

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

January 23, 2012 Session

**SANDRA M. BUTTREY v. ALTRIA GROUP, INC.**

**Appeal from the Circuit Court for Maury County**

**No. 10-13332 Stella Hargrove, Judge**

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**No. M2011-00661-WC-R3-WC - Mailed March 14, 2012**

**Filed April 24, 2012**

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The employee had degenerative disk disease for a number of years prior to April 2009, when she reported to her employer that she was experiencing significantly increased neck pain and symptoms, and she sought treatment. The employer denied the employee's claim for workers' compensation benefits. The trial court credited the testimony of the employee and of one of the treating physicians and awarded the employee 28.5% permanent partial disability to the body as a whole. The employer appeals, asserting that the employee's injury was not caused by her employment. We affirm the judgment of the trial court.<sup>1</sup>

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

WALTER C. KURTZ, SR.J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J., and J.S. DANIEL, SP.J., joined.

John W. Barringer, Jr. and Neesha S. Hetcher, Nashville, Tennessee, for the appellant, Altria Group, Inc.

Tracy W. Moore, Columbia, Tennessee, for the appellee, Sandra M. Buttrey

**MEMORANDUM OPINION**

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<sup>1</sup> 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.

## **Factual and Procedural Background**

At the time of the trial in this case, Sandra M. Buttrey (“Employee”) was forty-nine years old. She had a high school education and had always worked in commission sales. Since 1996, Employee had been employed by Altria Group, Inc. (“Employer”) or its predecessor as a territorial sales manager and was responsible for in excess of one hundred retail outlets. Employee testified at trial that her job included setting and resetting retail sales displays for Employer’s tobacco products. Employee routinely lifted sales bags, signs, and her computer. Employee also routinely performed overhead work, including placement of products on top spaces of retail fixtures, rotation of headers and graphics, and adjustment of display shelves weighing approximately fifteen pounds. Additionally, Employee was responsible for what were referred to as “resets” on an annual basis at each retail location, which entailed changing the configuration of Employer’s products within their allotted space on the retail fixtures and moving the fixture shelving.

In June 2001, Employee experienced an onset of neck pain with radiation into her left arm. She was treated conservatively and missed no work. She again experienced neck pain radiating into her left arm and into the fourth and fifth digits of her left hand with some numbness in 2005; again, she was treated conservatively and missed no work.

During the end of 2008 and the beginning of 2009, Employee assisted fellow territorial sales manager Rolf Larwig with resets at approximately eight Kroger retail stores, in addition to performing resets at the retail locations for which she was responsible. According to Employee, this required the replacement of all display shelving with new shelving. According to the trial testimony of Mr. Larwig, this was somewhat unusual because this time Employer did not contract out the shelf replacement as it had in the past, and he and Employee had to perform this task themselves. Mr. Larwig described this task as requiring the loading of the new shelving onto grocery carts; pushing the carts from the back of the stores to the front; opening the containers of shelving; separating the shelving; emptying the existing fixtures of all product; removing or adjusting the existing shelving; installing new shelving; and reloading the product. Mr. Larwig further testified that this work required lifting anywhere from five to thirty pounds, involved above shoulder level work, and was a physical job. Employee similarly described this work and the physical demands, which were greater than in her prior work for Employer. Mr. Larwig testified that he was sore every day as a result of this work. Mr. Larwig also testified that during this time Employee told him that her neck was hurting, she was taking medication for this, and she had to go home during the middle of the day due to her neck pain.

Employee testified that in approximately the first week of April 2009, she began to experience what she described as excruciating neck pain. According to Employee, this pain was different in intensity from that which she had ever previously experienced, and it radiated differently. Employee testified that she was unable to alleviate this pain with medication and rest as she had been able to do in the past. While she conceded that she could identify no single traumatic moment or event precipitating this onset, Employee testified that she believed that the amount and intensity of work and the pushing, pulling, and lifting required during the resets in late 2008 and early 2009 caused her most recent neck injury.

Employee reported her neck injury to Employer on April 8, 2009. Employee was seen by Dr. Hope Webb who ordered an MRI and referred Employee to Dr. Jonathan R. Pettit. Dr. Pettit, in turn, referred Employee to Dr. Frederick Wade. Dr Wade first saw Employee in May 2009.<sup>2</sup> His notes of Employee's history reflected that approximately a year earlier, while performing a lot of overhead, repetitive activity, Employee's symptoms recurred and then slowly worsened. Dr. Wade acknowledged in his deposition testimony that Employee did not report to him a specific activity or a specific point in time when a new injury occurred; rather, Employee reported that her symptoms increased during the preceding year. She reported pain in her neck and bilateral shoulders, which radiated to the left arm and elbow, and occasionally radiated and tingled into the left ulnar-sided digits. Dr. Wade performed a physical examination and reviewed Employee's 2009 MRI, which showed substantial disk protrusions at the C5-6 and C6-7 levels, with moderate compression of the central portion of her spinal cord. According to Dr. Wade, this indicated disk disease which was not just arthritic but which had progressed to the point that Employee's spinal cord and nerves were irritated and painful. Dr. Wade's diagnosis was cervical disk degeneration with cervical stenosis and predominately left cervical radiculopathy. Dr. Wade testified that while Employee had pre-existing cervical disk degeneration, her repetitive overhead work approximately one year before significantly exacerbated her symptoms. Dr. Wade opined that "she had a new onset radiculopathy from these cervical disks degeneration." Dr. Wade had further noted at Employee's May 2009 visit that he believed Employee had a new injury.

According to Employee, she was off work for the first time following this May 2009 visit. Employee saw Dr. Wade several additional times, and, after discussion with him, she elected surgical treatment. Dr. Wade performed a cervical discectomy and fusion at C5-6 and C6-7 on August 17, 2009. Dr. Wade saw Employee for post-surgical follow-up on several occasions over the following months. Employee's surgery went well, and she had a good recovery. Dr. Wade placed her at maximum medical improvement on December 9, 2009, and he released her to return to work with no restrictions. Dr. Wade indicated that Employee's

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<sup>2</sup>Employee was treated by Dr. Wade through her Employer-provided health insurer, CIGNA, not as a result of her workers' compensation claim.

pain had completely resolved. Employee similarly testified that she had returned to work with no restrictions and was able to do her job, although she did have some loss of mobility in her neck. Dr. Wade assigned a 19% whole body impairment rating. He testified that even though Employee had pre-existing degenerative disk disease, her condition was exacerbated by the more strenuous, intense work activities, and she suffered a new, distinct second injury to her neck caused by these activities.

Prior to her August 2009 surgery by Dr. Wade, Employee was seen one time in July 2009 for evaluation by neurosurgeon Dr. George H. Lien at the request of Employer's workers' compensation representative. Dr. Lien, testifying by deposition, stated that he saw Employee for approximately fifteen to twenty minutes, as he took a history and performed a physical examination. Dr. Lien reviewed Employee's MRI scans from both 2005 and 2009 and opined that Employee had cervical spondylosis and disk protrusion in her neck, with possible mild nerve compression, and some carpal tunnel syndrome in her hands. A comparison of Employee's 2005 and 2009 MRI scans revealed disk protrusions at C5-6 and C6-7 in both, but was slightly worse in the 2009 MRI scan. While he acknowledged a progression in Employee's MRI scans, Dr. Lien could not relate these progressive changes to Employee's work. According to Dr. Lien, Employee had degenerative disk disease, a pre-existing condition, with no evidence of a work-related injury or exacerbation. Dr. Lien admitted during cross examination that he was not certain whether or not he had asked Employee about any unusual work activities.

At trial, the parties stipulated to the applicable compensation rate, and also that Employee gave Employer proper notice and had a meaningful return to work such that the statutory 1.5 multiplier cap applied. Employer denied liability. The sole issue for trial was causation. Employer contended that in April 2009 Employee suffered merely a natural progression of her pre-existing degenerative disk disease. Employee contended that this pre-existing condition was aggravated or exacerbated by her work activities.

The trial court found Employee to be a credible witness and gave greater weight to the testimony of Dr. Wade than to the testimony of Dr. Lien. The trial court found a causal relationship between Employee's work activities and her neck injury because the repetitive overhead work significantly exacerbated her symptoms and she had new onset radiculopathy from her cervical disk degeneration. The trial court further found significant evidence of an anatomical change or advancement of Employee's pre-existing condition. The trial court determined Employee's permanent partial disability to be 1.5 times her anatomical impairment rating of 19% assigned her by Dr. Wade or 28.5% to the body as a whole.<sup>3</sup>

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<sup>3</sup> The trial court entered a four-page Memorandum Opinion on February 25, 2011.

## Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When the trial court has heard in-court testimony, considerable deference must be afforded in reviewing the trial court's findings of credibility and assessment of the weight to be given to that testimony. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). "When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues." *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

## Analysis

The sole issue in this case is causation.<sup>4</sup> "Except in the most obvious cases, causation must be established by expert medical evidence." *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598, 604 (Tenn. 2008). "Although absolute certainty is not required for proof of causation, medical proof that the injury was caused in the course of the employee's work must not be speculative or so uncertain regarding the cause of the injury that attributing it to the [employee's] employment would be an arbitrary determination or a mere possibility." *Foreman*, 272 S.W.3d at 572 (quoting *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987)). "If, upon undisputed proof, it is conjectural whether disability resulted from a cause operating within [the employee's] employment, or a cause operating without [her] employment, there can be no award." *Id.* (quoting *Tibbals Flooring Co. v. Stanfill*, 410 S.W.2d 892, 897 (Tenn. 1967)).

"Although workers' compensation law must be construed liberally in favor of an injured employee, it is the employee's burden to prove causation by a preponderance of the evidence," *Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 664 (Tenn. 2008), and a trial court should resolve reasonable doubt as to causation in favor of the employee. *See, e.g., Phillips v. A&H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004). "Benefits may properly be awarded upon medical testimony that shows the employment 'could or might have been the cause' of the employee's injury when there is lay testimony from which causation reasonably

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<sup>4</sup> The appellant's brief defines the issues to be: "(1) did the trial court err in finding a compensable injury; and (2) did the trial court err in placing greater weight on the testimony of Dr. Wade rather than Dr. Lien." *See* Brief of Appellant, p. 2.

can be inferred.” *Fritts v. Safety Nat’l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005) (citing *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004)). Moreover, “the testimony of expert witnesses must be considered in conjunction with the testimony of an employee as a lay witness.” *Trosper*, 273 S.W.3d at 604.

Under Tennessee law, “an employer takes an employee ‘as is’ and assumes the responsibility for any work-related injury which might not affect an otherwise healthy person but which aggravates a pre-existing [condition].” *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008). As the Court explained in *Cloyd*:

In consequence, an employer is “liable for disability resulting from injuries sustained by an employee arising out of and in the course of his [or her] employment even though it aggravates a previous condition with resulting disability far greater than otherwise would have been the case.” The law in this state likewise recognizes that a worker may sustain a compensable gradual injury as the result of continual exposure to the conditions of employment. Unlike some other jurisdictions, there is no requirement in this state that the injury be traceable to a definite moment in time or triggering event in order to be compensable.

274 S.W.3d at 643-44 (citations omitted).

The Court has also stated the following:

[T]he employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain. However, if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable.

*Trosper*, 273 S.W.3d at 607.

In this case, it is undisputed that Employee suffered from pre-existing degenerative disk disease in April 2009. However, the trial court found Employee to be a “very credible witness,” and it credited her testimony that her condition materially changed in severity and in nature after a change in her work activities in late 2008 and early 2009. Employee’s testimony was corroborated by the testimony of co-worker Mr. Larwig. There was conflicting

expert medical testimony with respect to causation and whether Employee suffered a natural progression of her pre-existing degenerative disk disease or instead an aggravation or an exacerbation of that condition. On this issue, the trial court credited the testimony of Dr. Wade, who opined that Employee suffered a work-related aggravation, more than the testimony of Dr. Lien, who opined that Employee suffered merely a natural progression of the pre-existing degenerative disk disease. Considering Employee's and Mr. Larwig's lay testimony, and also considering the fact that Dr. Wade saw and treated Employee over a period of months (whereas Dr. Lien saw Employee one time for twenty minutes or less), we cannot say that the trial court inappropriately credited Dr. Wade's testimony with respect to causation. Moreover, even Dr. Lien testified that Employee's 2009 MRI scan, as compared to her prior 2005 MRI scan, evidenced an anatomical change in Employee's condition in the form of a progression of her disk protrusions.

While this Court does make its own judgment related to expert witnesses who testify by deposition, it also gives some consideration to the treating physicians versus the examining physicians. "It seems reasonable that the physicians having greater contact with the [employee] would have the advantage and opportunity to provide a more in-depth opinion, if not a more accurate one." *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 677 (Tenn. 1991); *see also Carter v. First Source Furniture Grp.*, 92 S.W.3d 367, 373 (Tenn. 2002). Furthermore, even when the experts all testify by deposition, the evaluation of the live trial testimony by the trial judge is not to be disregarded. The Supreme Court has explained the following regarding independent evaluation of expert depositions:

[Such evaluation] does not mean that the deposition testimony of experts should be read and evaluated in a vacuum. While causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent conditions. *See Smith [v. Empire Pencil Co.]*, 781 S.W.2d [833,] at 835 [(Tenn. 1989)] (citing *Floyd v. Tennessee Dickel Distilling Co.*, 225 Tenn. 65, 463 S.W.2d 684 (1971)). As stated above, considerable deference must be given to the trial court's evaluation of such oral testimony.

*Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991).

Employer has strongly argued that examining physician Dr. Lien was more knowledgeable and had more information regarding Employee's on-the-job functions. Employer discounted his brief examination of Employee and stated that Dr. Lien's opinion

is entitled to more weight. Yet, Dr. Wade treated Employee, listened to her history, knew about her report of physical work at the place of employment, and operated on her back.

Based upon our review of the medical depositions and the other proof offered at trial, we are persuaded that the evidence does not preponderate against the finding of the trial court that Employee suffered a compensable injury to her neck. Although the medical testimony is conflicting, the lay testimony in conjunction with the medical evidence is sufficient to establish that Employee's work activities did advance the severity of her pre-existing degenerative disk disease.

### **Conclusion**

The judgment of the trial court is affirmed. Costs of this appeal are taxed to Altria Group, Inc., for which execution may issue if necessary.

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SENIOR JUDGE WALTER C. KURTZ



IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
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**No. M2011-00661-WC-R3-WC - Filed April 24, 2012**

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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 Altria Group, Inc., for which execution may issue if necessary.

PER CURIAM