

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 29, 2007 Session

LISA CODY v. PEYTON'S SOUTHEASTERN, INC.

**Direct Appeal from the Chancery Court for Bradley County
No. 03-305 Jerri S. Bryant, Chancellor**

Filed March 6, 2008

No. E2006-02129-WC-R3-WC - Mailed November 7, 2007

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 alleged that she developed carpal tunnel syndrome and a bulging cervical disc as a result of her employment. The trial court ruled that her claim was barred by failure to give notice of her injury as required by the workers' compensation law, and also that she had failed to prove that her conditions were caused by her employment. She has appealed, arguing that she gave timely notice according to the "last day worked" rule. She also contends that the evidence preponderates against the trial court's ruling on causation. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Chancery

Court Affirmed

JERRY SCOTT, SR. J., delivered the opinion of the court, in which GARY R. WADE, J. and JON KERRY BLACKWOOD, SR. J., joined.

Jimmy Wayne Bilbo, Cleveland, Tennessee, for the Appellant, Lisa Cody.

Kent Thomas Jones, Chattanooga, Tennessee, for the Appellee, Peyton's Southeastern, Inc.

MEMORANDUM OPINION

1. Factual and Procedural Background

Lisa Cody began working for Peyton's Southeastern, Inc. on November 2, 1999 as a piece picker. She quit school "pretty much at the end of the year of the tenth grade." She testified that she later received her GED. She had no other vocational training. Prior to her employment at Peyton's, she testified that she had not worked for "maybe three to four years,"

having been a stay at home mother. She also testified that she and her husband got married in 1992, after which she worked for a month, and then stayed at home until 1999 when she went to work at Peyton's.

Prior employment included work on an assembly line at McKee Bakery for about two months on one occasion and "probably about a month" later on. For a couple of years before the birth of her son, she worked for Coppinger's Color Labs, but she was not asked about her duties. She also worked at the Cherokee Coffee Shop while in high school.

As a piece picker, she filled orders by moving along a line picking products to fill orders from "a bay-like thing" after which she put a sticker on each item and put the products in a tote. She described the work as requiring constant movement of her hands and neck and she had "to go as fast as [she] could go." She testified that in 2002 she told her supervisor, Natalie Crider, of her hand problems. Ms. Crider told Ms. Cody to see the on-site physical therapist at Peyton's about her problems with her hands. The physical therapist said it could be carpal tunnel syndrome. He gave her a card and told her to go see Peterson and Stone.¹ Ms. Cody was told that it would be months before she could get an appointment. She also testified that the on site physical therapist issued hand braces to her.²

In September 2002, Ms. Cody's son died. He had worked at Peyton's on the same line where she worked. After his death, she took medical leave from October 3, 2002, until April 9, 2003, due to her depression, anxiety, panic attacks and crying spells. During that time she was treated by a psychiatrist.

On August 25, 2003, Ms. Cody was again placed on medical leave of absence until October 25, 2003. Ms. Cody said she was diagnosed with carpal tunnel syndrome by Dr. Nguyen, who performed carpal tunnel releases on both arms, one in August and another two weeks later.³ Later, Ms. Cody said the surgery was in October. She testified that she went to Peyton's and told them that she needed to "switch [her] medical leave over to Dr. Nguyen." She said Bruce Jacobson, "the safety guy," told her not to switch the medical leave over to workers' compensation and to "stay under your psychiatrist's care because you're going to create a lot of paperwork for us if you file. . . ."

Ms. Cody testified that Mr. Jacobson told her to go have the surgery after she returned to work. She filled out "paperwork that it wasn't work related." After they talked about it some more, she told him "I was going to have to fill out that it was work-related because I do have carpal tunnel. I have carpal tunnel and I need surgery."

1 Peterson and Stone are not identified in the record. Apparently, they are physicians or physical therapists.

2 They are also referred to as wrist splints and wrist braces in the testimony.

3 Dr. Nguyen's given name does not appear in the record.

She testified that he told her to leave, take a few days off, think about “if you want to file this under workers’ comp . . . because it’s going to create a lot of paperwork” and “just stay under depression.” She continued:

So I left out of there, me and my daughter, walking across the parking lot and I remember it, I will never forget it, I was crying, I was so upset, you know, because Peyton’s has really been good to me. You know, when I got hired in there I didn’t get through my 90 days and my mom had died. They got my son a job there twice.

You know, Peyton’s has really been good to me. Every one of my supervisors, they’ve just really blessed me a lot. And so I was really thinking about it. So, of course, when you get down to a situation like that, I just thought to myself, you know - - I just prayed about it. I said, God, got to leave this up to you. You know, Peyton’s has been good to me. I don’t want to hurt them. I don’t want to cause them any problems. But, you know, I have a daughter, I’ve got to think about her. I’ve got to think about what if.

So then a couple days later I went back in and I did sign a piece of paper that it was work-related, that I had carpal tunnel, which they knew that. You know, they already knew that I had carpal tunnel.

Ms. Cody remained on medical leave until December 17, 2003. When she returned to work, she was fired.

The only doctors who testified were Dr. Walter H. King and Dr. Yuchan Han, both by deposition. Dr. Nguyen, the surgeon who performed the carpal tunnel release and the one physician who would have been truly knowledgeable enough to testify regarding Ms. Cody’s carpal tunnel syndrome, its cause and its effects on her vocational disability, did not testify and was not deposed because he moved to Atlanta in 2003.

Dr. King testified about her neck and back problems and stated that carpal tunnel syndrome can be caused by repetitive work or activity.⁴ He testified that he first saw Ms. Cody on September 30, 2004 for cervical spine or neck pain. He saw her again on October 7, 2004, March 15, 2005 and June 9, 2005. Although his examinations related only to her spine, he “gave her 5 percent in both arms, which came out to 6 percent whole body impairment,” which “under page 495 of the AMA Guides, under the carpal tunnel section, is the 5 percent kind of the maximum rating that you can give.” He gave her five percent impairment to the cervical spine, which he amended to six percent. He concluded his cross examination testimony by stating that he could not “causally relate her neck or carpal tunnel injuries to anything that happened to her at work at Peyton’s Southeastern.” On redirect he testified as follows:

⁴ The appellant’s brief addressed only the carpal tunnel syndrome, so this opinion only addresses that condition.

- Q. Could the injury to her wrists, the carpal tunnel, as well as her cervical spine, have been the result of repetitive work or activity?
- A. Yes, sir. That's something that certainly happens to people. I didn't have her history of her carpal tunnel. It would have already been done by that other orthopedic surgeon who had been taking care of her. Her cervical spine, of course, can be aggravated or, you know, jobs can aggravate things. But it's not - - she didn't really complain of that. That's the problem we have here.

Dr. Han, a neurologist, also testified by deposition. Ms. Cody was referred to Dr. Han by Dr. King. Dr. Han performed an EMG study and requested an MRI of her cervical spine. He found multiple bulging discs and pinched nerves in her neck. She was complaining about "a constant pain, feeling weak in her hand, cannot hold things tight, dropping things all the time." However, he said these were subjective complaints and a repeat EMG study only revealed "a mild carpal tunnel on one side." He did not have any opinion as to whether repetitive motion on the job either caused the injury or caused an aggravation of a preexisting condition because she did not tell him exactly what she was doing at work. He gave her a "rating about her pain" that "fell into the moderate area for her dominant hand and mild for the nondominant, left hand." He rated her impairment for the right upper limb at 32 and 22 for the left upper limb. He put no restrictions on her physical activity and encouraged her to return to work, because "if she does not do anything, you know, those symptoms may be just getting worse, you know." For her hands he recommended physical therapy, medication, heat and, had she been in China, he would have tried some acupuncture. Most of his deposition related to the back pain.

The defense proof began with Brenda Grigg Gaven, an employee of Peyton's, who was the production manager of the night shift when Ms. Cody worked that shift. She remembered Ms. Cody, but did not recall that Ms. Cody made any complaints about her hands, wrists, or neck or that she made any reports to her or to her supervisor. She did not remember ever seeing Ms. Cody wearing wrist splints.

Cathy Montgomery, a supervisor at Peyton's, testified that she was Ms. Cody's supervisor for about a year until Ms. Cody went on the day shift. She further testified that Ms. Cody never, to her knowledge, reported any work related injuries to her. She further testified that she did not recall seeing Ms. Cody wearing wrist splints when she was working.

Shari Lynn Sargent, another supervisor at Peyton's, was Ms. Cody's supervisor on the third shift until about August 2001. She testified that Ms. Cody never reported any burning or tingling in her hands and she did not recall her ever reporting any problems with her neck. She did not recall seeing wrist splints on Ms. Cody or anyone else when she was the line supervisor. She did not recall seeing the on site physical therapist on the line with Ms. Cody to assist her in positioning and posturing on the line, as Ms. Cody had testified that he did. The first she heard of Ms. Cody having carpal tunnel syndrome was when she was asked in preparation for the trial whether she remembered anything about Ms. Cody having that condition.

