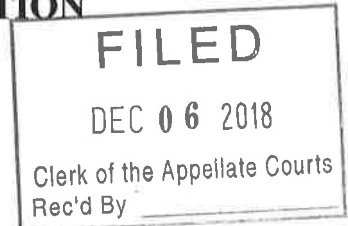
IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

August 6, 2018 Session

ANNA MARIA BUTLER v. MCKEE FOODS CORPORATION



Appeal from the Chancery Court for Hamilton County
No. 16-0322 Pamela A. Fleenor, Chancellor

No. E2017-02471-SC-R3-WC – Mailed November 1, 2018

Anna Maria Butler ("Employee") alleged that she sustained a compensable injury on May 2, 2012, in the course and scope of her employment with McKee Foods Corporation ("Employer"). The trial court found that Employee sustained a compensable injury and awarded permanent total disability benefits. Employer has appealed that decision, arguing that Employee's injury was not causally related to her employment. The 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. ACREE, JR., SR.J., delivered the opinion of the Court, in which SHARON G. LEE, J., and DON R. ASH, SR.J., joined.

Justin Furrow and Charles Gilbreath II, Chattanooga, Tennessee, for the appellant McKee Foods Corporation.

Flossie Weill, Chattanooga, Tennessee, for the appellee Anna Maria Butler.

OPINION

Factual and Procedural Background

On May 2, 2012, Employee slipped and fell while walking up a flight of stairs at work, hitting her head on a steel door and landing on a concrete floor. Employee filed a claim for injuries related to this event. After exhausting the benefit review process, Employee filed her complaint for workers' compensation benefits on May 16, 2016. The case proceeded to trial on May 10, 2017. Relevant to the issues on appeal, the trial court heard live testimony from Employee and co-worker Orlando Robinson, Jr. The proof at trial also included deposition testimony from Dr. Timothy Strait, Dr. Garrick Cason, and Dr. Jason Eck.

Employee, age 62 at the time of trial, worked for Employer from 1976 to 2013, the vast majority of that time as a forklift driver. Based on the evidence presented at trial, the trial court described Employee as "an honest, dependable, highly motivated, excellent lift truck operator with a fantastic attendance record." One of Employee's co-workers, Orlando Robinson, Jr., was walking with Employee when she fell on May 2, 2012. Mr. Robinson testified that "[w]hen she hit the door, it's like a turtle, you know, when his head goes into his shell. I didn't see her neck anymore. And I thought she had broke her neck and it scared me." Immediately after falling, Employee lay unresponsive on the floor for several minutes and then went to the emergency room for treatment.

Following the fall, Employee began experiencing neurological symptoms including balance issues and numbness in her arms and legs, along with an inability to perform many tasks that she was able to perform prior to the fall. Employee initially returned to her position as a forklift operator, but the job was prolonging her recovery because it requires repetitive head turning. She subsequently worked in positions as a packaging technician and janitor, but was unable to perform those jobs due to her physical limitations. She applied for numerous other jobs at Employer but was told she did not qualify because she either lacked a college degree or the relevant experience. Employee ultimately resigned at 58 years of age.

Prior to the May 2012 fall that gave rise to the instant case, Employee was injured while working for Employer when several packages fell on her. Following that incident, she was treated by Dr. Craig Humphreys for a neck injury from September 1997 through December 1997, when Dr. Humphreys released her back to work without restrictions.[1]

[1] The trial court referred to this incident as the "1997 injury." Employee testified at trial that the incident where the packages fell on her actually occurred in 1994, although she sought treatment from Dr. Humphreys in 1997. Whether the previous incident occurred in 1994 or 1997 is immaterial.

Employee treated any subsequent pain from that prior fall with ice and pain relievers, did not require any further medical treatment, continued to work for Employer as a forklift operator, and was also physically active outside of work, up until the May 2012 fall.

Employee was treated by four physicians following the May 2012 fall. On May 15, 2012, Employer provided Employee a panel of physicians and she selected McKinley Lundy, D.O., as her treating physician. Dr. Lundy diagnosed a cervical strain that arose out of and in the course of her employment, and placed Employee at maximum medical improvement on October 12, 2012, assigning no permanent medical impairment. Dr. Lundy also diagnosed Employee as having a pre-existing cervical degenerative disc disease primarily affecting the C5-C6 and C6-C7 vertebrae, concluding that this degenerative condition did not arise out of or in the course and scope of her employment. Dr. Lundy subsequently made a referral for Employee to see an orthopedic spine specialist or neurosurgeon for further evaluation and treatment because Employee continued to have significant symptoms following her May 2012 fall.

Following the referral from Dr. Lundy, Employer provided Employee a panel of physicians and she selected Timothy Strait, M.D., a neurosurgeon. Dr. Strait saw Employee in August 2012 and June 2013. He reviewed an x-ray of her neck and a CT scan of her brain. He did not order or review any further tests, such as an MRI. Consistent with Dr. Lundy's findings, he diagnosed Employee with a cervical strain and mild concussion. He concluded that Employee's neck complaints were cumulative and progressive wear-and-tear, and that the May 2012 fall did not cause any permanent aggravation or exacerbation to the pathology of her cervical spine.

Still experiencing significant pain, Employee sought independent medical treatment from Dr. Garrick Cason, an orthopedic surgeon, who she saw at least nine times between October 2013 and June 2016. Dr. Cason ordered an MRI and reviewed the x-rays that were taken the days after the fall. He also ordered and reviewed x-rays in November 2015 and April 2016. Dr. Cason concluded that Employee sustained myelopathy, a spinal cord compression injury, and that her May 2012 fall accelerated and exacerbated her pre-existing degenerative condition.

During cross-examination at Dr. Cason's deposition, Employer's counsel asked him whether his opinion on causation would be affected if Employee had testified that she had previously injured her neck in 1997, and had remained symptomatic since that time, and Dr. Cason said that it would. On redirect, however, Dr. Cason reviewed Dr. Humphrey's 1997 report that revealed no pathologic reflexes and no hyperreflexia such as Employee experienced after the May 2012 fall. Dr. Cason then reasserted his opinion that Employee's May 2012 fall accelerated her pre-existing condition, regardless of whether Employee had sustained a neck injury in 1997.

Employee also sought treatment from Dr. Jason Eck, D.O., an orthopedic specialist who Employee saw seven times over three years, beginning in April 2014. Dr. Eck reviewed the x-ray report from May 2012, the MRI images from 2013, the x-ray and report from 2014, and the MRI images from 2016. Dr. Eck, like Dr. Cason, concluded that the May 2012 fall accelerated Employee's degenerative neck condition, explaining that "not just normal natural history, but the fact that she had a significant fall and hit her head can cause both worsening of the structural anatomic changes as well as the symptoms that those can cause, and I feel that that's what's happened with her." Dr. Eck further testified that there was no evidence of any spinal cord compression related to the 1997 injury. He also pointed to Employee's new neurological symptoms, as opposed to just pain, following the May 2012 fall as evidence of a new injury.

After taking the matter under advisement, the trial court found that Drs. Strait, Cason, and Eck were all credible expert witnesses and held that Employee's injury arose primarily out of and in the course and scope of her employment with Employer. The trial court awarded permanent total disability benefits. Employer appealed.

Analysis

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014), which provides that review of factual issues 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. As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Tennessee Code Annotated section 50-6-102(12) (Supp. 2011) provides that the terms "Injury" and "personal injury":

> (A) Mean an injury by accident, arising out of and in the course of employment, that causes either disablement or death of the employee;
>
> . . . .

> (C) Do not include: (i) A disease in any form, except when the disease arises out of and in the course and scope of employment; or (ii) Cumulative trauma conditions, hearing loss, carpal tunnel syndrome, or any other repetitive motion conditions unless such conditions arose primarily out of and in the course and scope of employment[.]

An employee "does not suffer a compensable injury where the work activity aggravates [a] pre-existing condition merely by increasing the pain." *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598, 607 (Tenn. 2008). "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." *Id.*; *see also Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 645-46 (Tenn. 2008).

"'Except in the most obvious, simple and routine cases,' a claimant must establish by expert medical evidence the causal relationship between the claimed injury and the employment activity." *Cloyd*, 274 S.W.3d at 643 (quoting *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991)). The opinion of an authorized treating physician "shall be presumed correct on the issue of causation but said presumption shall be rebutted by a preponderance of the evidence[.]" Tenn. Code Ann. § 50-6-102(12)(A)(ii) (2014) (applicable to injuries occurring prior to July 1, 2014). Absolute medical certainty is not required to establish causation, and reasonable doubt must be construed in favor of the employee. *See White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992). 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, 275 (Tenn. 2009). Moreover, for injuries occurring prior to July 1, 2014, courts are required to construe the workers' compensation law liberally in favor of an injured employee. Tenn. Code Ann. § 50-6-116 (2014) (applicable to injuries occurring prior to July 1, 2014); *Crew v. First Source Furniture Grp.*, 259 S.W.3d 656, 664 (Tenn. 2008) (citing *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991)).

On appeal, Employer's sole argument is that Employee's injury did not arise out of and in the course and scope of her employment. More specifically, Employer contends that there was insufficient evidence to overcome the presumption in favor of the authorized treating physicians—Dr. Lundy and Dr. Strait—who opined that Employee's injuries were not causally related to the May 2012 fall.

In reaching its judgment, the trial court recognized that the opinion on causation of an authorized treating physician is presumed correct pursuant to Tennessee Code Annotated section 50-6-102(12)(A)(ii) (2014) (applicable to injuries occurring prior to

July 1, 2014), but held that Employee had overcome the presumption afforded to Dr. Lundy and Dr. Strait. Specifically, the trial court explained that "[t]he MRI's show significant changes at levels C3-C5 that differ from the degenerative changes at C5-7," and that "there were significant changes at C5-C7 that are more than would result from just normal aging." Importantly, Dr. Strait did not order the MRI's. Dr. Cason ordered the MRI's during his initial visit with Employee after he reviewed Dr. Strait's x-rays. Dr. Cason concluded that Employee sustained myelopathy, a spinal cord compression injury, and that her May 2012 fall accelerated and exacerbated her pre-existing degenerative condition between October 2013 and June 2016. Similarly, Dr. Eck concluded that the May 2012 fall accelerated Employee's degenerative neck condition. Dr. Cason and Dr. Eck opined that Employee's injuries were causally related to the May 2012 fall.

In addition, the trial court pointed to "objective signs of neurological changes due to spinal cord compression." Specifically, the trial court explained that prior to the May 2012 fall, Employee "had no balance issues, no problem walking in the dark and no problem with lifting objects," as she did after the fall. The trial court's finding of a spinal cord compression injury caused by the May 2012 fall was also consistent with the lay testimony of Mr. Robinson, who stated that at the time of the fall, he could not see Employee's neck, which looked "like a turtle . . . go[ing] into his shell."

Upon review of the evidence, we agree with the trial court that the evidence presented at trial was sufficient to overcome the statutory presumption in favor of the authorized treating physicians, and that Employee established by a preponderance of the evidence that her injury arose primarily out of and in the course and scope of her employment with Employer.

Employer also argues that the opinions of Dr. Cason and Dr. Eck cannot be used to overcome the statutory presumption in favor of Dr. Lundy and Dr. Strait because Dr. Cason and Dr. Eck were not aware of Employee's 1997 injury prior to their depositions. However, the trial court found Employee, who gave live testimony, "to be a very credible witness," and concluded that Employee had not told Dr. Cason or Dr. Eck about her 1997 injury "because she had been able to work and continue an active lifestyle for almost 15 years prior to her [May 2012] fall," and that she was not trying to hide her prior injury. Moreover, we disagree with Employer's characterization that Dr. Cason "changed his initial opinion when he learned that [Employee] gave him an incomplete medical history." In fact, Dr. Cason ultimately concluded on re-direct after reviewing the 1997 report from Dr. Humphreys that Employee's May 2012 fall had accelerated her pre-existing degenerative condition. Similarly, Dr. Eck did not waiver in his opinion that the May 2012 fall had caused Employee's injury.

Employer further argues that the trial court misspoke in stating its findings that Dr. Strait had been on Employer's panel for thirty-four years and that there was some bias in that regard in favor of Employer. Employer argues that this statement undermines the statutory presumption in favor of authorized treating physicians and requires reversal. However, the trial court did not disregard Dr. Strait's opinion because of his lengthy service on Employer's panel. To the contrary, the trial court specifically stated that it "found all the expert witnesses to be credible," and recognized the statutory presumption given to authorized treating physicians. The trial court then weighed the evidence before it and concluded that Employee "has overcome the statutory presumption that the treating physician's opinion is correct on the issue of causation," pointing to specific, objective evidence in the record of an injury caused by the May 2012 fall.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to McKee Foods Corporation, for which execution may issue if necessary.

WILLIAM B. ACREE, JR., SENIOR JUDGE

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Chancery Court for Hamilton County
No. 16-0322

FILED
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Clerk of the Appellate Courts
Rec'd By ________

No. E2017-02471-SC-R3-WC

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 are taxed to, McKee Foods Corporation, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM