

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 26, 2012 Session

**BELLSOUTH TELECOMMUNICATIONS, INC. v. ALONZO W.
HOWARD**

**Appeal from the Circuit Court for Davidson County
No. 09C4083 Hamilton V. Gayden, Jr., Judge**

**No. M2012-00788-WC-R3-WC - Mailed January 31, 2013
Filed April 11, 2013**

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. The employee reported to his employer that he had sustained bilateral carpal tunnel syndrome as a result of his work activities. The employer provided the employee with medical treatment. After the parties reached an impasse at the benefit review conference, the employer filed a petition seeking a determination of whether the employee was entitled to additional workers' compensation benefits. The employee's pre-trial motion to compel discovery was denied by the trial court. At trial, both sides presented expert medical evidence to support their positions as to the cause and nature of the employee's condition. The trial court denied the employee's claim, accrediting the testimony of the employer's expert witness that the employee did not suffer from carpal tunnel syndrome and that his symptoms did not arise out of or occur in the course and scope of his employment. On appeal, the employee contends that the trial court abused its discretion in denying his motion to compel discovery and in accrediting the testimony of the employer's expert witness. After careful review, we affirm the judgment of the trial court.

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

SHARON G. LEE, J., delivered the opinion of the Court, in which WALTER C. KURTZ, SR. J., and DONALD P. HARRIS, SP. J., joined.

Alonzo W. Howard, Nashville, Tennessee, pro se.

Sarah H. Best and Julie Cochran Fuller, Knoxville, Tennessee, for the appellee, BellSouth Telecommunications, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

In 2005, Alonzo Howard (“Employee”), while working for BellSouth Telecommunications, Inc. (“Employer”), began having neck problems that were unrelated to his employment. He was diagnosed with degenerative disc disease, spinal stenosis, and spinal myelopathy. In February 2006, he underwent a cervical laminectomy and fusion. He returned to his job in April 2006, with a lifting restriction. Subsequently, he began to experience pain, tingling, and numbness in his arms and a burning sensation across his back. Employee filed a claim for workers’ compensation benefits in February 2007, alleging that his job duties were aggravating his back and neck problems. This claim was later settled. According to Employee, in December 2007, Dr. Robert Fogolin, who was treating Employee for his back and neck problems, advised Employee that he had carpal tunnel syndrome. In May of 2008, Employee gave Employer notice that he was suffering from bilateral carpal tunnel syndrome caused by his work.

Employer provided Employee with medical care from Dr. Narendra K. Singh and Dr. Jeffrey Watson. Dr. Singh, an occupational medicine specialist, treated Employee for complaints of bilateral hand pain on September 30, 2008; October 28, 2008; and November 25, 2008. When Employee’s hand pain did not resolve after cortisone injections and use of wrist splints, Dr. Singh referred Employee to Dr. Watson, an orthopedic surgeon at Vanderbilt Hospital who specializes in treatment of cases involving the hands and upper extremities. Dr. Watson examined Employee on January 27, 2009. Based on Employee’s descriptions of pain, physical examination, and diagnostic test results, Dr. Watson diagnosed Employee with bilateral radicular pain associated with his neck problems, rather than carpal tunnel syndrome.

In July 2009, Employee obtained an independent medical examination from Dr. David Gaw, an orthopedic surgeon. Dr. Gaw diagnosed Employee with bilateral carpal tunnel syndrome arising out of his employment and assigned him a 2% permanent impairment rating to the whole person.

In August 2009, after working for Employer for thirty-eight years, Employee retired because of the pain he was experiencing in his neck, back, hands, arms, and knees. Employee has not worked since his retirement.

On October 26, 2009, the parties participated in a benefit review conference and reached an impasse. On November 19, 2009, Employer filed a petition in the Davidson

County Circuit Court seeking a determination of the benefits, if any, that Employee was entitled to receive for his claim of injury to his right and left upper extremities.

Employee filed a pre-trial motion to compel discovery pursuant to Tennessee Rule of Civil Procedure 37.01, alleging that Employer had failed to respond to his requests for production of documents and requesting that Employer be ordered to file complete responses. After a hearing on January 28, 2011, the trial court denied the motion but ordered that Employer issue third-party discovery to obtain the medical records of Dr. Singh, Dr. Christopher Kaufmann,¹ and Dr. Robert Fogolin.

Evidence presented when the case was tried on December 14, 2011 included the live testimony of Employee, the deposition testimony of Employee and Drs. Gaw and Watson, and Form C-32s completed by Drs. Singh and Gaw. The trial court rejected the opinions of Drs. Gaw and Singh that Employee's symptoms were the result of carpal tunnel syndrome and instead acceded to Dr. Watson's opinion that Employee's symptoms were caused by his neck condition, not carpal tunnel syndrome. The trial court ruled that Employee's injuries did not arise out of or occur in the course and scope of his employment and entered judgment denying his request for benefits.

Employee appeals and raises two issues: 1) whether the trial court abused its discretion in denying Employee's motion to compel discovery; and 2) whether the evidence preponderates against the trial court's conclusion that Employee's injury did not arise out of the course and scope of his employment.

We review the trial court's factual findings "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) (2008 & Supp. 2012). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee

¹ Dr. Kaufman treated Employee for his first workers' compensation injury.

must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

As a threshold matter, Employer contends that this appeal should be dismissed based upon Employee's alleged failure to comply with Tenn. R. App. P. 27. In summary, Employer asserts that Employee's brief does not cite to the record with sufficient specificity to permit review of his arguments. We find, to the contrary, that Employee's brief complies with the requirements of Rule 27. Employee, who is self-represented in this matter, presented his case in his brief and at oral argument in a respectful and competent manner. Employer's contention is without merit.

First, we address the issue of whether the trial court abused its discretion in denying Employee's motion to compel discovery. We review a trial court's decision as to a pre-trial discovery matter under an abuse of discretion standard. Benton v. Snyder, 825 S.W.2d 409, 416 (Tenn. 1992). Under this standard, an abuse of discretion occurs when a court causes injustice to a party by "(1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 524 (Tenn. 2010).

Before trial, Employee filed requests for production of documents requesting the following information pertaining to both his initial workers' compensation claim filed in February 2007 and his second claim filed in May 2008:

1. Complete and total copies of both worker compensation cases (A825016860-01 and 440CN262083) in the possession of Sedgwick C.M.S., my case manager Mr. Martin Townes and anyone involve [sic] in my cases. Also in the request is any and all call logs detailing the time, nature, what was discussed and with whom, notes or anything detailing any information discussed or written concerning the cases. All information requested is in any form that forms the basis of the original, whether it be written or recorded.
2. Any and all documents used by [Employer] and or their agents, detailing the procedures and policies involving employees who are prescribe[d] antidepressants and their job accommodations.

3. Any and all documents used by [Employer] and or their agents involving how work restrictions are granted, approved, denied and instituted with their job requirements.

4. Any and all documents used by [Employer] and or their agents detailing the policies and procedures involving the time period involve required [sic] in work[ers'] compensation cases between time of reporting, offering a panel and or setting of a doctor[']s appointment, and referral if requested by doctor involved in employee care.

5. Any and all documents used by [Employer] and or their agents that would detail or describe how case management or case utilization is used in worker[s'] compensation cases by [Employer].

6. Any and all documents requested or documents and or papers of policies and procedures in place[] from 01/01/2006 to the present.

In its response, Employer objected to the request at paragraph (1) stating that “it is vague and seeks information protected by the attorney-client privilege or by the attorney work product doctrine.” As to the documents requested by paragraphs (2)-(5), Employer responded that “[a]ny responsive documents will be made available for inspection and copying at the offices of [Employer’s] attorney by October 7, 2010.” As to the documents requested by paragraph (6), Employer objected on the grounds that the request “is vague, overbroad, and seeks information which is undiscoverable.” Without waiver of objection, Employer’s response further provided that “any responsive documents will be made available for inspection and copying at the offices of [Employer’s] attorney by October 7, 2010.”

After Employer’s response, Employee filed a “Clarification Involving Request for Production of Documents” in which he requested copies of correspondence within a specified date range between himself or any entity acting on his behalf and Employer/Employer’s agents regarding his workers’ compensation cases; correspondence between Employer/Employer’s agents and health care providers regarding Employee’s “conditions, treatments, assessments, diagnoses, prognosis and referrals involving his worker[s] compensation”; “[a]ny documents ‘detailing the first report of injury to [Employer/Employer’s agents]’ involving [the two] worker[s]’ compensation cases”; “[a]ny documents detailing any records of calls made to or received from health care providers, [Employee], or any entity acting on [Employee’s] behalf involving [Employee’s two]

worker[s'] compensation cases"; and "[a]ny documents or correspondence internally between [Employer/Employer's agents] concerning health care decision, health care discussions, case management, case utilization, involving [Employee's two] worker[s'] compensation cases."

In his motion to compel discovery, Employee alleges that when he made an unannounced visit to the offices of Employer's attorney on November 19, 2010, "to view the documents that were to be available for inspection and copying after October 7, 2010, . . . [t]he only documents provided were those previously supplied, which was [sic] medical records, and court pleadings, not the documents the answers stated would be available for copying and inspection." The motion further notes that Employer's attorney advised Employee at that time that he had provided Employee all of the information that the attorney had received from Employer. The motion asserts that when Employee requested documents he needed "to prepare for trial and prove he indeed has a work injury," Employer either asserted "a claim of privilege or stated items would be available but were not." Employee requested that the court order Employer to "file complete responses to [Employee's] Interrogatories and Request for Production of Documents" within ten days. Employer responded to this motion by explaining that there was "no documentation left for [the] court to compel — that "[Employee] has been given copies of every single document pertaining to this case, including medical records, physical therapy records, employment records, and all other materials within the possession, custody, and/or control of [Employer]." Further, Employer stated that when Employee made his unannounced visit to Employer's attorney's office, Employee was given access to all records located in that office. Moreover, Employer's attorney informed Employee that while the balance of his file was in the firm's Nashville office, Employee had already been given copies of everything contained in both files.

After a hearing on January 28, 2011, the trial court denied Employee's motion to compel discovery, but ordered Employer to issue third-party discovery to obtain the medical records of Drs. Singh, Kaufmann, and Fogolin.

The order denying Employee's motion to compel discovery did not set forth the trial court's reasoning, and the record does not include a transcript of the hearing on the motion. The motion to compel alleges that "[t]he only documents provided were those previously supplied, which was [sic] medical records, and court pleadings, not *the documents the answers stated would be available for copying and inspection.*" (emphasis added). However, Employer's response to Employee's requests for production merely stated that "[a]ny responsive documents will be made available for inspection and copying at the offices of [Employer's] attorney by October 7, 2010" but did not specify what documents Employer had in its possession or that it possessed documents that Employee did not already have. Employee failed to either specify in his motion to compel or present proof to the trial

court the documents Employer had in its possession that were not provided to Employee. A trial court's decision in discovery matters is not subject to reversal on appeal "unless a clear abuse of discretion is demonstrated," Benton, 825 S.W.2d at 416. Because the record in this case does not demonstrate a clear abuse of discretion, we affirm the trial court's denial of Employee's motion to compel discovery.

Next, Employee argues that the evidence preponderates against the trial court's conclusion that Employee's injury did not arise out of the course and scope of his employment. Specifically, Employee contends that the trial court erred in accrediting the opinion of Dr. Watson that Employee does not have carpal tunnel syndrome and rejecting the opinions of Drs. Singh and Gaw that he suffered from carpal tunnel syndrome.

The trial court was faced with differing expert medical opinions. Accordingly, it was "within the discretion of the trial judge to determine which expert testimony to accept." Story v. Legion Ins. Co., 3 S.W.3d 450, 455 (Tenn. 1999) (citing Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996)); Johnson v. Midwesco, Inc., 801 S.W.2d 804 (Tenn. 1990)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla, 324 S.W.3d at 511; Glisson, 185 S.W.3d at 353. We review the trial court's factual findings "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). Bearing these principles in mind, we have carefully reviewed the record to determine whether the trial court abused its discretion in adopting Dr. Watson's testimony over that of the other experts and whether the evidence otherwise preponderated against the factual finding the trial court made based upon Dr. Watson's testimony.

Employee, a fifty-eight year old high school graduate, testified at trial that in February 2006, he had a cervical laminectomy to fuse four discs after being diagnosed with spinal stenosis. He returned to work in April 2006 and thereafter filed a workers' compensation claim in February 2007 because he was experiencing pain and tingling in his neck radiating into his arms, a burning sensation across his back, and problems with his legs that he believed his job was aggravating. Employee gave Employer notice of his current claim in May 2008.

After Employee filed his claim, Employer provided him with medical treatment. Employee first saw Dr. Singh, who prescribed night splints and gave him cortisone injections in his wrist, neither of which resolved his symptoms. In November 2008, Dr. Singh referred Employee to Dr. Watson, who saw Employee in January 2009. Dr. Watson advised Employee that in his opinion, Employee did not have carpal tunnel syndrome

but that Employee's problems were related to his neck. In July 2009, Employee obtained an independent medical examination from Dr. Gaw, an orthopedic surgeon. Dr. Gaw diagnosed Employee with carpal tunnel syndrome.

The trial court also considered Dr. Singh's Form C-32 statement in which Dr. Singh opined that Employee had carpal tunnel syndrome, that the condition was caused by his employment, and that Employee should observe a forty-pound lifting restriction. Dr. Singh did not offer an opinion concerning permanent impairment.

Employee also submitted a C-32 statement from Dr. David Gaw. Dr. Gaw examined Employee on July 7, 2009 and concluded that Employee had bilateral carpal tunnel syndrome, that his condition was caused by his work activities for Employer, and that Employee retained a 2% impairment to the whole person due to this condition. Employer submitted Dr. Gaw's deposition, wherein Dr. Gaw noted that Employee had been diagnosed with diabetes, a condition which can cause symptoms similar to carpal tunnel syndrome. He also conceded that Employee's situation did not present a clear-cut case of causation, but that the most likely cause of his hand pain was carpal tunnel syndrome.

Employer submitted the deposition testimony of Dr. Jeffrey Watson, an orthopedic hand surgeon, who saw Employee on a referral from Dr. Singh. He examined Employee on January 27, 2009, and reviewed 2007 and 2009 EMG studies performed by Dr. James Anderson. Based on his physical examination and the diagnostic test results, Dr. Watson opined that Employee did not have carpal tunnel syndrome and that the problems in his hands were caused by residual problems from Employee's neck condition for which he had surgery in 2006. He assigned 0% permanent impairment.

The trial court took the case under advisement, reviewed the record, and following oral argument on February 13, 2012, ruled that the testimony of Dr. Watson was more persuasive than the testimony of Dr. Gaw and the C-32 statement of Dr. Singh. The trial court held that Employee had not sustained a compensable injury arising out of his employment.

Considering the record as a whole, we conclude that the evidence does not preponderate against the trial court's finding on this issue. Dr. Watson's deposition testimony was compelling and persuasive. Given Employee's previous neck problems, his complaints of upper extremity pain, test results, and the entire record, the trial court did not abuse its discretion in accepting Dr. Watson's testimony over the opinions of Dr. Singh and Dr. Gaw. Clearly Employee was experiencing pain in his hands, but the cause of the pain was at issue. Employee had the burden of proving that his injury arose out of and in the course of his employment. The trial court ruled he failed to carry his burden of proof. The

evidence does not preponderate against the trial court's decision. Accordingly, we affirm the decision of the trial court.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Alonzo Howard and his surety, for which execution may issue if necessary.

JUSTICE SHARON G. LEE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

BELLSOUTH TELECOMMUNICATIONS, INC.
v. ALONZO W. HOWARD

Circuit Court for Davidson County
No. 09C4083

No. M2012-00788-SC-WCM-WC - Filed April 11, 2013

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Alonzo W. Howard, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), Mr. Howard's "Petition to Rehear by the Entire Supreme Court, 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 both the motion for review and the "Petition to Rehear" are not well-taken and are 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 Alonzo W. Howard, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

LEE, Sharon G., J., Not Participating