

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2012 Session

DAVID D. LAWRENCE v. MIDWESTERN INSURANCE ALLIANCE

**Appeal from the Chancery Court for Knox County
No. 176231-1 John F. Weaver, Chancellor**

No. E2012-00632-WC-R3-WC-MAILED-January 9, 2013 / FILED-March 19, 2013

The employee alleged that his pre-existing heart failure was permanently worsened by an accidental inhalation of cement dust on the job. The workers' compensation insurer for the employer asserted that the worsening of the heart failure was a natural progression of the condition and that the inhalation event had no permanent effect on the employee. Cardiologists testified in support of each side's theory. The trial court found for the employee and awarded permanent total disability benefits. The insurer has appealed that decision. The appeal has been referred to the Special Workers' Compensation Appeals Panel, pursuant to Tennessee Supreme Court Rule 51, for a hearing and a report of findings of fact and conclusions of law. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2012) Appeal as of Right; Judgment of the
Trial Court Affirmed**

J. S. "STEVE" DANIEL, SP. J., delivered the opinion of the Court, in which GARY R. WADE, C. J., and E. RILEY ANDERSON, SP. J., joined.

T. Joseph Lynch, Knoxville, Tennessee, for the appellant, Midwestern Insurance Alliance.

Mark E. Floyd, Knoxville, Tennessee, for the appellee, David D. Lawrence.

MEMORANDUM OPINION

Factual and Procedural Background

David Lawrence ("Employee") was employed as a truck driver by Shore Trucking Company ("Employer"). He drove a tanker truck, hauling dry products such as lime, cement and fly ash. His job required him to load, transport and unload those products. In order to unload a product, Employee connected a hose between the tanker and a silo, then turned on

a large blower that emptied the tanker's contents into the silo. On December 2, 2008, Employee transported a load of dry cement from Chattanooga to Buzzi Unicem on Neyland Drive in Knoxville. Upon his arrival, Employee picked up a hose that was already attached to the silo he had been assigned. When Employee "unfolded" the hose to connect it to his truck, dry cement blew directly into his face. He immediately began to cough, but was able to connect the hose. After connecting the hose he began to hyperventilate. Employee got into the cab of his truck and called 911 from his cell phone. Employee testified that he "couldn't breathe and that it's like drowning, sitting in the cab of your truck, and every breath you took it the [air] wasn't there." Three other trucks were unloading into the same silo at the time. One of those trucks was being driven by Nikki Wright.

Mr. Wright found Employee and helped him out of the truck. Emergency medical technicians arrived, placed an oxygen mask on Employee and transported him to the University of Tennessee Hospital ("UT Hospital"). Employee's last recollection was being wheeled into the emergency room where he was placed on a ventilator and remained unconscious for nineteen days. Because of his breathing difficulties, he was unable to tell either Mr. Wright or his physicians what had occurred. After Employee returned to consciousness, he was transferred to Erlanger Hospital in Chattanooga where he remained for two days before he was released. Employee was able to return to work in February 2009.

Employee continued to work for Employer in the same position he had held before the December 2008 incident, but he testified that when he returned to work he "wasn't 100% by no means." Initially, he received easier assignments, had more time off and was not asked to haul lime. He and other employees were required to wear dust masks while loading and unloading his truck. Previously, dust masks had been available, but were not required. Employee testified that, over time:

I was declining in my health, I was fatiguing quick, it was hard to perform my job, it was hard to climb up on top of the tanker and keep my balance and I just felt, for my safety and others on the road, that, you know, I didn't want to pass out or nothing on the road. And so, I discussed it with the doctor and he suggested that I not drive a commercial vehicle anymore.

As a result of these issues, Employee stopped working in January 2011. In March 2011, he had surgery to implant a pacemaker/defibrillator. The pacemaker caused him to have pain and difficulty in using his left arm. After the implanting of the pacemaker, Employee was able to walk only short distances and drive an automobile for short trips. Employee testified that he considered himself unable to perform any of the jobs he had held in the past. Those jobs included helicopter repair, roofing and automobile mechanic. Employee had also previously owned and operated an automobile repair business and had

been a supervisor of a commercial roofing crew.

