

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

BETTY FRANKLIN v. DURO STANDARD PRODUCTS CO., INC.

**Appeal from the Chancery Court for Chester County
No. 2010-CV-398 James F. Butler, Chancellor**

No. W2011-01212-WC-R3-WC - Mailed June 25, 2012; Filed July 30, 2012

In this claim for workers' compensation benefits, the trial court awarded permanent partial disability benefits to the employee for hearing loss. Her employer has appealed, contending that the trial court erred by admitting the testimony of the employee's medical expert into evidence and by finding that her hearing loss was caused by her employment. We affirm the judgment of the trial court.

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

DONALD P. HARRIS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J. and TONY A. CHILDRESS, SP. J., joined.

William F. Kendall, III, Jackson, Tennessee (on the brief), Allison Rebecca Malone and James Howard Tucker, Jr., Nashville, Tennessee, for the appellant, Duro Standard Products Co., Inc.

Jeffrey P. Boyd and Laura Ann E. Bailey, Jackson, Tennessee, for the appellee, Betty Franklin.

MEMORANDUM OPINION

Factual and Procedural Background

Betty Franklin was employed as a machine operator for Duro Standard Products Co., Inc. ("Duro Standard Products"), and its predecessor, International Paper Corporation, beginning in 2002. Duro Standard Products is a manufacturer of paper bags and similar

products. Ms. Franklin was given a hearing test when she was hired by International Paper Corporation. The test showed noise-related hearing loss. The record does not indicate whether or not Ms. Franklin was informed of these results. In March 2006, shortly after Duro Standard Products purchased the business from International Paper, Ms. Franklin was given another hearing test. That test showed a slight decrease in her hearing. In May 2009, another hearing test was administered that revealed Ms. Franklin had sustained additional hearing loss, referred to as a standard threshold change. A representative of Duro Standard Products discussed the results of the test with Ms. Franklin, and she was referred to Dr. Karl Studtmann, an otolaryngologist, for additional testing.

Testing performed by Dr. Studtmann confirmed the existence of her hearing loss. He found no medical reason for the hearing impairment. Ms. Franklin reported that she was not exposed to loud or noisy environments outside her workplace. Dr. Studtmann's testing indicated that the pattern of Ms. Franklin's hearing loss was consistent with noise-induced hearing loss. Dr. Studtmann believed "the most likely etiology [of her hearing loss] was the noise exposure at work" given the absence of medical reasons for the hearing loss and Ms. Franklin's exposure to loud or noisy environments only in her workplace. Dr. Studtmann opined that Ms. Franklin retained hearing impairments of 15% to the right ear and 18.8% to the left ear for a binaural hearing impairment of 15.6%. Some portion of Ms. Franklin's hearing loss was likely due to the aging process, but it was not possible for Dr. Studtmann to apportion the impairment according to cause. Dr. Studtmann had no knowledge of the noise levels at Duro Standard Products' facility relative to Occupational Safety and Health Administrative ("OSHA") standards. He placed no formal restrictions on Ms. Franklin's activities, but recommended that she use ear muff hearing protection in addition to the ear plugs provided by Duro Standard Products. Ms. Franklin filed a complaint for workers' compensation benefits in the Chancery Court of Chester County on February 23, 2010.

Ms. Franklin was forty-eight years old at the time of trial. She had attended school into the tenth grade and later obtained a GED. Prior to being hired by Duro Standard Products, she worked for twelve years at Murray Outdoor Products, where she performed a number of different jobs. She described one part of that operation as noisy. She was not required to wear hearing protection at Murray Outdoor Products. Ms. Franklin had also been a machine operator at General Cable, a company that manufactured electrical cords. She testified that the environment at Duro Standard Products was noisier than either of her prior work environments.

Ms. Franklin stated that she did not have any hearing problems when she began working for International Paper in 2002. She testified that she was required to wear hearing protection when she began employment at International Paper, and the requirement that she wear hearing protection continued when Duro Standard Products purchased the business.

She continued to work for Duro Standard Products and wore ear muff hearing protection in addition to the foam ear plugs she was required to use in accordance with Dr. Studtmann's recommendation.

Concerning her diminished hearing, she testified that her two-year-old grandson had "to really make a lot of noise" before she could hear him. She had difficulty hearing the siren of an ambulance approaching her automobile and had to use a loud setting for the ringer on her telephone. She also reported that her daughter had made comments to her about her lack of hearing. Ms. Franklin testified that her only significant exposure to loud noise outside of the workplace came from her lawnmower and estimated that she performed that chore "every two weeks."

On cross-examination, Ms. Franklin testified that she did not use hearing aids and continued to perform the same job that she had before 2009. She confirmed that Duro Standard Products emphasized the use of hearing protection at safety meetings and that she always used the hearing protection provided to her.

Mike Blakely testified that he was a production manager for Duro Standard Products and was Ms. Franklin's indirect supervisor. He testified that Duro Standard Products provided ear plugs to its employees as required by OSHA, making them available at the entrance to the production area. He observed Ms. Franklin frequently and had noticed no change in her job performance since 2009.

Duro Standard Products introduced the deposition of Dr. Thomas Cameron, an audiologist who reviewed Ms. Franklin's case at the request of their counsel. The trial court excluded Dr. Cameron's opinions concerning causation because he is not a medical doctor, but the trial court permitted the remainder of Dr. Cameron's deposition to be admitted. Dr. Cameron testified that OSHA requires employers to have a hearing conservation program when noise levels exceed eighty-five decibels over an eight-hour period. He also testified that the hearing protection devices offered by Duro Standard Products to its workers, if worn properly, would prevent damage to the hearing.

Duro Standard Products filed a pretrial motion to exclude Dr. Studtmann's testimony. The motion was primarily based upon the doctor's testimony that he was unfamiliar with OSHA standards for noise exposure and that he did not rely on those standards in reaching his opinion concerning causation. In addition, Duro Standard Products argued that his deposition should be excluded because Dr. Studtmann's testimony concerning the relative effects of aging and noise exposure differed from an opinion expressed in an earlier written

report.¹ The trial court heard the motion at the beginning of the trial. It found that Duro Standard Products' objections went to the weight of Dr. Studtmann's testimony, rather than its admissibility, and therefore denied the motion.

After hearing the evidence, the trial court took the case under advisement. It issued its decision in the form of a letter to counsel. The trial court found that Ms. Franklin had sustained hearing loss caused by her work for Duro Standard Products, adopted Dr. Studtmann's impairment rating of 15.6% to the hearing of both ears, and awarded 32% permanent partial disability to the hearing of both ears. Judgment was entered in accordance with the court's ruling. Duro Standard Products has appealed from that judgment. 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. Tenn. R. Sup. Ct. 51, § 1.

Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before a reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002); see Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). This Court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

¹ In his August 7, 2009 report, Dr. Studtmann stated: "Given that [Ms. Franklin] had a significant baseline hearing loss, the change in her hearing is not dramatic. I am not able to definitively say whether her current hearing loss is simply related to continued gradual drop in her hearing or whether it is related to her noise exposure at her work."

His deposition testimony was "There's no way for me to tell you which is -- which is the entire case. And more than likely it's multifactorial I cannot separate the two."

Analysis

Admission of Dr. Studtmann's Deposition

Duro Standard Products first contends that the trial court erred by denying its motion to exclude Dr. Studtmann's deposition testimony. As it did in the trial court, Duro Standard Products asserts that Dr. Studtmann's unfamiliarity with OSHA standards for noise exposure and the differences between his deposition testimony and his written report concerning the relative contribution of aging and noise exposure to Ms. Franklin's hearing loss were so significant that his testimony should have been excluded. As our Supreme Court observed in Excel Polymers, LLC v. Broyles, 302 S.W.3d 268 (Tenn. 2009):

The admission of expert proof is governed by Tennessee Rules of Evidence 702 and 703. State v. Copeland, 226 S.W.3d 287, 301 (Tenn. 2007); Brown v. Crown Equip. Corp., 181 S.W.3d 268, 273 (Tenn. 2005). Tennessee Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tennessee Rule of Evidence 703 directs the trial court to "disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness."

302 S.W.3d at 272.

Trial courts' decisions concerning the admission or exclusion of evidence "are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion." Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 442 (Tenn. 1992). This standard of review is applicable to decisions concerning "questions pertaining to the qualifications, admissibility, relevancy, and competency of expert testimony." Brown v. Crown Equip. Corp., 181 S.W.3d at 273.

In denying Duro Standard Products' motion, the trial court in this case gave careful consideration to each of the issues raised by Duro Standard Products:

[G]etting back to Dr. Studtmann, he's not an audiologist and he doesn't do audiology, so -- There are two different types of experts. I'm just — I'm reluctant at this point to exclude his testimony outright. I do understand that there is a certain weight to be given to that testimony and that I have to -- When I weigh his testimony, I have to look at the information that he had and

the importance of that information not only to him, but to other experts, who utilize that information and whether or not it's proper information for him to use and whether or not he could make an opinion without that information, but I'm just not ready at this point to - having just gotten the information to exclude outright Dr. Studtmann's deposition. I will consider all of this when I ultimately go back after I hear the testimony and try to formulate an opinion about the case as to how much weight to give that information[.]

In our view, the trial court correctly found that the questions raised by Duro Standard Products concerning Dr. Studtmann's testimony affected its weight, rather than its admissibility. It is not disputed that Dr. Studtmann is a board-certified otolaryngologist, nor that hearing loss is a condition that falls within that medical specialty. Whether or not he had specific knowledge of OSHA standards for industrial noise exposure, he had scientific knowledge concerning the causes of hearing loss and the audiological profile of noise-related hearing loss. He also had the benefit of conducting a medical examination of Ms. Franklin. In light of these factors, we conclude that the trial court did not abuse its discretion by admitting his testimony.

Causation

Duro Standard Products' second contention is that the evidence preponderates against the trial court's finding that Ms. Franklin's hearing loss was caused by exposure to noise in its workplace. In support of this contention, it points to Dr. Studtmann's lack of knowledge of OSHA regulations concerning noise exposure and of Duro Standard Products' hearing conservation program. It also points to the testimony of Dr. Cameron that the noise level at Duro Standard Products' plant was not injurious if proper hearing protection was used. Duro Standard Products also refers to the results of Ms. Franklin's 2002 and 2006 hearing tests, which showed that her hearing loss began before Duro Standard Products acquired ownership from International Paper in 2005. Finally, it argues that the difference between Dr. Studtmann's written report and his deposition testimony concerning the relative contribution of age and noise exposure to Ms. Franklin's hearing loss diminish the reliability of his opinion.

Taking all of these factors into consideration, we are not persuaded that the evidence preponderates against the trial court's finding on the issue of causation. While Dr. Studtmann's knowledge concerning the extent of Ms. Franklin's exposure to harmful noise in the workplace was limited, the results of her audiograms were consistent with noise-related hearing loss. Dr. Studtmann performed a physical examination and took a medical history from Ms. Franklin. He found no medical reason for her hearing loss. Duro Standard Products presented no persuasive evidence to the contrary. Ms. Franklin's testimony

established that there were no other potential sources of harmful noise exposure. Her testimony was not contradicted. We give deference to the trial court when the court has weighed out-of-court testimony with the employee's live testimony. Cunningham v. City of Savannah, No. W2010-02411-WC-R3-WC, 2012 Tenn. LEXIS 145 at *17-*18 (Tenn. Workers' Comp. Panel Feb. 28, 2012).

Dr. Cameron testified that Ms. Franklin had sustained a standard threshold shift when tested in May 2009, which he defined as a change in hearing of ten decibels or more from the base line test. He testified that Ms. Franklin had a 12.7 age-corrected decibel shift. OSHA provides a table based on age and sex by which the test results being evaluated can be adjusted to account for the age difference between the baseline test and the current test. It is only when the age-adjusted difference exceeds a ten decibel change that a standard threshold shift is said to occur. Thus, Ms Franklin sustained a hearing loss with no known medical cause. Her hearing loss exceeded the requirements of a standard threshold shift after it was adjusted to eliminate the natural hearing loss caused by aging. This evidence supports Dr. Studtmann's opinion that the most likely origin of Ms. Franklin's hearing loss was her noisy workplace environment.

Dr. Cameron's opinion that the workplace noise to which Ms. Franklin was exposed would not have caused damage had Ms. Franklin properly worn the ear protection provided to her is not compelling. In an e-mail sent to Sheila Bell, the Safety Supervisor for Duro Standard Products, Dr. Cameron stated that the ear plugs were rated at 32 decibels of attenuation but that the "real world" attenuation was 12 decibels. It was Dr. Studtmann, however, who explained the discrepancy in the decibel ratings:

"That means that [the ear plugs] never fit perfectly in your ear. In a perfect world, in a perfect environment, in perfectly sized ear canals and perfectly placed, then you get thirty-two decibels of attenuation. In the real world, it tends to be more like twelve decibels."

Dr. Cameron testified in his deposition that the ear plugs provided by Duro Standard Products were rated at 29 decibels of attenuation. He did not testify in his deposition as to the "real world" attenuation of the ear plugs. Dr. Cameron did testify that Ms. Franklin could be exposed to noise if she were inserting the ear plugs improperly.

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 term "arising out of" employment refers to causation. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). An injury arises out of employment when there is apparent to the rational mind, upon

consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004); Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). The injury must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work. Thornton v. RCA Serv. Co., 188 Tenn. 644, 221 S.W.2d 954, 955 (Tenn. 1949).

Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain, and any reasonable doubt in this regard is to be construed in favor of the employee. Phillips v. A & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004); Clark, 129 S.W.3d at 47; Hill v. Eagle Bend Mfg. Inc., 942 S.W.2d 483, 487 (Tenn. 1997). Our courts have consistently held that an award of benefits may properly be based upon medical testimony stating that the employment could have been the cause of the worker's injury when, from other evidence, it can reasonably be inferred that the employment was the cause of the injury. Clark, 129 S.W.3d at 47. Evidence that the employment could have or might have caused the injury is sufficient to make out a prima facie case that the injury arose out of the employment. Id. at 49. If the employer introduces no evidence to the contrary, the preponderance of evidence supports an award of workers' compensation benefits. Id. Dr. Studtmann's testimony certainly satisfied the standard that Ms. Franklin's hearing loss could have been caused by her workplace environment. In our view, the record supports his opinion and the conclusion that her exposure to noise at work was the most likely origin of her hearing impairment. Without contrary medical evidence, we are unable to find that the evidence preponderates against the trial court's conclusion.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Duro Standard Products Co., Inc. and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SPECIAL JUDGE

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

BETTY FRANKLIN v. DURO STANDARD PRODUCTS CO., INC.

**Chancery Court for Chester County
No. 2010-CV-398**

No. W2011-01212-WC-R3-WC - Filed July 30, 2012

JUDGMENT ORDER

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 on appeal are taxed to the Appellant, Duro Standard Products Co., Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM