

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 11, 2006 Session

MARY SUE WALLER v. STATE OF TENNESSEE

**Direct Appeal from the Tennessee Claims Commission, Middle Division
No. 20100619 Stephanie R. Reeves, Commissioner**

No. M2005-02056-COA-R3-CV - Filed on October 16, 2006

This is an appeal of a personal injury award from the Tennessee Claims Commission. Mary Sue Waller (Ms. Waller) challenges the adequacy of damages awarded for the injuries she sustained in an automobile accident caused by the negligence of a state employee. She asserts that the State's failure to produce an expert and to challenge her expert's testimony binds the court to her expert's conclusions. Additionally, assuming this conclusive effect, she insists that the commissioner must have relied upon previously stricken deposition testimony in rendering her judgment. Ms. Waller further contends the award fails to account for her persistent neck and back pain, as well as the permanent impairment proven by her expert. The record contains sufficient evidence, including medical records admitted by Ms. Waller herself, to support the findings and award. Moreover, her expert's opinion is not only advisory, but also susceptible to conflicting evidence and a credibility determination. Because the evidence does not preponderate against the commissioner's findings and award, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission is Affirmed
and Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Robert L. Huskey, Manchester, Tennessee, for the appellant, Mary Sue Waller.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor General and George H. Coffin, Jr., Senior Counsel, for the appellee, State of Tennessee.

OPINION

The underlying facts of this case are not in dispute. Mary Sue Waller and her daughter, Cynthia Turman, sustained injuries in an automobile accident on July 25, 2000, while traveling to Murfreesboro, Tennessee. Russell Fann, a Tennessee Department of Transportation highway maintenance worker, was also traveling along the highway in a state-owned dump truck at

approximately fifty to fifty-five miles per hour. After rounding a curve, Mr. Fann saw traffic stopped downhill from him and applied the brakes to bring the dump truck to a stop. According to Mr. Fann, the brakes failed. The dump truck hit the back of Ms. Waller's truck, bending its frame and breaking the rear window.

Ms. Waller testified to a sudden impact and jolt forward. She remembered the seatbelt pulling her back and then recalled hitting something with the back of her head. She testified to feeling significant pain on the back of her head and in her lower back. She also surmised that she lost consciousness a few times before the paramedics arrived. An ambulance transported Ms. Waller and her daughter to the Stones River Hospital Emergency Room from the scene of the accident.

Over the next six months, Ms. Waller received medical treatment from Dr. Steven Bills, her family physician, and Dr. Raymond Capps, a neurologist referred to her by Dr. Bills. Ms. Waller reported similar symptoms to both physicians: constant headaches, neck, head, back, and shoulder pain, a twitching left eye, a tingling and numb sensation radiating from the back of her head to her face, and insomnia. Ms. Waller first visited Dr. Bills two days after the accident. Dr. Bills indicated in his notes that he suspected a re-injury of a previous back injury. He also scheduled a CT scan of her head that showed no abnormalities. After several visits, Dr. Bills suspected that the headaches, twitching eye, and numb, tingling, and painful sensations had a neurological origin. He scheduled an MRI of Ms. Waller's neck and spine and referred her to Dr. Capps, a neurologist.

Dr. Capps reviewed the MRI and noted no abnormalities other than degenerative joint disease and evidence of a previous cervical fusion performed in 1991. He scheduled a left occipital nerve block to relieve her headaches and other symptoms felt in the cranial and eye areas, which proved successful. To address Ms. Waller's complaints of neck and back pain, Dr. Capps referred her to Top Rehab Services for approximately twelve to thirteen sessions of physical therapy. Ms. Waller's last office visit pertaining to her accident-related complaints occurred on November 3, 2000. On that day, Dr. Capps examined Ms. Waller to evaluate the success of the nerve block and to examine her left shoulder, the movement of which caused her pain. He prescribed refills of medication that had been effective in relieving the pain but that she was no longer taking at the time of the office visit. Finally, he indicated that she should return to the office as needed.

Between Ms. Waller's last visit with Dr. Capps and the time of trial, she saw Dr. Bills approximately seventeen times for reasons unrelated to the accident. During those visits, Dr. Bills diagnosed Ms. Waller with pustular psoriasis, a form of arthritis, and noted that a physical examination revealed she had a long history of it. Moreover, he diagnosed Ms. Waller with osteoporosis.

Approximately four years after the accident and for purposes of litigation, Dr. David Florence¹ examined Ms. Waller for one hour and reviewed her medical records, medical bills, and deposition testimony. At trial and in his report, Dr. Florence identified the following sixteen injuries sustained by Ms. Waller in the automobile accident: posttraumatic and occipital neuralgia, post concussion syndrome, cephalgia, cervical neuritis, cervical whiplash injury, shoulder strain, unstable low back syndrome, right mandibular joint dysfunction, cervical radiculopathy, mild traumatic brain injury, insomnia, visceral scotomata, decreased range of motion of cervical spine, mild post traumatic stress disorder, left lateral herniation of the L4-L5 disc, and minimal right lateral herniation of the C4-C5 disc. Additionally, he found that Ms. Waller retained a 28% permanent impairment to the whole person, as calculated according to American Medical Association guidelines. Dr. Florence indicated that Ms. Waller would face limitations in sitting for long periods of time, running, pushing, pulling, lifting heavy objects, and extending her neck beyond her existing range of motion. Finally, he stated that Ms. Waller would require medication for the rest of her life for sleep and pain management.

Ms. Waller² filed a complaint against the State of Tennessee with the Claims Commission on February 14, 2001. In it, she asserted that, under the doctrine of respondeat superior, the State of Tennessee was liable for Mr. Fann's negligent operation of the dump truck and the resulting bodily injury to her and property damage to her 1999 Ford pick-up truck. She sought \$350,000³ to compensate for medical bills, painful and permanent injuries, pain and suffering, and loss of enjoyment of life. Additionally, she sought \$12,000 for damages to her truck.

Although Ms. Waller and the Turmans filed separate claims, they requested a consolidated proceeding. The commissioner entered an agreed order of consolidation on April 21, 2004 and heard Ms. Waller's and the Turmans' consolidated claims on November 29, 2004.

At trial, Ms. Waller testified to the extent of her injuries and offered the expert testimony of Dr. David Florence to prove at least sixteen different, diagnosed injuries and a 28% permanent physical impairment of the whole body, all sustained by her as a result of the accident. Ms. Waller's counsel offered her medical records into evidence through Dr. Florence's testimony, as proof of the information he had considered. Counsel also offered into evidence her medical bills to date, which totaled \$14,757.91. Additionally, the parties stipulated to \$ 11,741.67 of damage to her truck.

¹Ms. Waller has consistently emphasized the necessity for Dr. Florence's services because, despite her best efforts, Dr. Capps refused to participate in the proceedings. We note that the record does not contain a subpoena for Dr. Capps.

²Ms. Waller's husband originally joined in the complaint and filed loss of services and consortium claims. He sought damages in the amount of \$15,000 for those losses and joined Ms. Waller in seeking \$12,000 to compensate for the damage to their jointly owned truck. Mr. Waller died prior to the Claims Commission proceedings, and the commissioner thus considered only the personal injury and property damage issues raised by Ms. Waller.

³The statutory maximum for tort recovery against the State is \$300,000 per claimant and \$1,000,000 per occurrence. Tenn. Code Ann. § 9-8-307(e) (1999 & Supp. 2005).

In presenting their proof, the Turmans offered the deposition testimony of Dr. Bills, the family physician for both Ms. Turman and Ms. Waller, into evidence. Because counsel for both parties had conducted discovery separately, neither Ms. Waller nor her counsel attended the deposition of Dr. Bills. In the course of the deposition, counsel for the State of Tennessee questioned Dr. Bills about his treatment of Ms. Waller and elicited the following responses:

Q: Okay. Now, Doctor, you also treated the plaintiff's mother, Ms. Turman's mother, for injuries, did you not, sir?

A: You know, I can't recollect. I don't have her chart here right now and can't recollect whether I saw her or not. It seems to me that she did come in the office but had relatively minor complaints that resolved and she had no further issues.

Q: What were her complaints about, can you recall?

A: I don't recall specifically what those complaints were.

Q: Do you recall how many times you might have seen her?

A: I have seen her – I've seen her on multiple occasions since then. And those problems have been primarily related to her psoriatic disease and particularly pustular psoriasis involving her hands.

Q: And how did they resolve, those problems with her?

A: Hers resolved with in general a ten-day course of steroids.

Q: Do you recall whether she had any back problems associated with the psoriasis?

A: No, I don't – I don't recollect her having significant problems in that way.

The commissioner filed her judgment on June 7, 2005. She found that Ms. Waller had proven negligence on the part of Mr. Fann and causation of the following injuries: posttraumatic headaches, occipital neuralgia, neck pain, back pain, and shoulder pain. The commissioner awarded Ms. Waller \$11,741.67 for damage to the truck and \$38,000 for her injuries.

Upon reviewing the judgment, Ms. Waller learned that Dr. Bills' deposition addressed her injuries and that the commissioner had considered his testimony in rendering her judgment with respect to Ms. Waller. She filed a timely motion to alter or amend the judgment pursuant to Tennessee Rule of Civil Procedure 59.04 as well as a motion to strike the deposition. In the motion, Ms. Waller objected to the application of Dr. Bills' deposition testimony to her case. Because she

had no opportunity to cross-examine Dr. Bills at the deposition and had no notice of his comments about her treatment, Ms. Waller urged the commissioner to strike the testimony about her and re-calculate the damage award accordingly. The State responded that evidence other than the deposition supported the award, such as the medical records and the testimony of Ms. Waller and Dr. Florence. The State also contended that, at trial, Ms. Waller all but admitted to her recovery from the accident, consistent with Dr. Bill's deposition testimony.

The commissioner entered an order on motion to alter or amend on July 28, 2005, granting the motion to strike but denying the motion to amend the award. Because Ms. Waller had neither notice of the deposition nor an opportunity to cross-examine Dr. Bills, the commissioner struck that portion of testimony from the record. She declined, however, to re-calculate the award in light of other evidence in the record. She reasoned that Dr. Bills and Dr. Capps recorded their examination notes much closer in time to the accident than did Dr. Florence, who evaluated Ms. Waller's condition for the purposes of litigation four years after the accident. Additionally, the medical records revealed that Ms. Waller's treatment for her accident-related injuries ended on November 3, 2000 and that her condition had improved significantly at that point. In sum, the commissioner ruled that the exclusion of the deposition testimony had no effect on the award because the testimony of Dr. Florence and Ms. Waller, combined with a review of Ms. Waller's medical records, sufficiently supported the award of \$38,000.

On August 23, 2005, Ms. Waller filed a notice of appeal.

Issues Presented for Review

On appeal, Ms. Waller challenges the commissioner's judgment and presents the following issues, as restated, for review:

- I. Whether, in rendering her judgment, the commissioner committed reversible error when she considered the deposition testimony of Dr. Bills and accorded greater weight to it than to the live testimony of Dr. Florence, Ms. Waller's expert; and
- II. Whether the evidence supported the commissioner's award of damages in light of Dr. Florence's uncontradicted expert testimony justifying a higher award.

Standard of Review

The Tennessee Rules of Appellate Procedure govern appeals of Tennessee Claims Commission judgments. Tenn. Code Ann. § 9-8-403(a)(1) (1999 & Supp. 2005). Our standard of review for a non-jury trial is *de novo* upon the record. *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). We apply a presumption of correctness as to the Commission's findings of fact and damage awards, unless the preponderance of the evidence is otherwise. *See* Tenn. R.

App. P. 13(d). The appellant bears the burden of establishing that a preponderance of the evidence is contrary to the commissioner's findings. *Beare v. State*, 814 S.W.2d 715, 717 (Tenn. 1991).

This Court reviews a trial court's credibility assessments with deference. *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 563 (Tenn. 2001). Unlike appellate courts, trial courts observe witnesses as they testify and, accordingly, are in a superior position to evaluate credibility. *Union Planters Nat'l Bank v. Island Mgmt. Auth., Inc.*, 43 S.W.3d 498, 502 (Tenn. Ct. App. 2000). When a trial court's factual findings rest on its assessment of a witness's credibility, we will re-evaluate the assessment only when clear and convincing evidence to the contrary exists. *Sircy v. Metro. Gov't of Nashville*, 182 S.W.3d 815, 818 (Tenn. Ct. App. 2005) (citing *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999)).

In contrast, we independently assess documentary proof, such as depositions and other records, without deference to the trial court. *Wells*, 9 S.W.3d at 783–84. This rule rests on the fact that courts accord weight to documentary proof based upon the contents of the document, not upon demeanor or appearance of witnesses at trial. *See id.* As a result, appellate and trial courts are equally capable of assessing the probative value of documents in evidence. *See id.*

Analysis

Ms. Waller's Challenge to the Damages Award

Ms. Waller advances three chief arguments in protesting the award. First, she contends that because the State failed to attack the substance of Dr. Florence's opinion or to produce its own expert, this Court should give his testimony conclusive effect. Ms. Waller bases her second argument on the commissioner's alleged reliance on previously stricken deposition testimony in rendering her judgment. Third, Ms. Waller argues that the award fails to account for her persistent neck and back pain, as well as the permanent impairment proven by her expert.

Ms. Waller mistakenly assumes that the only evidence before the commissioner was Dr. Florence's expert opinion and her testimony. She introduced her own medical records into evidence and cannot now object to the commissioner's use of them in reaching her conclusions. After evaluating the evidence considered by the commissioner, we cannot agree with Ms. Waller that the evidence preponderates against the commissioner's award.

1. Ms. Waller's Medical Records

Ms. Waller raises a preliminary matter bearing directly on our analysis of the findings and damages award. She disputes the commissioner's reliance on her medical records as substantive proof of her impairment and injury. According to Ms. Waller, her counsel proffered the documents for the limited purpose of showing the basis of her medical expert's opinion. At the outset, we note the seeming conflict in a party seeking to restrict the review of the very records submitted to support the reliability of her expert's opinion. Nevertheless, before evaluating the

findings and award, we must first determine whether Ms. Waller's medical records were properly before the commissioner.

Here, Ms. Waller relies on Tennessee Rule of Evidence 803(6), which requires the proponent of business records to lay a proper foundation before the documents may come in as substantive evidence. She implies that, because her counsel did not take these required measures, this Court should infer an intent to limit the review of the records in evidence. The trial transcript reveals neither efforts to limit consideration of the records nor measures taken to lay a foundation.

Ms. Waller voluntarily chose to enter her medical records into evidence and cannot now object to the commissioner's review of them. Tennessee Rule of Evidence 703 allows an expert to base an opinion on inadmissible evidence if experts in the field also reasonably rely on that type of data. *See* Tenn. R. Evid. 703. In 1975, the Tennessee Supreme Court addressed the issue of expert medical opinions based on others' reports and established that the "expert opinion of an attending physician is admissible, although based in part upon reports of other doctors or hospital technicians who are not called as witnesses, if said reports are used in the diagnosis or treatment of the patient." *N. J. Zinc Co. v. Cole*, 532 S.W.2d 246, 250 (Tenn. 1975); *see also* Tenn. R. Evid. 703, advisory commission's cmt. The admission of Dr. Florence's report and testimony did not hinge upon the placement of Ms. Waller's medical records into evidence, yet she chose to proffer the records anyway. This belated objection lacks merit.

2. Dr. Florence's Expert Opinion

Ms. Waller also asserts that her expert's opinion went uncontradicted and accordingly merits conclusive effect. No other experts testified at trial, and counsel for the State conducted a brief cross-examination of Dr. Florence. The only other trial testimony regarding Ms. Waller's injuries came from Ms. Waller herself. Despite Dr. Florence's conclusions, the commissioner found that Ms. Waller had sustained posttraumatic headaches, occipital neuralgia, neck pain, back pain, and shoulder pain in the accident and awarded her \$38,000 for those injuries.

In this case, the absence of a substantive attack on Dr. Florence's testimony, either through cross-examination or another expert, does not render his conclusions controlling. Nor does it immunize Dr. Florence's opinion from the effects of conflicting evidence and assessments of credibility. Expert opinions regarding highly complicated and scientific issues ordinarily do not constrain the fact finder's conclusion on the subject matter. *Gibson v. Ferguson*, 562 S.W.2d 188, 189 (Tenn. 1976). Even if the expert's opinion is uncontradicted, it remains purely advisory in character, and the trier of fact may accord to it whatever weight it chooses. *Thurmon v. Sellers*, 62 S.W.3d 145, 162 (Tenn. Ct. App. 2001) (citing *Gibson*, 562 S.W.2d at 189-90).

Upon comparing the findings and Dr. Florence's conclusions, we find the most notable discrepancy in the permanent impairment diagnosis and the extent of injury and pain suffered by Ms. Waller. The commissioner considered and weighed Ms. Waller's trial testimony and medical records in relation to Dr. Florence's testimony. As a result, she did not adopt Dr. Florence's permanent impairment diagnosis, and the damages award suggests she took a more limited view of Ms. Waller's pain and suffering than did Dr. Florence.

Viewed together, the documentary proof and witness testimony produce conflicting data and raise questions regarding the extent of Ms. Waller's pain and injury and the likelihood of permanent impairment. For example, Ms. Waller testified to considerable improvement of the headaches, eye twitching, numbness, and tingling following the nerve block performed by Dr. Capps. Any residual effects were "nothing severe like at the beginning." Although at trial she complained of persistent neck and back discomfort, she also conceded to improvement in those areas and stated it was "hard to say" how frequently she encountered pain. And, in spite of Dr. Florence's report that she would be a chronic pain patient and would suffer lifestyle restrictions for the rest of her life, Ms. Waller emphasized that she learned helpful exercises at Top Rehab Services and has been able to alter her movements and activity in a way to avoid the pain. For example, she has learned to bend over and pick up items in a different way. Ms. Waller confirmed that she still engages in most of the same activities she did before the accident, such as going to church, grocery shopping, and driving herself on errands, despite these post-accident modifications.

Moreover, Ms. Waller's medical records reveal that, by the time of trial, four years had passed since her last treatment for or complaint about her accident-related injuries. Ms. Waller's last office visit relating to the accident occurred on November 3, 2000, when she met with Dr. Capps for a follow-up evaluation regarding her occipital nerve block. At this meeting, Ms. Waller reported an overall improvement following the nerve block and noted better sleep, less neck pain, and no headaches. She reported pain in her left shoulder that day but had stopped taking medications that had previously proven effective for controlling the discomfort. Dr. Capps prescribed refills and advised her to return to the office as needed. Ms. Waller did not return after that date. Ms. Waller also failed to mention any of these accident-related symptoms in her sixteen or seventeen office visits with Dr. Bills between November 3, 2000, and the date of trial some four years later.

Finally, her testimony and medical records indicate that she had neck problems resulting in a cervical fusion,⁴ as well as arthritis in her chest and rib area, prior to the accident. She also testified to having arthritis in her neck at the time of trial. Further, the medical records mention a back injury prior to the accident, document her ongoing treatment for psoriatic arthritis up to the time of trial, and include a diagnosis of osteoporosis. The record on appeal, however, is silent

⁴We also acknowledge Ms. Waller's testimony that her current problems differed from those precipitating the cervical fusion and that she had no neck problems between the surgery and the automobile accident.

regarding the connection, if any, between her current pain and her pre-existing arthritis, prior cervical fusion, and back injury.

We believe the court's credibility determinations account for the difference between the findings and Dr. Florence's opinion. This Court has stated previously that

[t]he decision of the trial court on the credibility of witnesses is entitled to great weight Any conflict in testimony requiring a determination fo the credibility of a witness or witnesses is for the trial court and binding on the appellate court unless from other real evidence the appellate court is compelled to conclude to the contrary.

Hudson v. Capps, 651 S.W.2d 243, 246 (Tenn. Ct. App. 1983). We find no evidence in the record that compels a different result.

3. Dr. Bills' Deposition Testimony

Assuming the evidence before the commissioner comprised only her testimony and her expert's conclusive opinion, Ms. Waller also insists that the only justification for the findings and award must be that the commissioner relied on Dr. Bills' unfavorable deposition testimony. Upon a thorough review of the record, we find no evidence that the commissioner improperly based her ultimate determination upon, or even considered, Dr. Bills' testimony after striking it.

Although Ms. Waller goes to great lengths to show the commissioner's reliance on the deposition testimony, she places undue emphasis on the effect of this purported error. Even independent of Dr. Bills' statements, sufficient evidence in the record supports the commissioner's findings. Tennessee Rule of Appellate Procedure 36(b) provides for appellate relief only when an error has more likely than not resulted in prejudice to the party. Tenn. R. App. P. 36(b). If no error has occurred, or if the errors that did occur were harmless, then we must affirm the judgment. *Union Planters Nat'l Bank v. Island Mgmt. Auth., Inc.*, 43 S.W.3d 498, 501 (Tenn. Ct. App. 2000)(citing *Doochin v. U.S. Fid. & Guar .Co.*, 854 S.W.2d 109, 112 (Tenn. Ct. App.1993)). Particularly in light of Ms. Waller's testimony and admission of medical records into evidence, this alleged error, if true, would work no prejudice in this case. Accordingly, we find this argument unpersuasive.

4. The Commissioner's Award of Damages

In ordering the \$38,000 personal injury award, the commissioner accounted for Ms. Waller's medical expenses to date and approximately \$23,241 in excess of those medical expenses. The amounts exceeding her expenses appear to represent compensation for her pain, suffering, and loss of enjoyment of life. In challenging the adequacy of the award, Ms. Waller first contends that it fails to account for her neck and back pain because the commissioner

overlooked the Top Rehab Services records. On the contrary, the commissioner specifically found that Ms. Waller had carried her burden in proving causation of neck and back pain. Even more, the award well exceeded her medical costs, including the Top Rehab Services expenses.

Ms. Waller apparently disputes the commissioner's award to the extent that it reflects her pain, suffering, and loss of enjoyment of life. As we noted above, however, these findings and award turn on credibility determinations. The record fails to contain clear and convincing evidence that would compel this Court to second-guess the commissioner's assessments of witness credibility. The commissioner reviewed the evidence before her and limited the damage award accordingly. Because the evidence does not preponderate against the commissioner's calculation, we affirm the award of damages.

Ms. Waller further complains that, in comparison to the damages awarded to the Turmans, her award is unfairly low. Tennessee Rule of Appellate Procedure 13(b) extends our review only to the issues presented by the parties, with exceptions in rare circumstances. Tenn. R. App. P. 13(b). Here, Ms. Waller has failed to raise the issue for review on appeal. Neither does this argument support the issue she *has* raised. *Cf.* Tenn. R. App. P. 27(a)(7) (requiring appellants to include in their briefs "[a]n argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, . . . with citations to the authorities and appropriate references to the record."). In this circumstance, we cannot fairly consider a bare assertion of unfairness to be an argument in support of this challenge to the commissioner's award. We therefore decline to delve into matters not properly before this Court.

Finally, we likewise dispose of the allegation of the commissioner's bias attributable to her former position in the Attorney General's office. In essence, Ms. Waller charges that the commissioner adopted opposing counsel's proposed findings because he functioned as her superior in the Attorney General's office. Quite simply, nothing in the record supports this allegation. Moreover, Ms. Waller's counsel withdrew his initial objection to this disclosed conflict in order to consolidate the claims and expedite the trial.

Conclusion

For the foregoing reasons, Ms. Waller has failed to carry her burden of establishing that the evidence preponderates against the commissioner's judgment. We affirm the commissioner's findings and damages award. Costs of this appeal are taxed to the appellant, Mary Sue Waller, and her surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE