

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 24, 2008 Session

UNITED PARCEL SERVICE v. JIM SANDERS

**Direct Appeal from the Circuit Court for Madison County
No. C-04-115 James F. Butler, Chancellor**

No. W2007-01525-WC-R3-WC - Mailed July 15, 2008; Filed August 19, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee, Jim Sanders, retired from his employment with the United Parcel Service in September 2003. In February 2004, he gave notice to his employer of a workers' compensation claim. He alleged that he had sustained gradual injuries or aggravation of his pre-existing conditions as a result of his work activities. The claim was denied, and the Mr. Sanders filed suit. At trial, the court sustained objections by both parties to medical records attached to medical depositions. At the conclusion of the trial, the trial court found that the employee had failed to carry his burden of proof and also that the claim was barred by failure to give timely notice of the alleged injury. The employee has appealed, asserting that the trial court erred in sustaining the employer's objection to medical records, in finding that he had not carried his burden of proof, and in finding that he had not complied with the notice requirement of the workers' compensation law. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right;
Judgment of the Circuit Court Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ALLEN W. WALLACE, SR. J., joined.

Art D. Wells, Jackson, Tennessee, for the appellant, Jim Sanders.

Lawrence W. White and Steve N. Snyder, Memphis, Tennessee for the appellee, United Parcel Service.

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Jim Sanders was a package delivery driver for United Parcel Service (“UPS”) from 1977 until 2003. By report, he had no significant health problems prior to 2001. In April 2001, he was injured in a motor vehicle accident, unrelated to his job. He sustained injuries to his neck, left shoulder, and left arm. He was unable to work for six months after the accident. He returned to work with no restrictions.

Upon his return, he had to drive more miles and deliver more packages than he had done before his accident. He testified that he used his left arm to steer his truck, and his right arm to shift gears. He delivered packages that weighed between one and one hundred fifty pounds. In early 2003, the length of his route increased. He testified that he advised his supervisor at the time, Tim Forderhase, that “[he] was having problems with [his] [left] shoulder and arm.” Mr. Forderhase gave Mr. Sanders permission to attend physical therapy during work hours. Mr. Sanders participated in physical therapy, which was paid for through his health insurance.

Mr. Sanders continued to have symptoms in his shoulder and arm while driving and handling packages. In September 2003, he retired. He testified that the reason for his retirement was that he could no longer perform his job due to his shoulder and arm problems. Mr. Sanders testified that he informed a second supervisor, David Miller, of the reason for his retirement in a social setting after he had retired.

Mr. Sanders underwent medical tests and treatment both before and after his retirement, but none of the treating physicians testified. He was ultimately diagnosed with carpal tunnel syndrome, ulnar nerve entrapment or cubital tunnel syndrome, and shoulder impingement, all on the left side.

In February 2004, counsel for Mr. Sanders sent a letter giving notice of his claim for workers’ compensation benefits to UPS. The claim was denied and this suit was filed.

Mr. Sanders was sixty-three-years-old at the time of trial. He was not employed, nor did he seek employment after his retirement, although he had provided some form of assistance or home care to two elderly individuals who lived in his home. Mr. Sanders testified that his symptoms had improved somewhat since his retirement because he was not as active. He reported that activities such as sweeping, mopping, raking, and pushing a lawn mower caused pain and numbness in his shoulder and arm.

The medical proof consisted of the depositions of two physicians who had performed independent medical examinations. Mr. Sanders’ treating physicians were not deposed. Records of some of the treating physicians were attached to the medical depositions. Each party objected to the admission of the medical records attached to the other party’s depositions, and the trial court excluded these records.

Dr. Robert Barnett, an orthopaedic surgeon, testified on behalf of Mr. Sanders. He conducted

an independent medical examination on March 15, 2006. He testified that Mr. Sanders had acromioclavicular joint arthritic changes in the left shoulder, ulner nerve entrapment in the left arm, degenerative changes in his neck, and left carpal tunnel syndrome. He assigned permanent impairment of 10% to the body as a whole allocated as follows: 3% attributable to the neck and the equivalent of 7% to the body as a whole for the 11% loss of the left arm due to loss of grip strength (10%) and loss of range of motion to the shoulder (1%). Dr. Barnett opined that all of these conditions were either caused or aggravated by Mr. Sanders' work. On cross-examination, he agreed that Mr. Sanders' symptoms were also consistent with the consequences of the 2001 automobile accident. He admitted that the impairment concerning the shoulder was based upon estimating Mr. Sanders' range of motion, rather than measurements taken with an instrument. He also agreed that basing impairment on loss of grip strength was not the preferred method according the American Medical Association guidelines.

Dr. Carl Huff, also an orthopaedic surgeon, testified for UPS. His deposition was taken on two separate occasions. Dr. Huff examined Mr. Sanders on September 15, 2005. He diagnosed Mr. Sanders with carpal tunnel syndrome, cubital tunnel syndrome, and shoulder impingement. He opined that none of these conditions were caused or aggravated by Mr. Sanders' work. He attributed the carpal tunnel syndrome to peripheral neuropathy, which is damage to the nerve caused by aging, disease, or trauma. He attributed the cubital tunnel syndrome to the 2001 automobile accident, noting that EMG results from 2004 were unchanged from results of testing done in 2001. He found that Mr. Sanders had been diagnosed with left shoulder impingement after the 2001 accident. He also testified that the condition was a normal degenerative process. He did not find evidence that Mr. Sanders' work had worsened the condition. On cross-examination during his first deposition, Dr. Huff testified that he had not seen records of the medical treatment Mr. Sanders received before his retirement. At the second deposition, Dr. Huff testified that he had seen these records and his previous opinions had not changed.

The trial court found that Mr. Sanders had failed to meet his burden of proof of causation. In reaching that ruling, the court specifically gave more credence to Dr. Huff's opinion than Dr. Barnett's opinion. The trial court further found that Mr. Sanders had failed to provide timely notice of his injury as required by Tennessee Code Annotated section 50-6-201 (2005). The court made an alternative finding that, if its finding on liability was reversed, Mr. Sanders had sustained a 30% impairment to the body as a whole. Judgment was entered accordingly. Mr. Sanders has appealed, contending that the trial court erred by refusing to consider medical records attached as exhibits to two medical depositions, by finding that Mr. Sanders' injuries were not caused or aggravated by his employment, and by finding that Mr. Sanders did not give sufficient notice of his alleged injury.

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) (Supp. 2007). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where 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. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

ANALYSIS

1. Objections to Medical Records

After Mr. Sanders' testimony was finished, his counsel submitted the deposition of Dr. Barnett to the court. Counsel for UPS then submitted the two depositions of Dr. Huff. Mr. Sanders objected to the admission of the medical records attached as exhibits to Dr. Huff's depositions ("Huff exhibits"), on the ground that they had not been properly authenticated. UPS then made the same objection to medical records attached to Dr. Barnett's deposition ("Barnett exhibits"). The trial court ruled that both the Huff exhibits and Barnett exhibits were inadmissible.

Mr. Sanders contends that the trial court erred in sustaining UPS's objection to the Barnett exhibits, and in refusing to consider the Huff exhibits for the limited purpose of evaluating the weight to be given to Dr. Huff's testimony. Mr. Sanders contends that the Barnett exhibits should have been admitted into evidence because UPS did not make a timely objection. He does not contend that the exhibits were properly authenticated.

In State v. Pilkey, 776 S.W.2d 943 (Tenn. 1989), the Supreme Court observed, "A motion to strike testimony from the record is one form of objection. It may be made after evidence has already been introduced and the movant seeks to have that evidence stricken from the record or from consideration by the jury." *Id.* at 952. Because the Barnett exhibits had not been viewed by the trier of fact at the time UPS objected to their admission, we affirm the trial court's finding that UPS's objection to the exhibits was timely and find that the Barnett exhibits were properly excluded from evidence.

Mr. Sanders also contends that the trial court should have considered the Huff exhibits, despite previously objecting to their admission, for the limited purpose of weighing Dr. Huff's testimony. Mr. Sanders argues that the records relating to Mr. Sanders' treatment for carpal tunnel syndrome by Dr. John Everett prior to his retirement were trustworthy and Dr. Huff should have given them more consideration. In support of this argument, Mr. Sanders points to Rule 703 of the Tennessee Rules of Evidence, which provides that the court may exclude expert opinion if the underlying facts or data indicate a lack of untrustworthiness. Rule 703, however, does not support Mr. Sanders' proposition that a trial court must then include evidence upon which expert opinion testimony is based if it is trustworthy. We find that this argument is without merit or basis in law. We further conclude that, even if the trial court erred in excluding the records, that error was harmless because Dr. Huff was cross-examined about the content of these records during both depositions. See Love v. Smith, 566 S.W.2d 876, 879 (Tenn. 1978) ("Ordinarily, an error in

admitting evidence is harmless if the fact shown by the offending evidence is also shown by other evidence in the record which is competent. If it appears to the reviewing court from an examination of the whole record that the verdict is unlikely to be different in the event of a retrial, the error must be considered harmless.”).

2. Causation

Mr. Sanders contends that the evidence preponderates against the trial court’s finding that he did not sustain his burden of proof on the issue of causation. In its finding, the court specifically gave credence to Dr. Huff’s testimony over that of Dr. Barnett. Mr. Sanders contends that this was error, although he provides few specific references to the record in support of that contention.

Mr. Sanders asserts that Dr. Huff did not have complete medical information at the time he reached his conclusions. He also argues that Dr. Huff’s opinion that Mr. Sanders’ conditions did not worsen while he was still working was contradicted by Mr. Sanders’ testimony that his symptoms improved after he retired. Finally, he contends that Dr. Barnett had more complete medical information than Dr. Huff.

In response, UPS points out that Dr. Huff was certified as an independent medical examiner in addition to his certification in orthopaedic surgery. Further, UPS notes that Dr. Huff did not change his opinion after reviewing the additional medical information referred to by Mr. Sanders. UPS also points out that Dr. Huff gave more detailed answers in support of his opinions. As additional support of the trial court’s ruling, UPS contends that Dr. Barnett conceded that Mr. Sanders’ symptoms were consistent with the 2001 auto accident and that Dr. Barnett’s procedure of assigning impairment is not precise.

In Orman v. Williams Sonoma, Inc. 803 S.W.2d 672, 676 (Tenn. 1991), the Supreme Court discussed the issue of conflicting expert testimony:

When the medical testimony differs, the trial judge must obviously choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts.

The trial court’s decision to give greater weight to the testimony of Dr. Huff over that of Dr. Barnett was consistent with those criteria. We have carefully reviewed the medical testimony in this case and conclude that the evidence does not preponderate against the trial court’s finding that Mr. Sanders failed to sustain his burden of proof on the issue of causation. In light of this conclusion, it is not necessary for us to address Mr. Sanders’ remaining argument concerning the issue of notice.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to Jim Sanders and his surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

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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, Jim Sanders, and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM