

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

November 28, 2011 Session

KATHY JOHNSON v. YOON INVESTMENTS, L.L.C. ET AL.

**Appeal from the Circuit Court for Davidson County
No. 09C-3929 Thomas W. Brothers, Judge**

**No. M2011-01462-WC-R3-WC - Mailed: January 13, 2012
Filed: April 12, 2012**

The trial court found that the employee had sustained a compensable injury in October 2005 and that she was permanently and totally disabled as a result of the injury. It also found that the employee's hospitalization in November and December 2009 was related to her work injury and ordered her employer to pay associated medical expenses. On appeal, her employer contends that the trial court erred by finding that the employee was permanently and totally disabled and that the 2009 medical expenses were related to her work injury. We affirm the judgment of the trial court.¹

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

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C.J., and D.J. ALISSANDRATOS, SP. J., joined.

Byron K. Lindberg, Nashville, Tennessee, for the appellants, Yoon Investments, L.L.C. and Brookwood Insurance Co.

Angus Gillis, III, Nashville, Tennessee, for the appellee, Kathy Johnson.

¹ 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.

MEMORANDUM OPINION

Factual and Procedural Background

Yoon Investments, L.L.C. (“Employer”) operates a Super 8 motel on Harding Place in Nashville. Kathy Johnson (“Employee”) was employed by Employer and a previous owner of the motel as a van driver. Her job consisted of transporting truck drivers to and from a Yellow Freight terminal located in another part of Nashville.

On September 30, 2005, Employee worked a late night/early morning shift. The van she was driving had a broken seat. She began to experience low back pain while driving. She reported this to her supervisor Mike Yoon. She sought treatment at the emergency department of Vanderbilt University Medical Center, where she was given pain medication. An MRI was suggested but not ordered at that time. She continued to work until October 15, 2005. On that date, she was driving the same van when she bent over to pick up a clipboard and felt an immediate, excruciating pain in her back and down the back of her leg. She reported the incident to her supervisor, and then she went to the emergency department of Southern Hills Hospital. She was referred first to Dr. Keith Abney, at Occupational Health & Rehabilitation, and then to Dr. Gregory Lanford, a neurosurgeon.

Dr. Lanford determined that Employee had “a herniated disk at L4-5 right paracentrally.” Dr. Lanford recommended surgery, but this was not carried out until September 2007 due to delays in obtaining “cardiac clearance” and an attempt to alleviate Employee’s symptoms through steroid injections. By the time the surgery took place, the disk was “basically disintegrating,” so Dr. Lanford performed a fusion of the L4 and L5 vertebrae, which consisted of “remov[ing] the disk material between L4 and L5, fill[ing] the disk space with bone, and put[ting] some bolts and rods in her back.” Employee had some improvement after surgery; however, she continued to have episodic back and leg pain that worsened after an incident in the early part of 2008 when she bent over to pick up an item from a low shelf at a grocery store.

Dr. Lanford discharged Employee from his care on May 13, 2008. He assigned 25% permanent anatomical impairment to the body as a whole. Based upon a functional capacity evaluation performed in August 2008, he assigned permanent restrictions of “20 pounds frequent lifting, 35 pounds occasional lifting, with minimization of repetitive bending, lifting and stooping.” Because of Employee’s continuing symptoms, he referred her to Dr. Jeffrey Hazlewood, a physical medicine and pain management specialist, for further treatment.

Dr. Hazlewood first saw Employee on June 24, 2008. She remained under his care when his deposition was taken in 2010. During this time, Dr. Hazlewood prescribed

numerous medications to alleviate Employee's pain, including Celebrex, Flexeril, Lortab, Baclofen, Elavil, Norco, slow-release morphine, and Lyrica. Employee, who had weighed approximately 300 pounds when her injury occurred, had gained a significant amount of weight and weighed 418 pounds in January 2010. Dr. Hazlewood explained: "[T]he best chance she has [to improve] is to lose weight. Her problem is she hurts so bad, she can't burn calories." He characterized her complaints of pain as "legitimate."

Dr. Hazlewood placed more restrictive limitations on Employee's activities than had Dr. Lanford. He stated:

[She] can't lift more than [fifteen] pounds occasionally, maximum [five] pounds frequently . . . can walk a total of two hours in an eight-hour day, but no more than [ten] to [fifteen] minutes at a time.

She could sit a total of five hours a day, no more than [thirty] minutes at a time. She might have to lie down up to an hour a day. Occasional balancing and kneeling. She could not climb, stoop or crouch or crawl. . . . [S]he had problems with reaching only occasionally overhead, no more than pushing or pulling [twenty] pounds occasionally. No working with heights or moving machinery.

When asked if Employee was "capable of holding any job in our society," Dr. Hazlewood responded, "Not at this time." Dr. Hazlewood also testified that it was probable that she would require pain management for the rest of her life.

Employee was born in 1963. She attended school until the tenth grade and later obtained a GED. She had worked as a dietary aide, a convenience store cashier and assistant manager, and a liquor store cashier before becoming a driver for Employer in 2001. She had also worked briefly as a telemarketer but was terminated because she "was no good at it." She had not worked or sought employment since her injury. Prior to September 30, 2005, she had experienced no on-the-job injuries. She did have several pre-existing medical conditions, including hypertension, arthritis in her knees, and a fatty tumor on her hip. Since her work injury, she has been diagnosed with diabetes, has suffered congestive heart failure, and has begun to use an oxygen tank to assist her breathing.

Employee testified that she was able to stand for only five minutes at a time. She performed activities such as cooking, washing dishes, and bathing while sitting down. She now uses a walker and a cane, and her primary care physician had prescribed a wheelchair. At the time of the trial, her regular medications included Oxycontin, Oxycodone, Baclofen,

Lyrica, and Elavil. In January 2010, she fell outside her home and was unable to get herself off the ground even with the assistance of her cousin. It was necessary to call the fire department to get her back up on her feet.

In November 2009, Employee was taken to Southern Hills Hospital in an incoherent state. She was placed in intensive care for a time, and then she was transferred to Vanderbilt Stallworth Rehabilitation Hospital. Employee had very limited recollection of those events. Employee's treating physician, Dr. Nicole Salloum, opined that the episode was the result of an adverse reaction to medication associated with kidney and liver dysfunction. At trial, Employee denied that she had deliberately taken an overdose of medication.

The trial court announced its ruling from the bench. It found that Employee had sustained a compensable injury, that she was permanently and totally disabled as a result of the injury, and that the November 2009 episode was related to the work injury. The trial court entered judgment in accordance with these findings.² Employer has appealed, contending that the trial court erred by awarding permanent total disability benefits and by finding that the November 2009 medical expenses were compensable.

Standard of Review

The standard of review for factual issues 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) (2008). When the trial court has heard in-court testimony, considerable deference must be afforded in reviewing the trial court's findings of credibility and assessment of the weight to be given to that testimony. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). When 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. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

² The oral ruling was later memorialized in a seven-page order entered on June 8, 2011.

Analysis

Permanent Total Disability

Employer's first contention is that the evidence preponderates against the trial court's finding that the Employee is permanently and totally disabled. In support of its position, Employer notes that, based upon the August 2008 functional capacity evaluation, the restrictions imposed by Dr. Lanford would permit Employee to work in a "medium" capacity and also notes that Employee admittedly never made an effort to return to the workforce after being released by Dr. Lanford. Employer further points out that Employee was forty-seven years old with a GED at the time of trial and that the trial court found her to be "intelligent, candid and well-spoken."

In response, Employee points out that Dr. Lanford had not examined her since May 2008, when she was referred to Dr. Hazlewood, who had continued to treat her thereafter. Dr. Hazlewood placed more severe restrictions upon her activities than Dr. Lanford. He testified that her prognosis was pessimistic:

I think she's going to have permanent chronic pain. There's no way in this world she's going to wake up some day and the pain is gone. She's going to, I'm afraid, continue to gain weight -- we're seeing that pattern now -- and become more and more deconditioned, but all I can do is try to just manage the pain within reason and not let her get into trouble and have hospitalizations, and try to control it the best I can, but it's not a good situation.

Dr. Hazlewood also testified that he did not consider Employee to be capable of returning to the workforce or holding "any job" in light of her condition.

In addition to Dr. Hazlewood's testimony, Employee relies upon her own uncontradicted testimony concerning her background and physical limitations. Although she was able to express herself well, her education was limited. Her entire employment history consisted of relatively unskilled, low-paying jobs. As a result of her injury, she was able to stand and to walk for only short periods of time. She regularly took narcotic pain medication. Her chronic pain had caused her to become so deconditioned that she was unable to lift herself from the ground after falling.

Tennessee Code Annotated section 50-6-207(4)(B) (2011 Supp.) provides that an injured employee is totally disabled if the injury "totally incapacitates the employee from working at an occupation that brings the employee an income" Our Supreme Court

outlined the factors to be considered in determining whether or not an injured employee is permanently and totally disabled in *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535-36 (Tenn. 2006):

The determination of permanent total disability is to be based on a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 386 (Tenn. 2002); *Cleek [v. Wal-Mart Stores, Inc.]*, 19 S.W.3d 770, 774 (Tenn. 2000)]. Such factors include the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability. *Cleek*, 19 S.W.3d at 774 (citing *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn.1986)). Though this assessment is most often made and presented at trial by a vocational expert, "it is well settled that despite the existence or absence of expert testimony, an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is 'competent testimony that should be considered.'" *Vinson*, 92 S.W.3d at 386 (quoting *Cleek*, 19 S.W.3d at 774).

188 S.W.3d at 535-36.

In this case, the evidence concerning all of these factors supports the trial court's finding of permanent and total disability. Employee has a limited education. Her work experience is entirely of the unskilled, low-wage variety. According to her testimony and that of her doctors, her work injury has caused severe limitations in her ability to perform the most basic activities of daily living. The likelihood that her condition will improve is poor. Based upon these factors, we conclude that the evidence in this record does not preponderate against the trial court's finding that Employee is permanently and totally disabled.

Expenses Related to November 2009 Hospitalizations

Employer's second contention is that the trial court erred by finding that Employee's admission to Southern Hills Hospital in November 2009 and subsequent transfer to Vanderbilt Stallworth were related to her work injury. Employer asserts that this hospitalization was the result of Employee's own actions in overdosing, either intentionally or negligently. Employee's recollection of the events leading to her admission at Southern Hills was limited. However, she testified that she did not intentionally take an overdose of

her medications. The primary evidence concerning the reason for the hospital admission and subsequent medical treatment was the testimony of Dr. Salloum, who stated:

Q: Okay, do you have an opinion based on a reasonable degree of medical certainty as to what the underlying problems were that were causing Ms. Johnson to be incoherent at the time she was admitted?

A: Well, her urine drug screen was positive for opiates and tricyclic antidepressants, which, at that time, she couldn't tell me why she was taking those medications.

When she was coherent about a week—I'd say a little over a week into her hospitalization, she was able to say that she had had a back surgery in the past and was maintained on chronic pain medication and that she had been taking two specific medications, including MS Contin and Elavil.

And I assumed that with the degree of her kidney dysfunction and a little bit of liver dysfunction, possible dehydration in the setting of those medications that's why she was incoherent. Because just by holding those medications and treating her with supportive care, she got better.

Q: When you said that she—her blood screen showed that she had opiates and tricyclics, would that be consistent with taking MS Contin and Lyrica?

A: Yeah . . .

* * * *

Q: Doctor, do you have an opinion as to why she had this reaction to the MS Contin and Lyrica?

A: I don't have an opinion. I don't know her doses that she was taking because she was unable to tell us. All she could tell us is that she had taken the medication that was prescribed.

But if she possibly got dehydrated or, like I said, had a little bit of liver dysfunction, that can interfere with how drugs are metabolized and maybe she didn't clear them as fast as a normal person would and they made her mental status altered. I can say that she adamantly

denied overdosing or having any attempt to harm herself by taking medication.

Q: Doctor, this lawsuit we are involved with involves injuries that occurred on or about October 1, 2005 and October 15, 2005 that ultimately resulted in a lumbar laminectomy and fusion at the L4-L5 disc interspace. Do you have an opinion based on a reasonable degree of medical certainty as to whether the hospitalization at Southern Hills that we just discussed, that being the one from November 13, 2009 to November 25, 2009 and the subsequent hospitalization at Vanderbilt Stallworth are related to the original accidents of October 1, 2005 and October 15, 2005?

A: I would feel comfortable saying they are related. The fact that she was being maintained on pain medication for this injury that occurred, yes, I would feel comfortable saying that.

Employer argues that this testimony was undermined by Dr. Salloum's statements during cross-examination that the drug screen showed the presence of MS Contin and Lyrica in Employee's system but did not show the levels at which they were present. Dr. Salloum also did not know the dosages of those medications that had been prescribed to Employee. In the absence of that information, Employer argues that Dr. Salloum's opinion amounts to speculation and is not sufficient to support a finding that a causal nexus existed between the work injury and this medical treatment.

Causation in a workers' compensation case may not be based on speculative proof. *Clark v. Nashville Mach. Elevator Co.*, 129 S.W. 3d 42, 47 (Tenn. 2004). However, absolute certainty is not required, and courts have recognized that expert opinions in this area can seldom be precise. *See Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005). Reasonable doubts as to causation—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).

Employer cites to *Anderson v. Westfield Group*, 259 S.W.3d 690 (Tenn. 2008) for the proposition that a non-work-related injury or condition subsequent to the compensable injury is itself compensable only if it was a natural consequence of the compensable injury. Employer says that, under *Anderson*, if the subsequent non-work-related injury or condition was the result of Employee's misconduct or negligence, it is not compensable. *Id.* at 696-99. In *Anderson*, the employee sought compensation for a burn injury that he received while

cooking. The employee contended that touching the hot burner on the stove was the result of the lack of feeling in his hand, which was the result of his prior work-related injury. *Id.* at 693-694. The Court denied compensation, explaining that the employee knew of the lack of feeling in his hand and was negligent for failing to pay appropriate attention to what he was doing when he was near the hot burner on the stove. *Id.* at 699-700.

This case is distinguishable from *Anderson*. While the proof is close, we do not believe that the evidence preponderates against the trial court's finding that Employee's November 2009 condition and hospitalization, as described herein, was the direct result of her compensable work-related injury. Dr. Salloum opined that a causal connection existed between the November 2009 event and the medications prescribed to Employee for her work-related injury. Dr. Salloum explained that tests showed Employee had liver and kidney dysfunction that could have caused a buildup of medications in Employee's system. At sufficient levels, the medications could have caused the symptoms Employee exhibited at admission. Dr. Salloum confirmed Employee recovered when the medications were withdrawn. Although there is an element of uncertainty in Dr. Salloum's opinion, there is no evidence that her theory of events is unsound, nor is there any expert medical evidence describing some other cause for Employee's symptoms. We therefore conclude that the evidence does not preponderate against the trial court's finding on this issue.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Yoon Investments, L.L.C. and Brookwood Insurance Co., and their surety, for which execution may issue if necessary.

WALTER C. KURTZ, SENIOR JUDGE

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**Circuit Court for Davidson County
No. 09C3929**

No. M2011-01462-SC-WCM-WC - Filed: April 12, 2012

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Yoon Investments, LLC and Brookwood Insurance Company pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

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 Yoon Investments, LLC and Brookwood Insurance Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, C.J., not participating