

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

March 25, 2015 Session

WILLIAM DeMORATO V. CHEROKEE INSURANCE CO.

**Appeal from the Chancery Court for Madison County
No. 68253 James F. Butler, Judge**

No. W2014-01262-SC-R3-WC – Mailed August 4, 2015; Filed September 10, 2015

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. After finding that William DeMorato ("Employee") suffered a bilateral carpal tunnel injury in the course and scope of his employment with Trans Carriers, Inc. ("Employer"), the trial court awarded permanent partial disability benefits of 15% to each arm and temporary total disability benefits of \$104,948.02. After Employer filed a motion to alter or amend the judgment, however, the trial court concluded that Employee was not entitled to temporary total disability benefits. Employee argues that the trial court erred in finding that he was not entitled to temporary total disability benefits. Employer argues that the trial court erred in finding that Employee suffered a compensable injury. We affirm the trial court's judgment.

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

CHANCELLOR MARTHA B. BRASFIELD delivered the opinion of the Court, in which JUSTICE HOLLY KIRBY and JUDGE BEN H. CANTRELL joined.

Ricky L. Boren, Jackson, Tennessee, for the Appellant, William Demorato.

David C. Riley, Memphis, Tennessee, for the Appellee, Cherokee Insurance Company.

OPINION
Factual and Procedural Background

Employee, age sixty-eight, testified by deposition that he worked as a truck driver for more than thirty years. From October to December of 2004, he worked for J.B. Hunt, but he did not report any injuries during this period. After leaving J.B. Hunt, Employee worked as a truck driver for Employer¹ from September 15, 2005 to February 12, 2007. In December of 2005, while he was hospitalized for a possible heart attack, he reported tingling and numbness in his hands. Following bypass surgery, he missed work from December 21, 2005 to April 10, 2006. In June of 2006, Employee was referred to Debra Martin, a nurse practitioner. Ms. Martin determined that Employee had positive Tinel's signs over his left and right ulnar nerves.

In February of 2007, Employee was terminated for poor performance after a series of driving mishaps and logbook violations. Although he applied for other driving positions, he did not obtain subsequent employment and began collecting social security. In September of 2007, Employee went to Dr. Keith Nord and reported that he had pain and numbness in his hands. Dr. Nord eventually performed surgical procedures on Employee's left hand in February of 2010 and on his right hand in June of 2011; Employee's symptoms improved following the surgeries. Employee acknowledged that he had other medical issues, which included heart problems and diabetes.²

Marian DeMorato testified that she married Employee in 2005; they both worked as truck drivers for Employer. She described the various duties, including driving, hooking up the trailer, and dropping the trailer. In December of 2005, Employee was hospitalized for a heart condition in Indiana and reported having pain in his left arm. Following heart bypass surgery, Employee was off work until April of 2006. Although Employee stopped working in February of 2007, he continued to have pain in his hands that often woke him up at night. Employee was treated for carpal tunnel syndrome by Dr. Nord and "got much better" thereafter.

Dr. Keith Nord, a board-certified orthopedic surgeon, testified that he first examined Employee on September 10, 2007. Employee reported numbness and tingling in his left hand. Dr. Nord determined that Employee's left hand had a "positive Tinel's, Phalen's, and median nerve compression test." Dr. Nord diagnosed left carpal tunnel syndrome and "recommended restricted duty, no repetitive activities of the left arm, [and] no lifting greater than 5 pounds with the left hand." Dr. Nord next examined Employee on December 30, 2009. Employee

¹Employer's insurance carrier, Cherokee Insurance, Co., is the named party in this proceeding.

²Employee died on September 17, 2012; his wife, Marian K. DeMorato, was substituted as a party.

reported that he had discomfort in both hands. Dr. Nord determined that Employee had a positive Tinel's, Phalen's, and median nerve compression test in both hands. He diagnosed bilateral carpal tunnel syndrome.

Dr. Nord next examined Employee on January 6, 2010. Employee said he continued to have problems with both hands and that his right hand was getting worse. Dr. Nord performed a left carpal tunnel release on February 4, 2010. On March 17, 2010, Employee reported that he was doing "fine" with his left hand but that he continued to have problems with his right hand. An EMG nerve conduction test performed in February of 2011 showed "moderate to moderately severe carpal tunnel syndrome in the right wrist as well as some diabetic peripheral neuropathy." Dr. Nord performed a right carpal tunnel release on June 21, 2011; he stated that Employee reached maximum medical improvement on July 6, 2011.

Dr. Nord testified that Employee's job included driving, hooking and unhooking trailers, and lifting packages of five to one hundred pounds. He stated that Employee "had no other risk factor or known causative factors and, therefore, [he] felt that this was work-related and had been caused by his driving." He further testified as follows:

- Q. Doctor, from the first time you saw him, which was September of 2007, was he on restrictions nonstop until you found him at MMI in July of 2011?
- A. Yes.
- Q. Okay. Would the restrictions you would have had on him precluded truck driving or strenuous physical activity?
- A. Yes.
- Q. Okay. When you released him at MMI, at that point in time, what would you have recommended in terms of activities to be careful of as a result of the bilateral carpal tunnel syndrome?
- A. We did put him at full duty, although repetitive type of activities can cause worsening of the problem again.

Dr. Nord assigned a 1% impairment of each upper extremity under the sixth edition of the AMA Guidelines.

Dr. Nord conceded that Employee did not discuss his employment history other than noting that he had been a truck driver for many years. Although Employee's symptoms worsened from 2007 to 2010, Dr. Nord acknowledged that he could not determine whether Employee's condition worsened from a "structural standpoint" because he did not have any EMG results or other records prior to 2010. Dr. Nord acknowledged that Employee was diabetic and had a serious heart condition. Moreover, he agreed that he did not see Employee

from September of 2007 until December of 2009 and that Employee had other medical problems that kept him from working. He stated that diabetes does not cause carpal tunnel syndrome but can make the EMG and nerve conduction tests more difficult to interpret; nevertheless, he did not believe that Employee's diabetes played a role in Employee's carpal tunnel issues.

Dr. Ron Bingham testified that he evaluated Employee in November of 2008. Employee had abnormal sensation on the fingers of his left hand; he had a negative Phalen's test on both hands and a positive Tinel's test on his left hand. After performing an EMG and a nerve conduction study, he concluded that Employee had moderate to moderately severe diabetic neuropathy. Although he initially concluded that Employee did not have carpal tunnel syndrome, he changed his opinion prior to his deposition. He also evaluated Employee in January of 2010 and February of 2011; after conducting EMG and nerve conduction tests, he determined that Employee had neuropathy and carpal tunnel. Dr. Bingham acknowledged that Employee underwent EMG and a nerve conduction studies in 1997 and 1998 and was diagnosed with right-side carpal tunnel syndrome. He said that Employee's carpal tunnel was "slightly worse on [his] study which is dated November 11, 2008 versus the study . . . dated September 3, 1997." He agreed that the progression may have been due to diabetic neuropathy.

Dr. Samuel Chung, D.O., performed an independent medical evaluation on August 25, 2011. Employee's medical history revealed "progressive worsening of bilateral pain in his overall distal fingers as well as numbness and tingling along with frequent night pain and having difficulty with loss of manual dexterity and grip strength while he was performing his truck driving activity." Following surgery by Dr. Nord, "patient ha[d] significant improvement in his night pain, less tingling and numbness of the distal fingers" but "continue[d] to experience ongoing symptoms of left wrist pain with activities such as gripping and twisting. . . ." Although Dr. Chung was aware that Employee had diabetes and congestive heart failure, he opined that Employee's bilateral carpal tunnel syndrom was caused by his work as a truck driver and not by his diabetes. Dr. Chung assigned 10% impairment to each upper extremity under fifth edition of the AMA Guidelines.

After considering the testimony and the evidence, the trial court sent a letter to counsel finding that Employee suffered a bilateral carpal tunnel injury in the course and scope of his employment. The trial court awarded permanent partial disability benefits of 15% to each arm and temporary total disability benefits of \$104,948.02. After Employer filed a motion to alter or amend the judgment, the trial court concluded that Employee was not entitled to temporary total disability benefits.³ Employee argues that the trial court erred in finding that

³Thereafter, Employee filed a motion to alter or amend the judgment, which the trial court denied.

he was not entitled to temporary total disability benefits. In contrast, Employer argues that the trial court erred in finding that Employee suffered a compensable injury. The appeal has been referred to the Special Workers' Compensation Appeals Panel. See Tenn. Sup. Ct. R. 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); 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 the 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). Questions of law are reviewed *de novo* with no presumption of correctness afforded to the trial court's conclusions. Gray v. Cullom Machine, Tool & Die, 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

Causation

Employer argues that the trial court erred in finding that Employee's bilateral carpal tunnel syndrome was caused or aggravated by his employment.⁴ Employer contends that Employee had carpal tunnel symptoms prior to working for Employer and that his condition was aggravated by his diabetic neuropathy. Employee argues that the evidence does not preponderate against the trial court's findings.

"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

⁴We opt to review this issue first because if the Employer's argument is correct, then Employee's issue regarding temporary total disability benefits would be moot.

the preponderance of the expert medical testimony, as supplemented by the evidence of lay witnesses. Id. An employee "does not suffer a compensable injury where the work activity aggravates a preexisting condition merely by increasing the pain." Trosper v. Armstrong Wood Products, Inc., 273 S.W.3d 598 (Tenn. 2008). However, "if the work injury advances the severity of the preexisting condition, or if, as a result of the preexisting condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable." Id. at 607. The claimant is granted the benefit of all reasonable doubts regarding causation of his or her injury. See Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 274-275 (Tenn. 2009).

In our view, the evidence does not preponderate against the trial court's finding that Employee suffered a compensable injury. Although the trial court acknowledged that this is a difficult case compounded by Employee's death before the trial, it found that Employee "did have carpal tunnel syndrome to some extent prior to becoming an employee of [Employer] and that his work with [Employer] advanced or aggravated his CTS to the point where it became much more symptomatic and caused him to seek medical treatment." The trial court emphasized that

Dr. Nord, the treating physician, began treating him after he was terminated from [Employer] and was furnished a job description for [Employee] and opined that [his] CTS was related to his work as a truck driver. After surgery, he placed [Employee] on restrictions from September 10, 2007 to July 6, 2011. He stated that those restrictions would have prevented [Employee] from driving a truck. He did state that [Employee's] CTS progressed from the time he left . . . employment until his surgery, and could not say for that [Employee's] CTS worsened from a structural anatomical standpoint during that time because there was no documentation to support it. . . . [Dr. Nord] did state that both of [Employee's] hands were involved in truck driving and that [Employee's] right hand got worse because he had to use that one more because his left hand was bothering him as well during his work.

Employer argues that Dr. Nord did not have a history of Employee's medical problems and that there was no evidence that Employee's work aggravated or advanced his carpal tunnel syndrome. However, as the trial court noted, Dr. Bingham stated that Employee "did have carpal tunnel syndrome and that there was progression in the condition from 1997 and 1998 EMGs that he reviewed until the one he did in 2008." Although Dr. Bingham stated that the progression could have been related to Employee's diabetes, "Dr. Chung placed medical causation with [Employee's] truck driving for 30-plus years" and opined that Employee's diabetes "did not contribute to [Employee's] CTS." Moreover, the evidence established that Employee's condition improved following the carpal release procedures. As the trial court

noted, absolute certainty is not required to establish causation in a workers' compensation case; accordingly, we conclude that the evidence does not preponderate against the trial court's judgment.

Temporary Total Disability

The trial court initially found that Employee was "entitled to temporary total disability from September 10, 2007 until July 6, 2011. However, the trial court later granted the Employer's motion to alter or amend and found that other medical conditions, not his carpal tunnel syndrome, were the cause of his inability to work during that period. The Employee argues that he is entitled to temporary total disability benefits for that period.

Temporary total disability refers to an "'injured employee's condition while disabled to work by his injury and until he recovers as far as the nature of his injury permits.'" Gray v. Cullom Machine, Tool & Die, Inc., 152 S.W.3d 439, 443 (Tenn. 2004). To establish a prima facie case of entitlement to receive temporary total disability benefits, an employee must show (1) that he or she was totally disabled and unable to work due to a compensable injury, (2) that there was a causal connection between the injury and his inability to work, and (3) the duration of the period of disability. *Id.*(citing Cleek v. Walmart Stores, Inc., 19 S.W.3d 770, 776 (Tenn. 2000)). Temporary total disability benefits ensure that the employee may receive compensation during "the healing period during which the employee is totally prevented from working." Cleek, 19 S.W.3d at 776.

To be eligible to receive temporary total disability benefits, the Employee must prove that his work-related injury was the cause of his inability to work. In this case, the proof shows that the Employee was terminated from his employment for cause on February 12, 2007. He sought treatment from Dr. Nord for carpal tunnel syndrome in his left extremity in September 2007, at which time the doctor recommended an EMG nerve conduction study, restricted work duty, no repetitive activities of the left arm, and no lifting greater than 5 pounds with the left hand. Thus, according to Dr. Nord, the Employee could have returned to work with restrictions (had he been employed at the time) the next day. Employee did not return to Dr. Nord until December 2009, at which time Dr. Nord diagnosed right carpal tunnel syndrome. The record indicates that, during the period from September 2007 to December 2009, Employee experienced other medical problems (unrelated to his work injury) that prevented him from working and from seeking treatment for carpal tunnel syndrome. Dr. Nord's work restrictions remained in place during this period. Dr. Nord performed carpal release surgery on Employee's left hand in February 2010 and on his right hand in June 2011. The Employee reached MMI on July 6, 2011. Dr. Nord testified that he usually releases patients to return to work on restricted duty one day after carpal tunnel release surgery. He testified that the period for full recovery after such surgeries is generally

about six weeks. Thus, it appears that the Employee could have worked (with restricted duties) during the period from September 2007 until his MMI in July 2011. Further, it appears that the Employee's inability to work was based on other medical issues, not the carpal tunnel syndrome. Thus, the Employee has failed to prove a causal connection between his work injury and his inability to work. Accordingly, we conclude that the trial court properly reversed its original award of temporary total disability.

Conclusion

For the foregoing reasons, the trial court's judgment is affirmed. Costs are assessed to Employee, for which execution shall issue if necessary.

MARTHA B. BRASFIELD,
CHANCELLOR

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

WILLIAM DEMORATO v. CHEROKEE INSURANCE COMPANY

**Chancery Court for Madison County
No. 68253**

No. W2014-01262-SC-R3-WC – Filed September 10, 2015

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 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 Appellant, William Demorato, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM