

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00517-CV

MEADWESTVACO CORPORATION, Appellant

V.

DAVID BOOKER, Appellee

**On Appeal from the 1st District Court
Jasper County, Texas
Trial Cause No. 29432**

MEMORANDUM OPINION

MeadWestvaco Corporation appeals the district court's judgment in favor of workers' compensation claimant David Booker.¹ We conclude that the trial court did not abuse its discretion in admitting the testimony of claimant's expert, that the evidence is both legally and factually sufficient, and that the jury question as submitted did not result in the rendition of an improper judgment. We therefore overrule MeadWestvaco's issues and affirm the judgment of the trial court.

¹MeadWestvaco is self-insured for workers' compensation purposes.

BACKGROUND

Booker sustained an injury when a steel roller struck him at work. He and other employees were in the process of changing a roll on a paper machine. The roller was twenty feet long, weighed over 60,000 pounds, and was suspended from an overhead crane at the time of the accident. A different crane struck the crane holding the roller, which then struck Booker in the pelvis area. Booker was standing on the catwalk; the roller struck him and pushed him into the railing on the catwalk. The roller swung back and struck him a second time, and possibly a third. Booker pushed himself from the handrail and collapsed to the catwalk.

Booker filed a workers' compensation claim. The Texas Department of Insurance -- Division of Workers' Compensation ("Division")² adopted the contested case hearing officer's decision on several disputed issues. The Division found an impairment rating of 12%. For an employee to obtain impairment benefits, a doctor must certify that the employee has reached maximum medical improvement (MMI) and assign an "impairment rating." Tex. Lab. Code Ann. § 408.123 (West 2006), § 401.011(30)(A) (West Supp. 2010). If the doctor assigns an impairment rating of 15% or higher, and the employee meets certain other requirements, the employee may qualify for supplemental income benefits.

² The Texas Workers' Compensation Commission was abolished effective September 1, 2005, and its functions were assumed by the Division of Workers' Compensation within the Texas Department of Insurance. *See* Tex. Lab. Code Ann. § 402.001 historical note (West 2006) [Act of May 29, 2005, 79th Leg., R.S., ch. 265, § 8.001, 2005 Tex. Gen. Laws 469, 607-08]. We use the term "Division" to refer to both the Division of Workers' Compensation and the former commission.

Tex. Lab. Code Ann. § 408.142(a) (West 2006).

Booker appealed the Division's final decision to the district court. At the trial court level, the Division's decision is subject to a modified de novo review. *Morales v. Liberty Mut. Ins. Co.*, 241 S.W.3d 514, 516 (Tex. 2007) (citing Tex. Lab. Code Ann. § 410.301 (West 2006)). The party appealing the Division's decision regarding compensability "has the burden of proof by a preponderance of the evidence." Tex. Lab. Code Ann. § 410.303 (West 2006); *Morales*, 241 S.W.3d at 516. A jury found an impairment rating of 71%. With four issues, MeadWestvaco appealed to this Court.

ADMISSION OF EXPERT TESTIMONY

In issue one, MeadWestvaco contends the trial court erred in failing to exclude the testimony of Dr. Jerry Franz, and argues the admission probably caused the rendition of an improper verdict. We review a trial court's decision to admit or exclude expert testimony under an abuse of discretion standard. *See Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006).

Under Rule 702 of the Texas Rules of Evidence, the party seeking to admit expert testimony must establish that the expert is qualified to render an opinion on the subject matter, and that the testimony is relevant to the issue in the case. *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 234 (Tex. 2010) (citing Tex. R. Evid. 702). To be relevant, the expert's testimony must assist the jury in determining an issue or in understanding other evidence. *Id.* If expert testimony is based on an unreliable foundation or flawed

methodology, the testimony does not satisfy Rule 702's relevancy requirement. *Id.* Expert testimony may be unreliable because the analytical gap between the offered opinion and the underlying data is too great. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 39 (Tex. 2007); see *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998). The trial court's ultimate task in determining whether to admit expert testimony is not to determine the correctness of the expert's conclusions, but to determine whether the analysis the expert employed to reach those conclusions is reliable and the testimony admissible. *TXI Transp. Co.*, 306 S.W.3d at 239.

In challenging the admissibility of Franz's testimony and report, MeadWestvaco asserts that Dr. Franz was not qualified to diagnose depression in Booker and contends that there was a lack of objective testing to support the diagnoses of depression, diastasis of the symphysis pubis, pelvic crush injury, right pudendal nerve malfunction, and peripheral neuropathy of the bilateral lower extremity. As a result, argues MeadWestvaco, there is too great an analytical gap between the medical evidence and Franz's opinion that the compensable injury caused these injuries or conditions. In response, Booker argues Franz's opinion is admissible and notes that the testimony consists of a qualified physician's medical opinions based on his education, training, and experience within the medical field, his review of the pertinent records, and his examination of the patient.

In his report, Dr. Franz concluded that seventeen disputed conditions were related to the compensable injury. The jury found that the accident caused seven of those injuries or

conditions. On appeal, MeadWestvaco challenges five of the seven conditions, and argues Franz's opinions were not grounded in methods and procedures of science, but instead were based on his subjective opinion.

The record demonstrates that medical tests were performed on Booker, various doctors examined him and reviewed his medical records, and certain doctors concluded he had sustained injuries and developed medical conditions that were related to the injury and that could be secondary to trauma. Dr. Franz grounded his opinions on these findings. In addition, Franz stated in his report that, as to the extent of the injury, he based his opinion in part on his own review of the "pelvic films."

The record is conflicting on certain points. The record contains a reference to Dr. Bishop's report, which stated that Booker had a "pubic symphysis contusion fracture nondisplaced." On cross-examination during his deposition, Franz agreed that the pelvic x-ray made after Booker was brought to the hospital did not reveal a fracture of the pelvis. A C.T. scan showed no fracture of the pelvis, and Franz indicated that if there was a separation in the pubis, the C.T. scan would have shown it. Franz also testified that there was a positive test result for a SI joint arthrogram which, he explained, was evidence of injury and evidence of disruption or separation of the symphysis pubis. In his opinion, the positive arthrogram was indicative of the amount of trauma that Booker would have sustained to break that joint apart. Dr. Osborne's report indicated that a March 2005 MRI of the pelvis showed "mild bone edema right pubic body adjacent to symphysis pubis,

could be secondary to trauma.” The report of Dr. Eidman, the treating physician, stated that Booker sustained a diastasis of his pubis symphysis, which is a dislocation or separation of the pubic bones.

The expert testimony also encompassed “pelvic crush,” pudendal nerve malfunction, and neuropathy of bilateral lower extremities. Some of the medical records contain references to a “pelvic crush” from the injury. In both his report and his testimony, Franz stated that the right pudendal nerve malfunction was part of the pelvic injury. The urodynamic test on the bladder was abnormal. Dr. Lovitt’s report, reviewed by Dr. Franz, indicated that a neurologist determined Booker had a nerve lesion caused by pelvic trauma. Franz testified this meant the “injury that [Booker] sustained caused problem[s] to the various nerves in the pelvis, in the lower part of the body.” The EMG/NCV test, performed by neurologist Dr. William High, tested nerve function and showed mild, diffuse sensory motor peripheral neuropathy of the bilateral lower extremities. Dr. Franz testified the EMG test was “very abnormal.” His opinion was that these disputed conditions were either caused or aggravated by the roller-crushing injury. The trial court did not abuse its discretion in concluding the diagnoses and opinions expressed by Dr. Franz had a sufficient foundation to be admitted into evidence.

MeadWestvaco also argues Dr. Franz’s testimony should have been excluded because Franz is not qualified to diagnose depression. During his examination and evaluation of Booker, Franz observed Booker’s flat affect, his weeping, his lack of social

interaction, and other conduct which Franz attributed to depression. Dr. Franz treats patients in the field of occupational medicine. Although he was not one of the Division's "designated doctors" for Booker, Dr. Franz is on the "directed doctors" list and performs these examinations frequently. The trial court did not abuse its discretion in permitting Franz to testify regarding whether Booker suffers from depression related to chronic pain from the occupational injury.

Dr. Franz conducted a physical examination of Booker, took his medical history in relation to the injury, reviewed his pelvic films, observed his demeanor and social interaction, consulted medical literature, and reviewed Booker's medical records, tests, as well as the opinions of other doctors regarding Booker's conditions. The trial court did not abuse its discretion in rejecting the challenges to Dr. Franz's methodology.

MeadWestvaco also argues that the 71% whole body impairment rating that Dr. Franz assigned to Booker is unreliable, because it does not comply with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition. *See* 28 Tex. Admin. Code § 130.1(c)(2) (2010) (Tex. Dep't of Ins., Impairment and Supplemental Income Benefits); *see also* Tex. Lab. Code Ann. § 408.124 (West 2006) (The Labor Code requires the evaluating physician to use the *Guides* in making impairment ratings.). MeadWestvaco asserts Franz did not properly utilize the *Guides*, as demonstrated by the opinion of Dr. Philip Osborne. Dr. Osborne disagreed both with Franz's method of assessing the rating and with the 71% rating assessed.

Dr. Franz testified he relied on Chapter 4 of the *Guides* for his opinion. MeadWestvaco contends Franz used the wrong chapter in the *Guides* to assess the impairment ratings for bladder dysfunction, anorectal dysfunction, and sexual dysfunction. Chapter 4 relates to a spinal cord injury, and MeadWestvaco argues there is no evidence Booker sustained a spinal cord injury. The introduction to Chapter 4 states as follows: “This chapter provides criteria for evaluating permanent impairments resulting from dysfunction of the brain, brain stem, cranial nerves, spinal cord, nerve roots, and peripheral nerves.” Franz testified he assigned his rating using the methodology that is prescribed by the Division and he employed the *Guides*, as required by Texas statute. In determining the admissibility of the expert evidence, the trial judge in his discretion resolved conflicts in the application of the *Guides*.

In contesting the 25% impairment rating for bladder dysfunction, MeadWestvaco references the *Guides* which indicate that cystometric or other tests “may be necessary” to establish this impairment. MeadWestvaco argues that because the results of the cystoscopy on Booker were normal, Booker has no urinary dysfunction and there is no support for the 25% rating for urinary dysfunction. Dr. Franz explained that the cystoscopy test looks for anatomical abnormalities. Franz testified that a urodynamic test, which Booker was unable to complete because of pain, showed Booker was not able to empty his bladder. Booker testified to lack of voluntary control and a constant feeling of a full bladder. He related that he had to wear diapers. There are medical records reflecting that within a year of the

accident, Booker expressed to his doctors that he was having groin pain that apparently encompassed urinary and anorectal problems and Booker testified he informed the doctors and case manager of these problems. Booker was prescribed Flomax to help deal with the bladder issues.

MeadWestvaco argues that since the jury found that the November 2004 injury did not cause injury to the bladder and did not cause neurogenic injury to the pelvic floor with neurogenic bladder and sphincter dysfunction, there is, in effect, nothing to support the 25% urinary dysfunction rating and the 25% anorectal dysfunction rating. Yet the jury also found that the November 2004 injury caused pudendal nerve malfunction and pelvic crush injury. In addition, Dr. Franz explained in his report that urodynamic diagnostic testing on Booker showed multiple deficits. During Booker's appointment with Franz, Booker stated he had trouble with urination and dribbling problems, and he had to wear diapers. During the physical examination, Dr. Franz's palpation of the abdomen revealed that Booker's bladder was distended and full. Franz testified this meant that Booker was not emptying his bladder completely. Dr. Franz testified the abnormal urodynamic test result confirmed this urination problem. Dr. Franz explained that the report of Dr. Haas stated there was probably pelvic floor dysfunction with levator spasm and anal sphincter incontinence.

MeadWestvaco relies on Dr. Osborne's opinion that Dr. Franz should have conducted a SNAP test before assigning a 20% impairment rating for sexual dysfunction. Dr. Franz testified Booker "had no sexual function or awareness of any sexual function."

Dr. Franz stated that while conducting a physical examination, he used a pinwheel on Booker to test for sensation and “could not discern any sensation whatsoever in the abdominal wall or on the penis or the scrotum. [Booker] did not have any sensation even with fairly significant pressure.” Booker’s wife confirmed what Booker reported to Dr. Franz.

MeadWestvaco argues that the assignment of an impairment rating for mental and behavioral disorders was not appropriate under the *Guides*, because Chapter 14 of the *Guides* does not contain any impairment percentages for mental injuries or conditions, and because Franz did not consult the DSM-IV, a diagnostic and statistical manual of mental disorders. Dr. Franz explained he assessed a 15% impairment rating based on the impact of the injury on Booker’s activities of daily living (ADLs), which, Franz explained are contained in the tables for mental behaviors in the *Guides*.

MeadWestvaco points out that the definition of impairment on the Division Form 69 provides that a finding of impairment must be based on objective clinical or laboratory findings. The tables relate to the classification of impairments resulting from mental or behavioral disorders. When Dr. Franz was asked whether there was any objective clinical or laboratory finding supporting the 15% impairment he assigned for the mental and behavioral disorder, Franz responded that, other than the history, there was none. Booker testified that Dr. Heat treated Booker for depression by prescribing medication for him. Franz stated that, under the *Guides*, the physician is allowed to discuss the impact of mental

and behavioral disorders on the person's activities of daily living. During Booker's appointment with Franz, Booker explained he could not go out in social circles or have friends over to his home. He cried in front of Franz. Dr. Franz described Booker as having a flat affect. Booker appeared to have lost interest in life and lacked the ability to concentrate. Franz testified that Booker felt he could not function as a husband, he feared losing his family, and he had lost many friends. Dr. Franz concluded Booker's interpersonal relationships were limited. Dr. Franz agreed that having to get up and change a diaper would be embarrassing. A practitioner in the field of occupational medicine, Dr. Franz assigned the behavioral rating as a doctor, not as a psychologist or psychiatrist, and he considered how the person was functioning in his day-to-day activities.

On cross-examination, Dr. Franz agreed that some of Booker's stressors are situational. Franz also acknowledged that if Booker had not received any treatments for the mental and behavioral disorder for five years, assignment of a permanent impairment to that condition would not meet the *Guides'* requirement that the impairment rating be permanent. Booker testified that another physician had treated him for depression with medication.

In another challenge under issue one, MeadWestvaco argues that Dr. Franz incorrectly assessed a 15% impairment rating for a pelvic fracture or separation. In the record, there is evidence, albeit conflicting, of a separation of the pubic symphysis. Dr. Franz apparently conceded on cross-examination that a 2-3% impairment rating would be

more “in line.” Franz did not expressly retract his overall 71% impairment rating, however.

As a final argument under issue one, MeadWestvaco contends the underlying basis for Dr. Franz’s opinion regarding the extent of Booker’s injury and the 71% impairment rating is unreliable. Dr. Franz presented two theories to explain the delay in the manifestation of Booker’s symptoms: one from an article by Dr. Charles Butrick, who espoused the theory of Chronic Complex Pelvic Pain Syndrome, and the other being a temporal causation theory. Dr. Franz referenced the Butrick article in his January 28, 2008, report on Booker. Franz testified that the Complex Pelvic Pain Syndrome explains the multiplicity of Booker’s pelvic floor problems, as well as the time lapse between the date of the on-the-job injury and the later development of the conditions at issue here. Franz concluded Booker’s problems are based on the aggravation of the tissue in the pelvis. He explained why Booker did not experience all of the injuries initially and why they developed and became more severe over time. In further explaining the later onset of injuries to the urologic and colorectal areas, Franz noted Booker did not have these conditions before the accident, but he had them within a year after the accident.

The Texas Supreme Court has stated that, “when combined with other causation evidence, evidence that conditions exhibited themselves or were diagnosed shortly after an event may be probative in determining causation.” *Guevara v. Ferrer*, 247 S.W.3d 662, 668 (Tex. 2007). Booker testified that, in spite of medical records stating he registered no complaints about those matters, he informed medical personnel and Meadwestvaco’s

caseworker about them early on. Franz indicated Booker had symptoms of urinary and anorectal problems, sexual dysfunction, and groin and low back pain.

We conclude the trial court did not abuse its discretion in admitting Dr. Franz's testimony and report. Dr. Franz was qualified to give his expert opinion; his testimony was not irrelevant, conclusory, or speculative; it was not based on an unreliable foundation; and any analytical gap between the data and the opinion was not so great that it rendered the opinion inadmissible as evidence. We overrule issue one.

SUFFICIENCY OF EVIDENCE

In issue two, Booker argues that, because the opinions of Drs. Franz and Eidman regarding extent of injury and impairment rating were conclusory and speculative, the jury's verdict was supported by legally insufficient evidence. In effect, MeadWestvaco argues the report and testimony of Dr. Franz amount to no evidence. Dr. Eidman signed a Division document agreeing with Dr. Franz's 71% impairment rating. We consider whether the evidence at trial would enable reasonable and fair-minded jurors to reach the verdict. *See Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009).

We have concluded in our analysis of issue one that the trial court did not abuse its discretion in admitting Dr. Franz's testimony and report into evidence. The record reveals Dr. Franz conducted a physical examination of Booker, obtained a medical history from him, and reviewed Booker's medical records. In his testimony and in his report, Dr. Franz identified the material he consulted, described his methodology, and explained how he

reached the opinion expressed. MeadWestvaco contends the objective testing fails to support the existence of the five conditions, and the evidence fails to support Franz's conclusion that the compensable injury caused the five conditions. The evidence is conflicting on the extent of the injury and on the impairment ratings. Other physicians came to different conclusions about Booker's injuries and his impairment rating. The jury's task was to resolve any conflict on those issues. *See C.C. Carlton Indus., Ltd. v. Blanchard*, 311 S.W.3d 654, 661 (Tex. App.—Austin 2010, no pet.) (Jury may find one expert more credible than another.).

MeadWestvaco also maintains Dr. Franz's impairment rating is invalid because Franz assessed the rating after Booker reached maximum medical improvement. There is evidence in the record that Booker had the conditions challenged by MeadWestvaco prior to the date of maximum medical improvement, however. The statutory definition of impairment refers to "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." Tex. Lab. Code Ann. § 401.011(23) (West Supp. 2010). Explanatory notes in the *Texas Register* state that impairment rating "assessments must be based on the injured employee's condition as of the date of MMI and shall not be based on changes in the injured employee's condition occurring after that date, such as when the injured employee's condition changes as a result of surgery that takes place after the date of MMI." 29 Tex. Reg. 2328, 2343 (2004) (Tex. Workers' Comp. Comm'n, Impairment and

Supplemental Income Benefits). The evidence in the record is legally sufficient to support the jury's findings concerning the extent of injury and the impairment rating.

In issue three, Meadwestvaco argues the evidence was factually insufficient to support the jury's finding on five conditions and its finding of 71% impairment. *See generally Dyson v. Olin Corp.* 692 S.W.2d 456, 457 (Tex. 1985) (standard of review); *Western Atlas Int'l, Inc. v. Wilson*, 930 S.W.2d 782, 784 (Tex. App.—Tyler 1996, writ denied). Specifically, MeadWestvaco asserts the evidence is factually insufficient to support the jury finding of 71% impairment and the findings on the pubis symphysis injury, pelvic crush injury, pudendal nerve malfunction, peripheral neuropathy, and depression caused by the accident. The evidence is conflicting on the extent of the injuries and on the impairment ratings. The jury is the sole judge of the witnesses' credibility, and it may choose to believe one witness over another. The jurors apparently assigned greater credibility to the testimony and report of Dr. Franz, as opposed to that of Dr. Osborne and Dr. McCrae. Booker's treating physician, Dr. Eidman, agreed with the 71% impairment rating assessed by Dr. Franz. The evidence supporting the jury findings is not so contrary to the overwhelming weight of the evidence as to be manifestly wrong and unjust. We overrule issue three.

