

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(June 19, 2006 Session)

**GARY WAYNE ROGERS v. WINCHESTER UTILITIES AND
TENNESSEE MUNICIPAL LEAGUE RISK MANAGEMENT POOL, INC.**

Direct Appeal from the Chancery Court for Franklin County
No. 16, 691 Jeffrey F. Stewart, Chancellor

No. M2005-01516-WC-R3-CV - Mailed - January 3, 2007
Filed - March 8, 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 §50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer contends that the trial court erred by (1) not excluding the expert testimony of Dr. Albert Brandon for lack of trustworthiness and for an opinion based upon unreliable principles and methodology; and (2) finding that the employee proved medical causation for the employee's medical condition. We affirm.

Tenn. Code Ann. §5-6-225(e) (1999) Appeal as of Right; Judgment of the Franklin County Chancery Court. Affirmed.

JEFFREY S. BIVINS, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J, and CLAYBURN PEEPLES, SP. J., joined.

Clifton N. Miller, Christopher R. Moore, Henry, McCord, Bean, Miller, Gabriel and Carter, Tullahoma, Tennessee, for the Appellee, Gary Wayne Rogers.

William N. Bates, J. Russell Farrar, Farrar & Bates, Nashville, Tennessee, for Appellants, Winchester Utilities and TMC Risk Management Pool, Inc.

MEMORANDUM OPINION

I. Facts

In 1975, the Plaintiff, Gary Wayne Rogers (“Rogers”), began working for Winchester Utilities (“WUD”), a public utility district providing water services to Winchester, Tennessee and surrounding areas. For some twenty-five years, Rogers worked as an electric and water meter reader for WUD. On June 13, 2000, Rogers reported to work at approximately 7:00 a.m. and began his meter route with Edwin Sells, a co-worker. After reading approximately eleven or twelve meters that day, Rogers and Sells arrived at a local nursery.¹ Rogers used a key to gain entry through a locked fence surrounding the nursery. Almost immediately, Rogers noticed a strong, peculiar smell and dead grass near the meter, but proceeded to the meter. As Rogers approached the meter, the smell grew stronger. Rogers observed that the lid to the meter was open and that a liquid was surrounding the meter, as well as covering the face of the meter. In order to read the meter, Rogers wiped the liquid off the face of the meter with his hand. At that point, some type of insect flew into Rogers’ mouth, and Rogers instinctively touched his mouth with his hand, the same hand with which he had wiped off the meter. Rogers then finished reading the meter and walked back to the truck. By the time Rogers reached the truck, he already developed symptoms of dizziness, nausea, aching, swelling and difficulty moving. He also began experiencing episodes of vomiting.

Rogers was unable to continue working, so Sells drove Rogers home. By the time Rogers reached his home, he was experiencing swelling, aching, fever, and flu-like symptoms. Rogers remained at home for the next five days with symptoms of high fever, aching, flu-like symptoms, and difficulty performing functions, such as dressing and using the restroom.

On June 18, 2000, Rogers was admitted to the hospital and remained hospitalized for approximately fourteen to sixteen days. Dr. Albert Brandon began treating Rogers at the hospital. Dr. Brandon tested Rogers for a number of different illnesses and diseases. At the time of his discharge from the hospital, Rogers was diagnosed with a general hepatitis. The tests revealed no viral or bacterial infections present in Rogers’ body. Dr. Brandon continued to treat Rogers after his discharge from the hospital. Over the next several months, Rogers was examined by a number of specialists for his illness. There still was no specific diagnosis of his illness. Dr. Brandon then referred Rogers to Dr. Robert Lagrone, a rheumatologist, on April 27, 2001. Rogers first visited Dr. Lagrone on May 24, 2001. After initial evaluation, Dr. Lagrone diagnosed Rogers with adult-onset Still’s Disease. Later, in September 2002, Rogers began seeing Dr. Elezar Steigelfest, another rheumatologist. Dr. Steigelfest also diagnosed Rogers with adult-onset Still’s Disease.

During the two years following the accident in June 2000, Rogers worked sporadically, but was unable to work on a consistent basis. After Rogers was released from a second hospital stay in July 2002, he never returned to work. WUD officially terminated Rogers on October 1, 2003.

¹The parties apparently dispute whether the nursery was an abandoned property. However, for purposes of this case, that dispute is not material.

Dr. Brandon ultimately assessed Rogers with a 100% disability rating. Rogers continues to visit Dr. Steigelfest for treatment of his Still's Disease. He continues to suffer from aching joints, fevers, night sweats, chills, and persistent flu-like symptoms.

On May 29, 2001, Rogers filed suit against WUD and the Tennessee Municipal League Risk Management Pool.² The trial court conducted the trial in this matter on April 22, 2005. The trial court heard testimony from Rogers, Sells, and Ms. Virginia Rogers, the mother of the plaintiff. The trial court also considered the deposition testimony of Dr. Brandon, Dr. Lagrone, and Dr. Steigelfest. The trial court overruled WUD's objection as to the admissibility of Dr. Brandon's testimony as an expert witness. The trial court also considered both the medical testimony and the lay testimony and concluded that Rogers had carried his burden of proving that he had suffered an injury in the course of his employment. Finally, the trial court found that Rogers was permanently and totally disabled.

II. Issues

WUD submits the following issues on appeal:

1. Whether the trial court erred by not excluding the expert testimony of Dr. Albert Brandon under Rules 702 and 703 under the Tennessee Rules of Evidence?
2. Whether the trial court erred in finding that Rogers proved that his condition arose out of his employment?

III. Standard of Review

The standard of review in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Layman v. Vanguard Contractors, Inc.*, 183 S.W.2d 310, 314 (Tenn. 2006). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine whether the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-84 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). This Court, however, is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

²Although the Tennessee Municipal League Risk Management Pool is a named defendant in this case, we will refer to both defendants as "WUD" or "employer" for the sake of simplicity.

