

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

October 29, 2018 Session

STACY CLARK v. CHARMS, L.L.C.

**Appeal from the Chancery Court for Lauderdale County
No. 15201 William C. Cole, Chancellor**

No. W2017-02552-SC-R3-WC – Mailed February 4, 2019; Filed March 19, 2019

Stacy Clark (“Employee”) alleged that she injured her back and left knee in the course and scope of her employment with Charms, L.L.C. (“Employer”). The trial court determined that Employee suffered a compensable injury to her left knee and awarded 21 percent permanent partial disability, temporary total disability, medical expenses, future medical expenses, discretionary costs, and attorneys’ fees. The court made no award for the injury to her back. Employer’s 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 trial court’s 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 as Modified**

WILLIAM B. ACREE, SR.J., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and ROBERT E. LEE DAVIES, SR.J., joined.

James L. Holt, Sr. and Paula R. Jackson, Cordova, Tennessee, for the appellant, Charms, L.L.C.

Edward L. Martindale, Jr., Jackson, Tennessee, for the appellee, Stacy Clark.

OPINION

Factual and Procedural Background

Trial Testimony

Employee, age forty at the time of the trial, earned her GED in 1995. Before working for Employer, she worked as a correctional officer and as a cashier. In March 2007, she began working for Employer as a packer and as a box line operator. On May 22, 2013, Employee slipped and fell, landed on her left knee, and was unable to stand for several minutes. She immediately reported the incident to her supervisor stating she had pain in her back and left knee.

Employee chose Dr. Stephen Waggoner, an orthopedic surgeon, from Employer's panel of physicians. On May 23, 2013, Employee saw Dr. Waggoner and gave a history of pain in her back, left buttocks, and left knee resulting from her fall. Dr. Waggoner prescribed pain medication, ordered physical therapy, and imposed restrictions as to lifting and prolonged standing or sitting. Employee testified that, during subsequent visits, she complained of both back and knee pain, but Dr. Waggoner examined only her back and not her left knee. After informing Employer of her concern with Dr. Waggoner's treatment, Employer assigned a case manager, Katherine Young, who accompanied Employee during her appointments with Dr. Waggoner on October 3 and 30, 2013.¹

Dr. Waggoner released Employee from care in October 2013 and recommended she see a neurologist. Employee selected Dr. Fereidoon Parsioon from another panel of physicians. In November 2013, she told Dr. Parsioon that she had fallen at work and had back pain, left knee pain, and numbness in her right leg. Dr. Parsioon does not treat patients for leg injuries, and he did not treat Employee for her knee pain.

Employee underwent a functional capacity evaluation on November 21, 2013. David Martin Brick testified that Employee did not report knee pain during the testing of her lower extremities, but Mr. Brick conceded that he focused primarily on Employee's complaints of back pain. He found Employee displayed good effort with no malingering.

¹ Katherine Young testified that she accompanied Employee to appointments with Dr. Waggoner on October 3 and 30, 2013, but she did not go into the exam room with Employee or overhear any conversations between Employee and Dr. Waggoner.

In April 2014, Employee told her primary care physician that she had pain and swelling in her knee, and she was referred to Dr. Lowell Stonecipher, an orthopedic surgeon. She contacted Employer, and she was told that additional tests or treatment on her knee would not be covered by workers' compensation. Instead, she should seek treatment under her group insurance. Employee went to Dr. Stonecipher, who drained fluid from her left knee, administered an injection, and ordered an MRI. Dr. Stonecipher performed arthroscopic surgery on Employee's left knee on June 18, 2014. In August 2014, she returned to work in her original position. Employee testified that she continues to have pain in her back and pain and swelling in her left knee. She also has trouble standing and doing routine chores.

Tracy Lavelle, Employer's Human Resources Manager, testified that Employer is self-insured for workers' compensation and uses a Third Party Administrator to administer benefits for work-related injuries. In April 2014, Ms. Lavelle told Employee that additional medical treatment for her knee would not be provided under workers' compensation insurance because there was "no medical documentation that the problem was related to her injury from May 2013." She told Employee to advise her if her primary care physician determined the injury was work-related, but Employee did not do so. Employee applied for and received group medical insurance. On July 21, 2014, Employee requested short term disability benefits for the work missed resulting from the surgery performed on her left knee by Dr. Stonecipher on June 18, 2014. She indicated on the applicable form that the request was not for a work-related injury. According to Ms. Lavelle, Employee received \$3,460 in short term disability benefits between March 13, 2014, and August 14, 2014.