JURY QUESTION

In issue four, MeadWestvaco argues that the trial court erred in submission of jury question two. MeadWestvaco contends the question failed to properly place the burden of

proof on Booker. The trial court instructed the jury that “[w]henver a question requires an answer other than ‘yes’ or ‘no,’ your answer must be based on a preponderance of the evidence unless otherwise instructed.” Question number 2 stated as follows:

What is the whole body impairment rating suffered by David Booker as of his date of Maximum Medical Improvement?

“Impairment” means any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent.

“Impairment rating” means the percentage of permanent impairment of the whole body resulting from a compensable injury.

The jury is hereby informed that it was the decision of the Texas Department of Insurance’s Division of Workers’ Compensation that the whole body impairment rating suffered by David Booker as of his date of Maximum Medical Improvement was 12%.

Answer “5%” or “10%” or “12%” or “71%”.

Answer: 71%

MeadWestvaco asserts that the court’s charge made it appear that the four impairment ratings were equivalent, and that the instruction and jury question number two improperly placed on MeadWestvaco the burden to prove that the impairment rating was one of the ratings other than the 71% assigned by Dr. Franz. The trial court refused MeadWestvaco’s submitted instructions and questions. The proposed question two submitted by MeadWestvaco is as follows:

Did David Booker prove, by a preponderance of evidence, that his Impairment Rating was different than that determined by the [DIVISION], which was 12%?

If the jury's answer was "yes" to MeadWestvaco's proposed question two, the jury would then answer proposed question three containing the other impairment ratings, 5%, 10%, or 71%. The jury would be required to choose one of the three.

Section 410.303 places the burden of proof, by a preponderance of the evidence, on the party appealing the issue of compensability to the trial court. Tex. Lab. Code Ann. 410.303. In a similar issue before the Third Court of Appeals, the party appealing the Division's decision contended the trial court failed to properly assign the burden of proof in the jury charge. *Barrigan v. MHMR Servs. for the Concho Valley*, No. 03-05-00742-CV, 2007 WL 27732, at *3 (Tex. App.—Austin Jan. 4, 2007, pet. denied) (mem. op.). The trial court charged the jury as follows:

Your answers should be based on a preponderance of the evidence. Preponderance of the evidence means the greater weight and degree of the credible evidence introduced to you and admitted in this case.

.....
Question 1

What is Wendy Barrigan's impairment rating?

20%: _____

10%: _____

Id. In *Barrigan*, the court explained that the trial court failed to include an instruction assigning the burden of proof to MHMR (the party appealing from the Divisions's order), but the court concluded the error was harmless. *Id.* (citing Tex. R. App. P. 44.1(a)(1)). The trial court had instructed the jury at the beginning of trial that MHMR had the burden of proof by a preponderance of the evidence on the impairment rating. *Id.* Throughout the

trial, Barrigan’s counsel repeatedly emphasized to the jury that MHMR had the burden to prove Barrigan’s impairment rating by a preponderance of the evidence. *Id.*

In this case, the trial judge instructed the jury at the beginning of the trial and then again before closing argument that Booker had the burden of proof. Booker’s attorney also stated in closing argument that Booker had the burden of proof. The court’s charge instructed the jury on the “preponderance of the evidence” part of the burden of proof. With the question submitted as it was, in effect Booker was required to prove the impairment rating was not 5%, 10%, or 12%, and that it was 71%. As in *Barrigan*, even if we were to conclude the trial court erred in failing to include an instruction more specifically assigning the burden of proof to Booker, the error was harmless. *See id.* Considering the trial court’s instructions at the beginning of trial and prior to closing argument, trial counsel’s statement assigning the burden of proof to Booker, and the jury charge submitted, MeadWestvaco has not shown that jury charge error probably caused the rendition of an improper judgment. *See Tex. R. App. P. 44.1(a)*. We overrule issue four and affirm the judgment.

AFFIRMED.

DAVID GAULTNEY
Justice

Submitted on September 9, 2010
Opinion Delivered December 30, 2010

Before Gaultney, Kreger, and Horton, JJ.