroot, Jackson, Tennessee, for the appellee, Franklin James Williams.

MEMORANDUM OPINION

Factual and Procedural Background

Franklin Williams ("Employee") began working for Goodyear ("Employer"), a tire

manufacturer, in 1976. He alleged that he developed carpal tunnel syndrome in his left arm in August 2005 as a result of his employment. For the ten years prior to August 2005, he had worked as a member of the "balance crew." This job involved spools of steel used in the tire making process. Employee placed the spools into machines, took them out of machines and transported them within his department. He also operated a machine referred to as a "gummer," which placed liners in tires. Employee testified that the job required use of his left hand and arm, more or less, continuously.

In August 2005, Employee began having "trouble" with his left arm. He was referred to Dr. John Campbell. Dr. Campbell diagnosed left carpal tunnel syndrome. Employee testified that he informed his supervisor of this diagnosis, and his belief that the condition was work-related, on August 8, 2005. He had apparently already been scheduled for surgery at that time. Dr. Campbell performed a left carpal tunnel release on August 16. Employee was off work for six weeks. Thereafter, he returned to work for Employer and continued to do so at the time the trial occurred.

Dr. Samuel Chung, an osteopathic physician, performed an independent medical examination ("IME") at the request of Employee. Dr. Chung opined that Employee retained a 20% anatomical impairment of the left arm as a result of sensory loss caused by his carpal tunnel syndrome. He testified that he knew that Employee worked for Employer. He had a general impression of the types of work at Employer's facility but no knowledge concerning Employee's specific job tasks. Dr. Chung was asked a hypothetical question concerning a causal relationship between "heavy work, repetitive work, and quite a bit of work using his left arm . . . ." He responded: "Definitely. Most of the patients that I do see for the independent medical examination are repetitive work-related injuries, and they do come back – come here for a carpal tunnel evaluation. So that would kind of go along with that."

On cross-examination, Dr. Chung admitted that he did "not have any information upon which to base an opinion about causation of [Employee's] specific injury in this case."

Dr. Campbell did not testify nor were his records placed into evidence. At the close of Employee's proof, Employer made a motion requesting that the trial court apply the missing witness rule. During the discussion of this motion, counsel for Employee stated that Dr. Campbell had moved out of the state of Tennessee. Employer also made a motion to exclude Dr. Chung's testimony concerning causation. This had been the subject of an earlier motion in limine, which had been denied by the trial court.

The trial court denied both of Employer's motions. It found that Employee had sustained a compensable injury and awarded 25% PPD to the left arm. Employer has appealed, contending that the trial court erred by admitting the testimony of Dr. Chung concerning causation and by declining to apply the missing witness rule as to the treating physician. In addition, Employer asserts that the evidence preponderates against the trial court's finding that Employee sustained a compensable injury.

Standard of Review

Review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . 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." As this Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

Analysis

1. Admission of Dr. Chung's Testimony

On direct examination, Dr. Chung testified as follows:

> Q: Okay. And Dr. Chung, do you have an opinion within a reasonable degree of medical certainty as to whether the work history that [Employee] described to you was consistent with causing his left carpal tunnel syndrome?
> [Objection by opposing counsel]
> A: He was working at Goodyear Tire. Now, there [are] different types of job that I know that the Goodyear Tire workers do. So it depends on what department he was in. But for the most part, what I'm aware of [is] that the people . . . over there at Goodyear . . . obviously lift tires and load them to different areas. And that requires heavy [lifting] as well as repetitive motion.
>
> Q: And if in fact [Employee] was engaged in an occupation that required heavy work, repetitive work, and quite a bit of work using his left arm and his right arm, would that support your opinion that the left carpal tunnel syndrome was caused by his work history at Goodyear?
> [Objection by opposing counsel]
> A: Definitely. Most of the patients that I do see for the independent medical examination are repetitive work-related injuries, and they do come back – come here for a carpal tunnel syndrome evaluation. So that would kind of go along with that.

During cross examination, Dr. Chung testified:

> Q: All right. And would it be fair to say that you have never reviewed a job description for [Employee] at Goodyear Tire and Rubber Company? Is that correct?
> A: That's correct. I didn't review his job description.

> Q: And would it be fair to say that you have not received or reviewed any specific information on [Employee's] job duties at Goodyear Tire and Rubber Company; is that correct?
> A: That's correct. I have not looked at any specific job duties, no.
> Q: So then, it would be fair to say that you do not have any information upon which to base an opinion about causation on [Employee's] specific injury. I understand that you can talk in generalities.
> A: Right.
> Q: But as far as [Employee] himself is specifically concerned, you don't have any information upon which to base an opinion about causation; is that correct?
> A: Right. I don't necessarily have specific job duties to say that – yeah, I– no, I mean. I've never looked at a description.

By motion in limine and by objection raised at trial, Employer sought to exclude Dr. Chung's testimony regarding causation. It asserts that the testimony was unreliable based upon Dr. Chung's admission that he had no specific knowledge concerning Employee's job. On that basis, Employer contends that Dr. Chung's opinion was mere speculation and should have been excluded by the trial court pursuant to Rule 703, Tennessee Rules of Evidence. In response, Employee notes that, in addition to a specific question about his case, Dr. Chung was also asked a hypothetical question concerning the relationship between work requiring repetitive heavy use of the hand and carpal tunnel syndrome. He responded positively to that question. Employee contends that his own testimony concerning his job substantiates the basis of the hypothetical, and, therefore, Dr. Chung's opinion.

Questions pertaining to the qualifications, admissibility, relevancy, and competency of expert testimony are matters left to the trial court's discretion. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263 (Tenn. 1997). As a result, a trial court's ruling admitting or excluding expert testimony will not be overturned unless the trial court abused its discretion. *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 273 (Tenn. 2005). We note that absolute certainty with respect to causation is not required and that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005). Viewing Dr. Chung's testimony as a whole, we do not find that it was so speculative that the trial court abused its discretion by admitting it into evidence over Employer's objection.

Employer also argues that the testimony should have been excluded because Dr. Chung's report, provided in response to discovery requests, did not address the issue of causation. Employer cites *Lyle v. Exxon Corp.*, 746 S.W.2d 694 (Tenn. 1988) in support of its position. In *Lyle*, the defendant sought to exclude the testimony of an expert witness who had not been disclosed by the plaintiff, in spite of appropriate discovery, until four days before the trial. *Id.* at 698. The trial court suggested a continuance, which the defendant declined. The trial court then offered counsel the opportunity to interview the witness prior to his testimony. It also offered counsel additional time to prepare his cross examination. On appeal, the Supreme Court affirmed, stating that determination of the appropriate sanction for failure to timely disclose an expert witness was to be determined by the trial court based upon several factors, including, *inter alia*, "[t]he need for time to prepare to

meet the testimony," and "[t]he possibility of a continuance." *Id.* at 699. The Court also noted that the trial court's ruling on the issue was subject to review on an abuse of discretion basis. *Id.*

In this case, the deposition of Dr. Chung was taken on July 10, 2007. The trial occurred on August 30, 2007. In our view, this interval was sufficient to allow Employer to take a supplemental deposition to correct or expand its cross-examination. Moreover, Employer conducted a vigorous and effective cross examination on causation, illustrated by the passage quoted above. Under the circumstances, we again conclude that the trial court did not abuse its discretion in admitting this testimony.

2. Preponderance of the Evidence

Alternatively, Employer argues that, even if Dr. Chung's testimony is considered, his opinion was not based upon actual knowledge of Employee's job, and, for that reason, was insufficient to support a finding of causation. In addition, it contends that the absence of any discussion of causation in his report demonstrates that Dr. Chung did not consider the issue until the question was raised in his deposition, further suggesting the absence of a factual basis for his opinion.

As noted above, Dr. Chung was asked, and responded to, a hypothetical question, and Employee gave testimony consistent with the assumptions used in that question. It is fair to characterize Dr. Chung's testimony as limited, and Employee's testimony about the demands of his job on his left arm was brief and not especially specific. However, it is not necessary for the facts offered in a hypothetical question to mirror the evidence at trial in all particulars. Rather, such a question is sufficient if it "contain[s] enough facts, supported by evidence, to permit an expert to give a reasonable opinion which is not based on mere speculation or conjecture and which is not misleading to a trier of fact." *Pentecost v. Anchor Wire Corp.*, 662 S.W.2d 327, 329 (Tenn. 1983).

Employer had the option of cross-examining Dr. Chung to determine if his understanding of the terms "repetitive" and "heavy" were consistent with Employee's actual job duties. Likewise, Employer could have cross-examined Employee concerning the specific tasks he performed and their frequency. Alternatively, Employer could have produced medical evidence or ergonomic data demonstrating that Employee's work activities were not likely to cause carpal tunnel syndrome. Employer did not choose any of these options. Thus, Dr. Chung's testimony is the only expert medical proof in the record concerning the subject of causation. That testimony is not compelling. But, for the reasons set out above, it is sufficient to support the trial court's finding. There is no proof in the record to the contrary. For these reasons, we are unable to conclude that the evidence preponderates against the trial court's finding on the issue.

3. Missing Witness Rule

Employer contends that the trial court should have applied the missing witness rule as to the potential testimony of Dr. Campbell. "Under the missing witness rule, a party is entitled to argue, and have the jury instructed, that if the other party has it peculiarly within his power to produce a witness whose testimony would naturally be favorable to him, the failure to call that witness creates

an adverse inference that the testimony would not favor his contentions." *State v. Middlebrooks*, 840 S.W.2d 317, 334 (Tenn.1992). In *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 400 (Tenn. Ct. App. 2006), the Court of Appeals described the conditions for application of the rule: "Before the missing witness rule can be invoked, the evidence must show that '[(1)] the witness had knowledge of material facts, [(2)] that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and [(3)] that the missing witness was available to the process of the Court for trial.'" (Quoting *State v. Bigbee*, 885 S.W.2d 797, 804 (Tenn.1994)).

Clearly, the first condition is met; as Employee's treating physician, Dr. Campbell had knowledge of material facts. However, there is no evidence of any relationship between Employee and Dr. Campbell other than that of doctor and patient. Employer does not cite any Tennessee cases in which that relationship alone was found sufficient to justify application the missing witness rule.

In addition, there is no evidence in the record that it was "peculiarly within [Employee's] power" to produce Dr. Campbell. The trial court found that the doctor was "equally available to both parties." Although there is no actual evidence on the subject, the comments of counsel during discussion of Employer's motion certainly provide some basis for the conclusion that the doctor was equally unavailable to both parties. A similar conclusion by a trial court was affirmed in *Henderson v. New York Life Ins. Co.*, 250 S.W.2d 11, 16 (Tenn. 1952). Moreover, Dr. Campbell's records were reviewed by Dr. Chung and therefore available to both parties to place into evidence, though neither did.

4. Judgment Against Insurer

Finally, Employee named Liberty Mutual Insurance Company ("Liberty") as a defendant in his complaint and alleged that Liberty was Employer's workers' compensation insurer at the time of this injury. Employer's answer denied this allegation, and no proof was placed in the record concerning the issue. Nevertheless, judgment was entered against Liberty. Employee did not address this issue in his brief. We conclude that the entry of judgment against Liberty was erroneous. The judgment will be modified to dismiss all claims against Liberty.

Conclusion

The judgment of the trial court is modified to dismiss all claims against Liberty Mutual Insurance Company. It is affirmed in all other respects. Costs are taxed to Goodyear Tire & Rubber Co., and its surety, for which execution may issue if necessary.

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D. J. ALISSANDRATOS, SPECIAL JUDGE

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No. W2008-00640-SC-WCM-WC - Filed August 20, 2009

ORDER

This case is before the Court upon the motion for review filed by The Goodyear Tire & Rubber Company 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 Goodyear Tire & Rubber Company, and its surety, for which execution may issue if necessary.

PER CURIAM

CLARK, J., NOT PARTICIPATING