Dean John Coulter, a self-employed physical therapist, testified that he provides on site physical therapy, ergonomics and injury prevention services to Peyton's as an independent contractor. At the time of trial he had been providing those services for over ten years. He remembered seeing Ms. Cody when she returned from a leave of absence after December. He made a note of what she said about her problems with her hands and wrists and when the problems began. However, he did not bring his notes with him, so he could not remember the exact date, but he remembered that the problem began while she was on leave, which began in October or December. He believed he told her to see her family physician, Dr. Nguyen.

Ms. Cody's counsel questioned Mr. Coulter about whether repetitive motion of the hands and wrists could lead to carpal tunnel syndrome. He answered, "That could be a contributor, yes." The defense objected because her counsel was seeking to elicit a medical conclusion from a physical therapist. The trial court sustained the objection.

Mr. Coulter did not recall going to observe Ms. Cody piece picking, although observation of workers was something he did as part of his duties. He would have documented it in his notes, but since he did not bring his notes to court, he had no recollection of having observed her at work.

When asked if he had given Ms. Cody black wrist splints or a wrist brace to wear while working on the line, he could not recall doing that without his notes, which were not brought to court. Mr. Coulter remembered when he took her history that he thought "that these symptoms have gone on for a time" and "[w]e need to take care of them and she needs to address these right away."

In rebuttal, Ms. Cody's counsel called Sondra Thornburg, who had been Ms. Cody's friend for twenty-five years. She worked at Peyton's as a temporary employee from 1997 until September 23, 2004. She also worked as a piece picker on the same line that Ms. Cody worked, but never worked with her. She saw Ms. Cody wearing her "little wrist things" like she was wearing in the courtroom. She testified that Ms. Cody was wearing the wrist splints as early as June or July 2003.

Bruce Alvin Jacobson, "the safety guy," is the manager of regulatory compliance at the five distribution centers that Peyton's operates around the United States. He testified that he saw Ms. Cody, accompanied by her daughter, at the company's medical office in late October 2003. Both of Ms. Cody's arms were bandaged and she was "complaining that she had carpal tunnel release on both arms and that the left one was bothering her quite a bit." She never filed the physical form required by Peyton's, but they went ahead and gave the first report of work injury to the State of Tennessee. He denied the statement about the massive amount of paperwork as there was only one section on two forms to be filled out. The forms were to be taken to Dr. Nguyen and one was to be faxed back to Peyton's by her doctor.

In rebuttal, Jill Banks, Ms. Cody's daughter, testified that she was with her mother when she met with Mr. Jacobson, who, according to Ms. Banks, told her that there was too much paperwork to file for workers' compensation and just to stay under the medical leave under the psychiatrist. He took the workers' compensation form she had filled out and ripped it up.

Bruce Jacobson testified again in surrebuttal. He denied that he tore up the papers in front of Ms. Cody and Ms. Banks, and he further denied that he would ever send anyone to Dr. Nguyen as he was not one of Peyton's workers' compensation panel members.

2. Issues Presented

Ms. Cody raises the following issues on appeal:

- 1) Did the trial court err by finding that the employee did not provide notice of her injury?
- 2) Did the trial court err by finding that the employee had failed to prove that her carpal tunnel syndrome was caused by her employment?

3. Scope 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. 2006). When issues of 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 witnesses' 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 testimony 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). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

4. Analysis

A. Notice

Tennessee Code Annotated section 50-6-201(b)(Supp. 2001) sets out the notice requirement for gradual injuries, such as carpal tunnel syndrome. That section provides:

(b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or such injured employee's representative shall provide notice to the employer of the injury within thirty (30) days after the employee:

(1) Knows or reasonably should know that such employee has suffered a work-related injury that has resulted in permanent physical impairment; or

(2) Is rendered unable to continue to perform such employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

An employee who fails to notify his employer within the thirty days after she has sustained a work-related injury forfeits the right to workers' compensation benefits unless the employer has actual notice of the injury or unless the employee's failure to notify the employer was reasonable. Tenn. Code Ann. § 55-6-201(a) (Supp. 2001).

Ms. Cody first contends she was excused from the notice requirement because her employer had actual knowledge that she was having problems with her hands. She bases her position on the fact she openly wore braces at work and told the contract therapist that she was having problems with her hands. She also argues that she did not know her problem was work related until she was diagnosed with carpal tunnel syndrome in mid August 2003. She gave notice at that time to the employer's "safety guy" in October 2003.

Ms. Cody's contention that her employer had actual notice of her injury is not supported by the evidence. The trial court explicitly noted:

She produced no one today to say that they saw her wear splints at work, no one today to say that she told them of the injury, other than her own testimony. There is no proof that she provided them any notice on her wrists. One witness that saw her splints saw them at her home and were of a different color than what plaintiff testified that she wore at work.

Assuming arguendo that a statement by Ms. Cody to the employer's independent physical therapist would satisfy the notice requirement, Mr. Coulter's testimony does not support her testimony. He agreed that she told him about her symptoms, but also said that she told him that those symptoms began while she was on a leave of absence. Since he failed to bring his notes to court and could not remember when she told him of her problem, his testimony was of questionable value. Resolution of the notice issue, like all other issues of fact, rests squarely upon an assessment of the credibility of the witnesses, and the trial judge found that the defense witnesses were credible and the "vast weight of the testimony [was] in favor of the defendant."

The trial court's ruling on the notice issue implicitly rejected Ms. Cody's testimony. The trial court's findings with respect to the credibility of witnesses and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004). Based upon our independent review of the record, we find no basis to reverse the trial court's finding on the notice issue.

B. Causation

Our courts have "consistently held that an award may properly be based upon medical testimony to the effect that a given incident 'could be' the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury." Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997).

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). Nonetheless, the burden of proving each element of her cause of action rests upon the employee in every workers' compensation case. Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987). "[C]ausation and permanency of a work-related injury must be shown in most cases by expert medical evidence." Id.

In this case, Dr. Han testified that it was "possible" that Ms. Cody's condition was caused by repetitive work. However, it was abundantly clear from his testimony during direct examination that Dr. Han had no knowledge concerning the specifics of Ms. Cody's job. The trial court described Dr. Han's testimony as "some of the most convoluted testimony about the AMA Guides that I've read in any deposition." The court's statement referred to the method used to determine impairment, but the same description can be fairly applied to all of his testimony. At one point, Dr. Han described his own opinion on causation as "just speculation."

Dr. King did not treat Ms. Cody for her carpal tunnel syndrome. He stated that the condition can be caused or aggravated by work activities, but that he did not have sufficient information about Ms. Cody's job to express an opinion about causation.

Given the fact that neither of the physicians who testified treated Ms. Cody and neither was provided with sufficient information to form an opinion as to causation or to testify that her condition was related to her employment, there simply was insufficient evidence that Ms. Cody's condition was caused or aggravated by her duties at her place of employment. Workers' compensation case law certainly points to carpal tunnel syndrome as a condition frequently caused or exacerbated by repetitive activities with the hands and arms. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). In that case, there was unequivocal testimony from a physician who had conducted scientific tests that the worker suffered from bilateral carpal tunnel syndrome and the panel could find "no other possible cause except the repetitive use of the claimant's hands at work." Id. Ordinarily causation and permanency of work-related injuries

must be established by expert testimony. Tindall, 725 S.W.2d at 937. Of course, appellate courts are bound by the record presented to them, and we cannot reach conclusions based on anything but the record before the court.

Mr. Coulter, the physical therapist, testified that the job performed by Ms. Cody was repetitive in nature. However, he did not offer a direct opinion on the issue of causation. In any event, the testimony of a physical therapist concerning causation is not admissible in a workers' compensation action, Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 545 (Tenn. 1992), and the trial court properly excluded his testimony regarding the causation of carpal tunnel syndrome.

Viewing the relevant evidence in its entirety, we conclude that there is nothing in the record upon which we can disagree with the finding by the trial court and the evidence does not preponderate against the trial court's finding on the issue of causation.

5. Conclusion

Finding no merit to either of the appellant's issues, the judgment of the trial court is affirmed. Costs are taxed to the appellant, Lisa Cody, and her surety, for which execution may issue if necessary.

JERRY SCOTT, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

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Chancery Court for Bradley County

No. 03-0305

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No. E2006-02129-SC-WCM-WC

JUDGMENT

This case is before the Court upon the motion for review filed by Lisa Cody pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the

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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.

Costs are assessed to appellant, Lisa Cody, and her surety, for which execution may issue if necessary.

WADE, J., NOT PARTICIPATING