On cross-examination, Employee admitted that he had misrepresented his level of education during his discovery deposition and in his interrogatory responses. At trial, he testified that he left school in the eleventh grade. During his deposition and in his interrogatory responses, he stated that he was a high school graduate. He agreed that his resume listed the following skills: “Drywall prep and hanger, roofing, both tile and shingles, electrical, mechanic, welder, plumbing, heating and air, operations of all types of machinery, helicopter repair, US Army, work and communicate well with people, ASME certified and have a current CDL, Class A license.” He also agreed that he had supervised as many as sixty-five employees in the roofing business.

Employee admitted that he had a previous accident involving inhalation of dust while working for Employer and that, prior to being hired by Employer, he had been diagnosed with hypertension, diabetes and high cholesterol. He did not miss any work from the time he returned to his job in February 2009 until he resigned in January 2011.

Employee’s wife, Victoria Lawrence, testified that Employee had no heart problems prior to the December 2008 incident, although he had undergone a cardiac catheterization in the past. She confirmed that he was unconscious for nineteen days after the December 2008 incident and that he was “struggling” after his return to work in February 2009.

Dr. John Golding, a cardiologist, testified by deposition on behalf of Employee. He became Employee’s treating physician in 2004, when he performed the previously mentioned cardiac catheterization. At that time, he diagnosed Employee with hypertensive heart disease. Dr. Golding testified that Employee had “some enlargement of the muscle wall” and “diastolic dysfunction” of the heart at that time. However, “the main part of his heart as far as systolic function and cardiac output was normal.” Based upon the records of UT Hospital, he testified that Employee’s primary problem at the time he was admitted was that “he was hypoxic and he wasn’t able to maintain an adequate blood oxygenation level.” Tests performed at that time showed that Employee had developed systolic heart dysfunction. This was a new finding for Employee. According to Dr. Golding’s testimony, systolic dysfunction can be caused by respiratory distress. He opined:

Most likely [Employee’s pre-existing heart condition] was aggravated by [the December 2008 incident]. Obviously, he had some predisposition to heart disease prior to that, and we already knew he had some diastolic dysfunction prior to that. But the event itself probably aggravated some of his underlying cardiac issues. Because he was so hypoxic, just the prolonged intubation, he probably got some muscle dysfunction from being so hypoxic.

....

I believe . . . the inhalation of the dust [was the cause of Employee's respiratory distress]. It's the only thing that really fits. Now, . . . he was fine until he inhaled the stuff. He inhaled the stuff; he got short of breath. It's kind of the old term in medicine don't make it hard. Usually the simplest explanation is the right explanation. If a guy inhales a massive amount of dust, he gets short of breath, that's probably why he's short of breath.

Dr. Golding testified that Employee retained a 45% permanent anatomical impairment to the body as a whole due to the December 2008 incident. He stated that Employee should not be permitted to drive a commercial vehicle because of the defibrillator implant and that he would be capable of sedentary work only.

Michael Galloway, a vocational consultant, evaluated Employee at the request of his attorney. He administered the Wide Range Achievement Test, and testified that this test revealed that Employee was able to read at an eleventh grade level and perform arithmetic at a tenth grade level. Mr. Galloway noted that Employee's work history was mostly "labor activity." Based on Dr. Golding's restrictions, Mr. Galloway opined that Employee had a 100% vocational disability. In reaching his conclusion, he did not consider Employee's experience as a roofing supervisor or automobile repair shop owner because those jobs were more than fifteen years before the evaluation.

Dr. Hal Roseman, a cardiologist, conducted an independent medical examination at the request of Employer's workers' compensation insurer, Midwestern Insurance Alliance ("Insurer"). Dr. Roseman testified in person and was of the opinion that Employee had developed acute respiratory distress and acute systolic heart failure. He opined that there was no causal relationship between the December 2008 incident and Employee's systolic heart failure, stating that such a relationship was "scientifically untenable." His opinion was based on the premise that an acute pulmonary failure such as Employee suffered could affect only the right (diastolic function) side of the heart, and could not affect the left (systolic function) side. Based on the same records of UT Hospital relied upon by Dr. Golding, Dr. Roseman was of the opinion that Employee suffered from pneumonia at the time of his injury, which was the cause of his respiratory distress. He also opined that Employee already had cardiomyopathy (heart failure) at the time of the incident. He noted that Employee suffered from many risk factors for heart failure prior to December 2008, including obesity, sleep apnea, hypertension, diabetes and alcohol abuse. He testified that the presence of these factors over time formed a classic scenario for heart failure. He considered Dr. Golding's opinion concerning causation to be "scientifically untenable and implausible."

Dr. William Wray, a vocational consultant, evaluated Employee at Insurer's request.

His testing revealed that Employee had average reading skills and slightly better than average math skills. He interpreted Dr. Golding's testimony to permit Employee to engage in light, as well as sedentary, work. He opined that Employee had a 40% to 60% vocational disability as a result of his heart failure. Unlike Mr. Galloway, Dr. Wray felt that Employee had some transferrable skills based upon his work history, and he did not exclude employment more than fifteen years prior from his evaluation of Employee's skill set. He further testified that using the "most narrow definition" of Dr. Golding's restrictions, Employee would have a 95% vocational disability as a result of his heart failure.

The trial court announced its findings from the bench. It found Dr. Golding's testimony to be more persuasive than Dr. Roseman's. On that basis, it found that Employee's pre-existing heart condition had been aggravated or accelerated by the December 2, 2008 incident. It further found that Employee was permanently and totally disabled as a result of that event. The trial court entered a judgment in accordance with those findings. Insurer has appealed, contending that the evidence preponderates against the trial court's ruling on causation. In the alternative, it asserts that the evidence preponderates against the finding that Employee was permanently and totally disabled.

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). When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 898, 900 (Tenn. 2009). "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) (citing Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006)). 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

Insurer raises three issues on appeal. First, it contends that the evidence preponderates against the trial court's finding that Employee's episode of respiratory distress on December 2, 2008 was caused by inhalation of cement dust. Second, it argues that, even if such an event occurred, it did not cause an advancement of Employee's pre-existing heart condition. Third, it argues in the alternative that Employee is not permanently and totally disabled.

Did an Inhalation Event Occur?

Insurer advances several arguments in support of its assertion that Employee did not inhale a large amount of cement dust on December 2, 2008. It argues that Employee's testimony was not credible because that testimony had been impeached by the fact that Employee had testified at trial that he left school in the eleventh grade but stated in his deposition and interrogatory responses that he was a high school graduate. In addition, Insurer notes that neither Nikki Wright nor Edward Johnson, another driver who assisted Employee at the time of the incident, testified that there was dust on Employee at that time. Finally, it argues that the records of UT Hospital do not indicate that cement dust was discovered in Employee's lungs.

We note that the trial court found Employee to be a credible witness, a finding that is entitled to great deference from this Panel. Madden, 277 S.W.3d at 898, 900. The trial court's credibility finding considered the discrepancy in Employee's testimony concerning his education background as it related to the issues in this case and resolved them in his favor. We further note that Mr. Johnson testified that he did not recall whether there was any dust on Employee, and Mr. Wright testified that he could not see if there was dust on Employee or if Employee was coughing up dust, because it was dark in the cab of the truck when he found him. Mr. Wright also testified that he himself had previously witnessed a large quantity of dust blow out of the same hose when it was unfolded. We are unable to evaluate Insurer's contentions concerning the records of UT Hospital, because those records were not placed into evidence. Insurer offered the records at trial, and Employee objected. After a colloquy with counsel, the trial court deferred its ruling, and Insurer later withdrew the request to introduce the records. Based upon the foregoing, we are unable to conclude that the evidence preponderates against the trial court's finding that the December 2, 2008 event occurred as described by Employee.

Medical Causation

Based upon the testimony of Dr. Roseman, Insurer contends that it is "scientifically impossible" that a hypoxic event could advance pre-existing diastolic heart dysfunction to systolic dysfunction. It points to Dr. Roseman's testimony that no medical case studies of such an event exist. It also refers to Dr. Roseman's testimony that Employee had many risk factors for diastolic heart failure and that diastolic heart failure was the likely result of the natural progression of his condition.

As outlined above, Dr. Golding's opinion differed from Dr. Roseman's. Dr. Golding testified that Employee's pre-existing condition made him more susceptible to heart muscle damage from oxygen deprivation.

Our supreme court has recently reviewed the standard to be applied in evaluating

evidence concerning the issue of causation in workers' compensation cases:

Generally speaking, a workers' compensation claimant must establish by expert medical evidence the causal relationship between the alleged injury and the claimant's employment activity, "[e]xcept in the most obvious, simple and routine cases." Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008) (quoting Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991)). The claimant must establish causation by the preponderance of the expert medical testimony, as supplemented by the evidence of lay witnesses. Id. As we observed in Cloyd, the claimant is granted the benefit of all reasonable doubts regarding causation of his or her injury:

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" Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004); see also Glisson v. Mohon Int'l, Inc./ Campbell Ray, 185 S.W.3d 348, 354 (Tenn. 2006). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004).

Id.; see also Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). The trial court may properly award benefits based upon medical testimony that the employment "could or might have been the cause" of the employee's injury when there is also lay testimony supporting a reasonable inference of causation. Fritts, 163 S.W.3d at 678.

Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274-75 (Tenn. 2009).

Moreover, a trial court generally has the discretion to choose which expert to accredit when there is a conflict of expert opinions. See Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990); see also Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996). Viewed in that light, we conclude that the trial court here did not abuse its discretion by choosing to accredit the opinion of Dr. Golding over that of Dr. Roseman.

Permanent Total Disability

Insurer's final argument is that the evidence preponderates against the trial court's

finding that Employee is permanently and totally disabled. The heart of its argument is that Employee's vocational expert, Mr. Galloway, (1) incorrectly interpreted Dr. Golding's restrictions, and (2) arbitrarily excluded from his analysis job skills and experience obtained more than fifteen years prior to the injury.

Dr. Golding testified:

Higher levels of exertion with an ejection fraction of less than 30%, he's not going to be able to tolerate things of that nature. Sedentary work, he can probably do; you know, sitting down, desk-type stuff. He shouldn't have any real issues with that. He'll have some weight lifting restrictions. Anytime you have heart failure and systolic dysfunction, you don't want to see anyone lifting heavy weights because of the systemic rise in blood pressure and aggravating the heart function.

We agree that the meaning of Dr. Golding's statement is not entirely clear. In our view, both Mr. Galloway's interpretation and Dr. Wray's interpretation are reasonable. However, Mr. Galloway's interpretation is consistent with the testimony of Employee and his wife that he is capable of only limited sustained activity. Employee testified that he was only able to walk approximately a quarter of a mile without stopping. Inasmuch as the trial court found Employee to be a credible witness, we cannot fault its further, explicit conclusion that he was limited to sedentary work, thus adopting Mr. Galloway's interpretation of Dr. Golding's restrictions. As the trial court noted, Dr. Wray testified that if the "most conservative" interpretation of Dr. Golding's restrictions was used, Employee had a 95% vocational loss due to his heart condition.

Dr. Wray's opinion that Employee retained access to 5% of the job market was premised in large part upon his consideration of Employee's experiences as a supervisor and small-business owner in determining Employee's skill set. Mr. Galloway explained his decision not to consider skills and experiences more than fifteen years prior to injury as follows:

[The] Social Security Administration . . . use[s] that as a baseline as well. And what we've found over the years, in putting together research, is where the skill set begins to erode. I'm not suggesting that, just at the end of that 15-year time period, it just magically disappears, but it begins to erode because of the changes say in technology, changes in duties, for

example, so that . . . is an issue.

Mr. Galloway also noted that Employee's supervisory experience was in the roofing industry, which required physical labor in addition to other duties.

Having reviewed the entire record, we are unable to conclude that the evidence preponderates against the trial court's decision to adopt Mr. Galloway's assessment of Employee's disability over that of Dr. Wray.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Midwestern Insurance Alliance and its surety, for which execution may issue if necessary.

J. S. "STEVE" DANIEL, SP. J.

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**Chancery Court for Knox County
No. 176231-1**

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JUDGMENT

This case is before the Court upon the motion for review filed by Midwestern Insurance Alliance pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

David D. Lawrence's motion that the Court find the instant appeal frivolous and award the movant damages is denied.

Costs are assessed to Midwestern Insurance Alliance and its surety, for which execution may issue if necessary.

Wade, C.J., not participating