IV. Analysis

WUD first contends that the trial court erred by admitting the expert testimony of Dr. Albert Brandon. WUD contends that Dr. Brandon's testimony lacked sufficient trustworthiness and was based on invalid and unreliable principles and methodology. Tennessee Rules of Evidence 702 and 703³ govern the admissibility of expert testimony in Tennessee. Generally, questions related to these rules pertaining to the qualifications, admissibility, relevancy, and competency of expert testimonies are matters left to the trial court's discretion. *McDaniel v. CSX Transportation, Inc.*, 855 S.W.2d 257, 263 (Tenn. 1997). We may not overturn the trial court's ruling admitting or excluding expert testimony unless the trial court abused its discretion. *Id.* at 263-64. A trial court abuses its discretion only if it applies an incorrect legal standard or reaches an illogical or unreasonable decision that causes an injustice to the complaining party. *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002).

In contending that the trial court erred by admitting the expert testimony of Dr. Brandon, WUD relies heavily upon an analysis of the non-exclusive factors identified by the *McDaniel* court as factors a trial court *may* consider in determining reliability of proposed expert testimony. WUD also relies upon two additional factors identified in *State v. Stephens*, 78 S.W.3d 817 (Tenn. 2002).

The Tennessee Supreme Court recently directly addressed the issue of the admissibility of expert testimony in the case of *Brown v. Crown Equipment Corporation*, 181 S.W.3d 268 (Tenn. 2005). In *Brown*, the trial court had excluded expert testimony based upon a detailed analysis of the *McDaniel* factors. *Brown*, 181 S.W.3d at 277-81. The *Brown* Court held that the "rigid application of the *McDaniel* factors to all expert testimony is problematic because all expert testimony may not 'fit' within the factors." In reversing the trial court's exclusion of the expert testimony in *Brown*, the Court noted that the "objective of the trial court's gate-keeping function is to ensure that 'an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Id.* at 275. The *Brown* Court concluded that the proffered experts in that case based their testimony primarily upon their practical experiences in their respective professions and that their testimony did not fit neatly within the *McDaniel* factors. *Id.* At 277.

³Rule 702 provides as follows:

If scientific, technical or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise.

Rule 703 provides as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Similarly, in the instant case, the testimony of Dr. Brandon did not fall neatly within the *McDaniel* factors. Dr. Brandon based his testimony upon his training, research, and practical experiences. The trial court carefully considered the qualifications, admissibility, relevancy and competency of Dr. Brandon. *See, e.g.*, Transcript of Findings of Facts and Conclusions of Law, pp. 4-5. We find that the trial court's admission of the expert testimony of Dr. Brandon clearly was within the trial court's discretion. Accordingly, this issue is without merit.

The second issue raised by WUD is whether Rogers carried his burden of proving that his injuries arose out of his employment. WUD contends that the expert testimony in this case is not sufficient to establish medical causation. To be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Ann. §50-6-102(13). The phrase "arising out of" refers to the cause or origin of the injury. *Hill v. Eagle Bend Mfg, Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997). An injury arises out of employment "where there is apparent to the rational mind upon consideration of all the circumstances, a causal connection" between the work and the injury for which benefits are sought. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001).

The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997). Additionally, *Reeser* provides as follows:

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that the given incident "could be" the cause of the employee's injury, where there is also lay testimony from which it reasonably may be inferred that the incident was, in fact, the cause of the injury.

Reeser, 938 S.W.2d at 692. Moreover, in *Fritts v. Safety Nat. Cas. Corp.*, 163 S.W.3d 673, the Supreme Court reiterated this holding:

Acknowledging the imprecision and uncertainty medical proof of causation, any reasonable doubt must be construed in favor of the employee. Benefits may properly be awarded upon medical testimony that shows the employment "could or might have been the cause" of the employee's injury when there is lay testimony from which causation reasonably can be inferred.

Fritts, 163 S.W.3d at 678.

In this case, the trial court heard expert testimony from Dr. Brandon, Dr. Lagrone and Dr. Steigelfest. Dr. Brandon testified that Rogers' incident probably triggered the adult-onset of Still's Disease to a reasonable degree of medical certainty. Dr. Steigelfest testified that it is

“possible” that the chemical exposure caused the onset of Still’s Disease. On the other hand, Dr. Lagrone testified that he cannot state whether the chemical exposure did or did not cause Rogers’ case of Still’s Disease. The trial judge has the discretion to conclude that the opinion of one expert should be accepted over that of another expert. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1991). Additionally, the lay testimony of Rogers, Sells and Virginia Rogers clearly bolsters the proof of causation in this case. *See Reeser*, 938 S.W.2d at 692. The trial court expressly concluded that Mr. Rogers had suffered an injury in the course of and scope of his employment “based upon the testimony, both medical and lay, that I have heard in this case.” Transcript of Findings of Facts and Conclusions of Law, p. 7. Accordingly, we find no error in the trial court’s decision on causation.

V. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed, and the case is remanded for any necessary proceedings. The costs of the appeal are taxed to the appellants, Winchester Utilities and Tennessee Municipal Risk Management Pool.

JEFFREY S. BIVINS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
June 19, 2006 Session

GARY WAYNE ROGERS v. WINCHESTER UTILITIES, ET AL.

**Chancery Court for Bradley County
No. 03-111**

No. M2005-01516-SC-WCM-CV - Filed - March 8, 2007

JUDGMENT

This case is before the Court upon the motion for review filed by Tennessee Municipal League Risk Management Pool and Winchester Utilities pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 Tennessee Municipal League Risk Management Pool and Winchester Utilities, for which execution may issue if necessary.