IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE, FEBRUARY 1997 SESSION

FILED

April 22, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

CHARLOTTE FREEMAN,	)	
	)	HAMBLEN CIRCUIT
Plaintiff/Appellee	)	
	)	
v.	)	03S01-9608-Ch-00089
	)	
CPQ COLORCHROME, INC.,	)	EARL H. HENLEY,
	)	CHANCELLOR
Defendant/Appellant	)	

For the Appellant:

David W. Noblit
Leitner, Moffitt, Williams,
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Third Floor, Pioneer Building
Chattanooga, TN 37402

For the Appellee:

Jeffrey W. Rufolo
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Chattanooga, TN 37402

M E M O R A N D U M   O P I N I O N

Members of Panel:

Justice E. Riley Anderson
Senior Judge John K. Byers
Special Judge Roger E. Thayer

AFFIRMED **BYERS, Senior Judge**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

While lifting a machine at work, plaintiff heard or felt a "pop" in her neck and experienced a slight tingling in her hands. Because she felt little or no pain at that time, she did not immediately suspect that the "pop" and the tingling might be symptomatic of serious injury. When she developed pain in the neck a few days later after sleeping on the arm, she sought medical care and found that she had herniated two cervical disks.

The trial court found the plaintiff had proved that her neck injury was caused by her work and awarded her 40 percent permanent partial disability to the body as a whole. The defendant appeals, insisting that plaintiff has not met her burden of proving that her work caused injury.

We affirm the judgment of the trial court.

Plaintiff, 46 years old with a G.E.D. diploma, began working for defendant's predecessor in 1986. While refinishing photo negatives on February 15, 1994, she lifted a 29-pound machine and felt or heard a "pop" in her neck and a slight tingling in her right arm. She didn't have much, if any, pain, and didn't think much about it.

Plaintiff went to the work site within the next three days and, in conversation with her supervisor and two other employees, said that she thought her injury was caused by lifting the machine at work. The supervisor, Kathy Quintard, who was in-and-out of the room during this conversation, thought this was only "chit-chat" among friends. Although she heard plaintiff discuss the injury, she did not consider this to be her official notice of work-related injury, and so Ms. Quintard did not make a report of it. The evidence indicates Ms. Quintard thought that unless plaintiff came to her office and made an "official" statement, she would not be entitled to workers' compensation coverage.

On February 17, 1994, plaintiff awoke with arm pain after having slept on the arm. She went to an emergency clinic that day and again on February 20, 1994,

complaining of pain and stating that she had slept on her upper right arm. Because she thought she had to have permission from the employer before she told a doctor to file workers' compensation insurance, she did not mention a work-related incident to the doctors. As she was leaving the clinic after her second visit, she asked the staff for workers' compensation forms. They gave her the forms and noted her request on her chart.

On February 24, 1994, plaintiff went to her family physician, Dr. J. Michael Mazzolini. The usual practice in Dr. Mazzolini's office is that the nurse questions the patient, obtains the history, writes it down on the chart, then sends the patient in to see the doctor, who adds his own comments, then dictates a more extensive note after the patient leaves the office that day.

Plaintiff recalls that as Dr. Mazzolini was examining her and trying to figure out what the problem was, he asked her "what might have happened . . . did you move furniture, did you lift anything?" She replied that she had "only lifted a machine at work." Her son's girlfriend went with her to Dr. Mazzolini's office, was in the examining room, and recalls the conversation between doctor and patient. She remembers that the doctor asked plaintiff, "did you move furniture, did you lift anything?" and that plaintiff replied, "only a machine at work."

Dr. Mazzolini does not remember a discussion with plaintiff about moving a machine at work; he has no record of it in his notes; and he thinks that if the conversation had occurred, he would have written it down or dictated it later.

On March 21, 1994, Dr. Mazzolini received a call from Tom Green, Human Resources Manager for defendant, inquiring whether his treatment of plaintiff was the result of a claimed work injury. Mazzolini, after reviewing his records, said no.

When plaintiff did not improve after conservative care, Dr. Mazzolini referred her to Dr. Megison, neurosurgeon, who diagnosed cervical spinal stenosis secondary to degenerative bone spurs and some herniated discs, especially at the C5-C6 and C7 levels. He performed double disc removal on April 15, 1994.

Dr. Megison was still treating plaintiff for this injury when he was deposed one year later and opined that she had not reached maximum medical improvement. He

answered affirmatively when defense counsel asked whether she could have had a spontaneous onset of the herniated cervical discs and whether other patients had complaints similar to hers after sleeping in a certain position.

When Dr. Megison refused to assess plaintiff's permanent disability,[1] the parties agreed to send her to Dr. George E. Seiters, orthopedic surgeon, for an impairment rating.

Dr. Seiters was asked for an opinion as to the cause of plaintiff's herniated disks and was given three hypotheticals: (1) no injury; (2) sleeping on her arm; and (3) lifting something at work. He opined any one of these situations could have caused the injury, since degenerative disc disease can break down without injury or in any number of different ways, including lifting something or sleeping on her arm.

The employer insists that plaintiff cannot recover because she has not met her burden of proving that her work caused her injury.

Our review is *de novo* on the record accompanied by a presumption that the findings of fact of the trial court are correct unless the preponderance of the evidence is otherwise. Tenn. Code. Ann. sect. 50-6-225(e).

Causation and permanency of a work-related injury must be shown in most cases by expert medical evidence. *Tindall v. Waring Park Ass'n.,* 725 S.W.2d 935 (Tenn. 1987).

Although absolute certainty is not required for proof of causation, the medical proof must not be speculative or so uncertain regarding the cause of the injury that attributing it to the plaintiff's employment would be an arbitrary determination or a mere possibility. *Ibid.* at 937.

However, in a workers' compensation case, a trial judge may properly predicate an award on medical testimony to the effect that a given incident "could be" the cause of the plaintiff's injury, when he also has before him lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury. *Clarendon v. Baptist Memorial Hospital,* 796 S.W.2d 685 (Tenn. 1990).

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[1]"Because I don't want to and because I never do."

The only medical evidence on causation was given by Dr. Seiters who, the trial judge and counsel for the parties agreed, "just calls them like he sees them." Dr. Seiters opined that plaintiff's injury could have occurred by lifting the machine, by sleeping on her arm, by some other act, or without any identifiable act at all.

Plaintiff testified she did not think she had an injury when she heard or felt the "pop" in her neck. When she woke up from sleeping on the arm and felt pain, she told the doctors exactly that. When she began to put two and two together she picked up workers' compensation papers from one doctor's office, although she did not discuss the work incident with the doctors because she thought she had to get permission from her employer first. She told her co-workers and supervisor informally that she hurt her neck lifting the machine, but they filed no report.

The employer argues that plaintiff's seemingly contradictory versions of the facts cancel out each other, *as a matter of law,* leaving no lay evidence to support Dr. Seiters' speculative medical testimony as to causation.

It is a rule of law in this State that contradictory statements of a witness in connection with the same fact have a result of cancelling out each other. *Tibbals Flooring Company, Inc. v. Stanfill,* 410 S.W.2d 892 (Tenn. 1967); *Taylor v. Nashville Banner Pub. Co.,* 573 S.W.2d 476, 482 (Tenn. App. 1978). This rule was most memorably explicated in *Johnston v. Cincinnati N. O. & T. R. Railway Co.,* 240 S.W. 429 (Tenn. 1922):

> "If a plaintiff should testify with equal positiveness that defendant stole his horse and that some third person stole his horse, no one would doubt that the case ought not to go to the jury.
>
> *Id.* at 160.

Defendant argues that since, under *Johnston* and its progeny, plaintiff's testimony must be disregarded *as a matter of law,* the question of credibility is never reached. Plaintiff says that any inconsistencies in her testimony at most raise an *issue of fact* as to credibility, which the trial judge resolved in her favor.

We think it instructive to quote the relevant portions of *Johnston* more fully:

> "The testimony of a witness as to a particular fact may have value, even though he has both affirmed and denied it if the contradiction is explained and is shown to have been the result of misunderstanding or inadvertence.
>
> . . .

> The question here is not one of the credibility of a witness or of the weight of evidence; but it is whether there is any evidence at all to prove the fact. If two witnesses contradict each other, there is proof on both sides, and it is for the jury to say where the truth lies; but if the proof of a fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way
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> . . .
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> We have searched complainant's testimony for an explanation of its inconsistencies that would entitle it, upon grounds of inadvertence or mistake, to some weight on the side of the jury's verdict . . . but could find none, and . . . when we went outside of his testimony and looked to his conduct and correspondence before the present difference arose, the impossibility of any such explanation was only emphasized."

We find in this case, as the court in *Johnson* could not, that there are reasonable bases upon which the inconsistencies in the testimony of the plaintiff are sufficiently explained to create an issue of credibility of the plaintiff's testimony rather than leaving a cancellation of her testimony on the basis of contradictory testimony on the same facts.

The trial judge found the plaintiff to be credible.

The workers' compensation law is "a remedial statute which shall be given an equitable construction by the courts to the end that the objects and purposes of this chapter may be realized and attained." Tenn. Code Ann. § 50-6-116. Even in cases where the evidence allows inferences which could support either party, we are bound by the strong public policy of our Work[ers'] Compensation Law to resolve conflicts and doubts in favor of the claimant. *Curtis v. Hamilton Block Co., Inc.,* 466 S.W.2d 220 (Tenn. 1971).

This legislative mandate applies to the issue of causation of an injury, and "any reasonable doubt as to whether an injury arose out of and in the employment is to be resolved in favor of the employee or his dependents." *Williams v. Preferred Dev. Corp.,* 452 S.W.2d 344 (Tenn. 1970).

We find that the preponderance of the evidence supports the trial court's judgment, which we affirm. Costs are assessed to the appellant.

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John K. Byers, Senior Judge

CONCUR:

____
E. Riley Anderson, Justice

____
Roger E. Thayer, Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

CHARLOTTE FREEMAN,	)	HAMBLEN CIRCUIT
	)	NO. 94-289
Plaintiff/Appellee,	)	
	)	
vs.	)	Hon. Earl H. Henley,
	)	Chancellor
	)	
	)	
CPQ COLORCHROME, INC.,	)	
	)	
Defendant/ Appellant.	)	03S01-9606-CH-00089

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Worker' Compensation 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 act and conclusions of law are adopted and affirmed, and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the Defendant/Appellant CPQ Colorchrome, Inc. and surety, Leitner, Warner, Moffitt, Williams, Dooley & Napolitan, for which execution may issue if necessary.

04/21/97

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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John K. Byers, Senior Judge

CONCUR:

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