Deposition Testimony

Dr. Stephen Waggoner, an orthopedic surgeon, examined Employee on May 23, 2013. Although Employee's left knee was "tender along the medial joint line of the left knee, as well as the patella and patella tendon," the knee had "no significant swelling or abrasions." X-rays showed no abnormalities. Dr. Waggoner's initial diagnosis was "a lumbar strain, and a left knee contusion." On her May 29, 2013, visit, Employee had ongoing back pain and her knee was doing "a little better." Dr. Waggoner prescribed pain medication and physical therapy.

According to Dr. Waggoner, Employee did not report knee pain after her final two visits. However, his records indicate that Employee received physical therapy for her back and knee in August 2013. His notes for a March 21, 2014, visit stated: "Additional

reason for visit—knee complaint is described as the following: Symptoms are located in the left knee. Date of injury 5/22/13.” Dr. Waggoner speculated that the history on the form had been carried over from the record of Employee’s initial visit. He released Employee from his care in October 2013 with restrictions against lifting more than fifteen pounds frequently or thirty pounds occasionally. Dr. Waggoner assigned zero percent impairment for Employee’s back. He testified that he did not consider a rating to Employee’s knee because “we were dealing with a back injury” and “she wasn’t complaining of any symptoms to me in her knee.”

On October 22, 2013, Employee had a functional capacity evaluation with Keith Murray. Mr. Murray is the Clinic Director at STAR Physical Therapy and performs functional capacity evaluations in western Tennessee. He testified by deposition that Employee did not report pain in her knees. Mr. Murray did not look for signs of swelling in Employee’s knee.

Dr. Fereidoon Parsioon, a neurologist, testified that he saw Employee on November 18, 2013. During the visit, Employee reported knee pain and swelling and “back pain and left buttocks pain that goes all the way down to the left lower extremity.” Before this visit, she had returned to light duty work with the restrictions imposed by Dr. Waggoner. Dr. Parsioon’s examination did not reveal “any abnormalities,” and he “did not see any swelling of the left knee area.”

On December 23, 2013, he saw Employee a second time; he did not recall her complaining about knee pain during this examination. Dr. Parsioon conceded that he did not treat knee problems as a neurologist. He assigned zero impairment for Employee’s back and did not consider an impairment rating for her knee. He imposed a weight lifting restriction of fifty pounds.

Employee first saw Dr. Lowell Stonecipher, an orthopedic surgeon, on April 10, 2014. Employee complained of left knee pain and swelling, and she gave a history of injuring her knee in the parking lot of her Employer on May 22, 2013. He drained fluid from her left knee and diagnosed the problem as “coming from her patella.” He prescribed medication and physical therapy. On May 1, 2014, Employee received a cortisone injection to her knee. On May 20, 2014, Employee reported that she was continuing to have pain and an MRI was ordered. The MRI “showed some free-edged tearing of the body of the lateral meniscus” and “full chondral loss of the weight bearing surface lateral femoral condyle.” According to Dr. Stonecipher:

She had subluxation of the patella, some chondromalacia of the patella, lateral facet greater than the right, high grade chondral loss on the medial trochlea. That's the side bone; that's the femur where the patella articulates with. So, one, she probably had a little tear of the body of the meniscus, but she had significant arthritis in her knee and subluxation of the patella at that time.

On June 18, 2014, Dr. Stonecipher performed an "arthroscopy of the left knee, partial lateral meniscectomy and patella shave and lateral release." Although Employee "did not have a torn meniscus," she had "some loose bodies in her knee, which you kind of would expect . . . because of the amount of arthritis and so forth she had." Dr. Stonecipher further testified as follows:

Q. Dr. Stonecipher, let me ask you if you have an opinion based upon a reasonable degree of medical certainty as to the cause of the problem for which you saw and treated Ms. Clark for with regard to her left knee.

A. Well she said she fell in the parking lot on whatever day that was in 2013, and certainly that could go along with the problems. Now she obviously had some arthritic problems in both knees. She had some subluxing patella on both sides that she was born with and what have you, or she's had that all her life, and so that does contribute to her having arthritis, but the fall did aggravate her left knee.

Q. That was going to be my next question. If she did have those preexisting conditions, in your opinion, would the fall have aggravated those pre-existing conditions?

A. Yes, sir.

Q. Doctor, I want to also ask you if you have an opinion based upon a reasonable degree of medical certainty as to whether or not Ms. Clark will retain some degree of permanent physical impairment as a result of the surgery and treatment that you performed on her left knee.

A. Yes, sir.

Dr. Samuel Chung, an orthopedic surgeon, performed an independent medical

examination (IME) on October 13, 2014.² An x-ray of Employee's left knee revealed a 1 mm cartilage interval between the patellofemoral joint line of the left knee. The condition was "much smaller than a normal joint line" and was "consistent and compatible" with Employee's reported injury. Dr. Chung found "residuals from left knee injury requiring surgical intervention with ongoing symptomatology." Dr. Chung testified Employee's left knee injury was caused by her fall at work on May 22, 2013, and he assigned her a 14% permanent anatomical impairment rating to the left leg.

The trial court found that Employee suffered a compensable injury to her left knee and leg and awarded 21 percent permanent partial disability, future medical expenses, and discretionary costs. No award was made for the injury to her back.³ The trial court subsequently entered an amended final judgment awarding temporary total disability benefits and medical expenses for the treatment provided by Dr. Stonecipher. Employer has appealed.⁴

Standard of Review

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. *See* Tenn. Code Ann. § 50-6-225(a)(2). Considerable deference is afforded to the trial court's findings with respect to the credibility of witnesses and the weight to be given their in-court testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 733 (Tenn. 2002). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. The reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997).

² He also conducted an IME regarding Employee's lower back on March 26, 2014.

³ There was no appeal of the Chancellor's denial of benefits for the injury to the back.

⁴ After the commencement of the appeal, the case was remanded to the trial court for a determination of Employer's liability for the medical expenses incurred in the treatment by Dr. Stonecipher and for temporary benefits for the time Employee was off work because of her surgery.

Analysis

I.

Employer argues that Employee failed to establish a compensable injury because she did not suffer permanent impairment to her left knee or an advancement of her underlying knee conditions. As a result, Employer argues that the trial court erred in awarding permanent partial disability, future medical expenses, discretionary costs, and attorneys' fees. In contrast, Employee argues that the evidence in the record does not preponderate against the trial court's findings.

In most cases of work-related injury, causation must be established by expert medical evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987). Absolute certainty in the medical evidence is not required. *Trosper v. Armstrong Wood Products, Inc.*, 273 S.W.3d 598, 604 (Tenn. 2008). "The claimant must establish causation by the preponderance of the expert medical testimony, as supplemented by the evidence of lay witnesses." *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 274 (Tenn. 2009)(citing *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn.2008)). Benefits may be awarded to a claimant who presents medical evidence showing the employment could or might have been the cause of his or her injury when there is also lay testimony supporting a reasonable inference of causation. *Excel Polymers, LLC*, 302 S.W.3d at 275 (citing *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn.2005)). Although an employee "does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain," an injury is compensable if it "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 . . ." *Trosper*, 273 S.W.3d at 607. An employee is granted the benefit of "all reasonable doubts regarding causation of his or her injury." *Excel Polymers, LLC*, 302 S.W.3d at 274- 75.

The evidence does not preponderate against the trial court's determination that Employee suffered a compensable injury to her left knee. Employee reported the injury to her left knee immediately after falling on May 22, 2013. On the following day, Dr. Waggoner found the left knee "was tender along the medial joint line . . ., as well as the patella and patella tendon." Employee testified that she continued to report pain in her knee to Dr. Waggoner and Dr. Parsioon. Physical therapy records dated August 2013, Dr. Parsioon's records dated November 18, 2013, and Dr. Waggoner's records dated March 21, 2014, all indicated that Employee continued to complain of left knee pain. In

addition, Dr. Stonecipher testified that Employee's "fall did aggravate her left knee" and "aggravated her preexisting conditions." And Dr. Chung concluded that Employee suffered an injury to her left knee as a result of her fall and assigned an impairment of 14 percent.

Employer nonetheless emphasizes Dr. Waggoner's testimony that Employee's left knee did not have "significant swelling or abrasions," and that an x-ray revealed "no abnormalities." Employer argues that Dr. Waggoner did not recall her telling him of knee pain after the first two visits. However, his records indicate otherwise. Dr. Parsioon likewise did not see any swelling or abnormalities in Employee's left knee, and he did not recall Employee mentioning her knee pain after her first visit. As Employee notes, however, neither Dr. Waggoner nor Dr. Parsioon made findings relative to the cause of Employee's knee injury. Although Employee completed two functional capacity evaluations, these evaluations focused primarily on her back. The trial court accredited Employee's in-court testimony that she had ongoing pain in her left knee. Moreover, the trial court found "there was enough documentation through the treatment, through the physical therapy notes to find that this was an ongoing problem." In short, we conclude that the evidence does not preponderate against the trial court's judgment as to causation and the award of future medical expenses, discretionary costs, and attorneys' fees.

II

Employer also argues that pursuant to Tennessee Code Annotated section 50-6-102(13)(E)(2014),⁵ Drs. Waggoner and Parsioon's testimony is entitled to a presumption of correctness because they were Employee's treating physicians. The Presumption established by this statute does not apply. The effective date of the statute is July 1, 2014, and this accident occurred on May 22, 2013.

III

In addition, Employer argues that Employee is estopped from receiving workers' compensation benefits because she received short-term disability benefits and stated the injury was not work-related. Employee argues that the trial court correctly awarded

⁵ "The opinion of the treating physician, selected by the employee from the employer's designated panel of physicians pursuant to § 50-6-204(a)(3), shall be presumed correct on the issue of causation but this presumption shall be rebuttable by a preponderance of the evidence." Tenn. Code Ann. § 50-6-102(13)(E)(2014)(applicable to injuries occurring on or after July 1, 2014)

benefits.

Although the trial court did not make extensive findings relative to this issue, we conclude that Employer has not shown grounds for relief based on estoppel. We recognize that, in some cases, an Employer “may set off from temporary total, temporary partial, permanent partial and permanent total disability benefits any payment made to an employee under an employer funded disability plan for the same injury; provided, that the disability plan permits such an offset.” Tenn. Code Ann. § 50-6-114(b). As Employee correctly asserts, Employer did not offer evidence that it was entitled to a set off under this statute.

Employer argues that Employee is estopped from recovering workers’ compensation benefits because she received group health insurance and short-term disability benefits. Employer relies principally on *Koehring-Southern v. Burnette*, 464 S.W.2d 820 (Tenn. 1970)(recognizing an employee can be estopped from receiving workers’ compensation benefits after receiving benefits from group insurance). In that case, an employee who suffered a work-related back injury in 1968 did not file a workers’ compensation claim but received benefits under his group insurance. Following a second work-related back injury in 1969, he filed a workers’ compensation claim and argued that the two injuries left him totally disabled. The employer argued that the employee was estopped from asserting a claim based on the 1968 injury because he received insurance benefits for that incident. The trial court found the employee was totally and permanently disabled as a result of both injuries and awarded him compensation and medical expenses. *Id.* at 821-822. On appeal, the Supreme Court rejected the employer’s estoppel argument, citing *Kelly v. Cliff Pettit Motors, Inc.*, 234 S.W.2d 822, 823 (Tenn. 1950) which states: “An essential element which is the basis of the law of estoppel in pais is that one who pleads the estoppel shall have relied on the words, acts, or omissions of the party against whom the estoppel is asserted.” *Koehring-Southern*, 464 S.W.2d at 823; *Kelly*, 234 S.W.2d at 823 (The court found that the petitioner did not rely upon any representation made by Employer, and thus, there was no basis for an estoppel.).

Employer has not shown grounds for relief under *Koehring-Southern*. Here, Employee immediately reported her work-related injury in May 2013 and received treatment for her back and knee. In April 2014, Employer contacted Ms. Lavelle, notified her that she was continuing to have pain in her left knee, and requested authorization for additional treatment. Ms. Lavelle told Employee that further treatment would not be covered by workers’ compensation. Employee then sought and received treatment from Dr. Stonecipher under Employer’s group health insurance plan. She

applied for short term disability benefits because Employer told her temporary benefits would not be paid by workers' compensation. The trial court subsequently determined that Employee's knee injury was compensable and that she was "justif[ied] . . . in having a non-authorized physician [] perform the treatment" to her left knee. In short, the learned Chancellor found Employee had no other option for medical treatment or for benefits for time missed from work other than through group insurance and short term disability payments. Under these facts and the trial court's findings, we conclude that Employer has not shown Employee was estopped from seeking workers' compensation benefits.

III

Finally, Employer argues that Employee was not entitled to recover medical expenses related to Dr. Stonecipher's treatment because she did not receive authorization to obtain treatment from Dr. Stonecipher as part of her workers' compensation claim and because the medical expenses were covered by her group insurance plan.⁶ As noted above, Employee reported her work-related injury immediately in May 2013 and received ongoing treatment. When she contacted Employer in April 2014 and explained that she was continuing to have pain in her knee, she was told further treatment would not be covered by workers' compensation. The trial court subsequently found that Employee's left knee injury was work-related and that she was "justif[ied] . . . in having a non-authorized physician [] perform the treatment" to her left knee. In light of these findings, we conclude that the trial court did not err by awarding medical expenses.

Conclusion

After reviewing the evidence and the parties' argument, we affirm the trial court's ruling that Employee suffered a compensable injury and its award of temporary total benefits, medical expenses, discretionary costs, attorneys' fees, and future medical expenses. Costs are taxed to Charms, L.L.C., for which execution may issue if necessary.

WILLIAM B. ACREE, SENIOR JUDGE

⁶ Employer argues, in effect, that Employee should not receive a double recovery for medical expenses because they were paid by her medical insurance. Both counsel for Employer and Employee acknowledged the possibility of a subsequent subrogation proceeding in this regard; that matter, however, is not before us.

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

STACEY CLARK v. CHARMS LLC

**Chancery Court for Lauderdale County
No. 15201**

No. W2017-02552-SC-R3-WC – Filed March 19, 2019

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 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 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 assessed to the Appellant, Charms, L.L.C., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM