UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2122

September Term, 2013

SANDIE TREY

v.

UNITED HEALTH GROUP et al.

Graeff,
Nazarian,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: October 15, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury sitting in the Circuit Court for Frederick County found that appellant, Sandra "Sandie" Trey, did not sustain the compensable occupational diseases of bilateral carpal and cubital tunnel syndromes arising out of her employment with appellee, United Health Group.[1]

The effect of the jury verdict was to reverse a finding by the Workers' Compensation Commission that Trey had sustained those occupational diseases as a result of the conditions of her employment.

From the judgment of the circuit court, Trey appeals and raises two questions for our review:

I. Did the trial court err in admitting the testimony of appellees' experts?

II. Did the trial court err in denying appellant's motion for judgment because the evidence was legally insufficient to prove that the decision of the Workers' Compensation Commission was incorrect?

For the reasons that follow, we shall affirm.

FACTUAL and PROCEDURAL BACKGROUND

Trey began working for United Healthcare as a customer service representative in 1996. Over the years she was promoted, but her work duties remained essentially the same – typing on a computer keyboard and answering telephone calls.

In 2001, she began to experience pain and tingling in her fingers and was subsequently diagnosed with carpal tunnel syndrome. Her symptoms subsided with physical therapy treatment but, in 2007, after returning to work after three months of maternity leave,

[1]Also a party to this litigation is United's insurer, Fidelity & Guaranty Insurance Company.

her symptoms returned. Trey met with Dr. Leo M. Rozmaryn near the end of 2007, who diagnosed her with bilateral carpal tunnel syndrome and performed surgery on her right hand, which relieved her symptoms. Rozmaryn performed surgery on her left hand in 2008, with less success.

In 2009, Trey contacted Dr. Harrison Solomon, who likewise diagnosed bilateral carpal tunnel syndrome. Soloman performed a second surgery later that year on her left hand. Trey did not improve as much as expected, and, based on several nerve tests and an MRI on her neck, Solomon diagnosed cubital tunnel syndrome of the left hand.

In 2012, Trey filed a claim with the Workers' Compensation Commission seeking compensation for the occupational diseases of bilateral carpal tunnel syndrome and cubital tunnel syndrome, since 2007, due to repetitive use of her hands at work. Later that year, following a hearing, the Commission issued an Order finding Trey had sustained the compensable occupational diseases of bilateral carpal and cubital tunnel syndromes, that the syndromes arose out of and in the course of her employment, and directing United and its insurer to pay her medical expenses. From that Order, appellees sought judicial review in the Circuit Court for Frederick County and requested a jury trial.

At trial, appellees presented videotaped *de bene esse* depositions of their experts, Dr. Peter Charles Innis and Rozmaryn.[2] Innis, who was accepted as an expert in the field of

[2] Pursuant to Md. Rule 2-419(a)(4), the appellees elected to take a video or *de bene esse* deposition of the doctors in lieu of having them appear at trial.

orthopedics and hand surgery, related that he performed an independent medical examination of Trey on April 10, 2012, during which he took her history, performed a physical examination, and reviewed her medical records.

Innis opined that Trey had bilateral carpal tunnel syndrome, but her work at United did not cause her disease. He explained that certain activities like typing can increase the symptoms of carpal tunnel syndrome, but that those activities do not cause the disease.

Innis supported his opinion with medical literature that disproved a link between carpal tunnel syndrome and typing. He cited a 6,000-patient study from Denmark and a significant study from the Mayo Clinic that failed to find an association between typing and carpal tunnel syndrome. Those studies concluded that force and repetition cause the disease and that typing, alone, did not impart the requisite force. He testified that he did not know what caused Trey's carpal tunnel syndrome, and noted she had many known risk factors, including pregnancy, age, gender, and obesity. He also suggested that her symptoms could be due to a bulging disc in her neck area, or "thoracic outlet syndrome," a condition that affects the muscles and nerves between the shoulder and neck causing numbness in the hand.

Regarding cubital tunnel syndrome, Innis explained that the syndrome is caused by a problem with the ulnar nerve at the elbow. He opined that Trey did not have cubital tunnel syndrome because she did not have complaints directly centered at her elbow, and physical examination of her ulnar nerve at the elbow disclosed no abnormality.

Rozmaryn, also admitted as an expert, testified that he treated Trey in 2007 and 2008 for carpal tunnel syndrome. He admitted that in 2007, he advised her that her carpal tunnel syndrome was causally related to her work where she engaged in repetitive typing. Since then, however, he has come to believe that her condition was not work-related because her work, although heavily repetitive, did not involve the force necessary to cause the disease. He explained that in the early 1990's the association between typing and carpal tunnel syndrome was a "cherished notion" that has not withstood "scientific scrutiny." He testified that the cause of carpal tunnel syndrome was multi-factorial and, while he did not believe that her work caused her condition, he could not attribute a causal factor.

Trey described her employment and medical history for the jury. She testified, in part, that she has worked at United 40 hours a week, except for three months of maternity leave in 2007, and roughly two months for each of her three surgeries.

Solomon testified, *de bene esse*, as an expert in the field of medicine and orthopedic hand surgery. He saw Trey initially in October 2009, and, after taking a history and physical examination, he diagnosed her condition as ongoing carpal tunnel syndrome despite a prior surgery on her left hand. He performed a second surgery on her left hand in December of that year. Despite some immediate pain relief, by the end of 2010 she was again experiencing pain symptoms in her left hand.

In 2011, Solomon ordered several nerve tests and an MRI on her neck. Based on those tests, he believed that her symptoms were consistent with cubital tunnel syndrome,

which he explained is caused by prolonged bending of the elbow at 90 degrees or more, leading to compression of the ulnar nerve at the elbow. Solomon testified that the cause of carpal tunnel syndrome is multi-factorial but that repetitive use of the hand combined with other factors, such as pregnancy and obesity, can contribute to the development of the disease. He admitted that the medical literature has been "on both sides of the issue" as to whether repetitive activity by itself causes carpal tunnel syndrome. Nonetheless, he opined that Trey's work was a contributing cause of her carpal and cubital tunnel syndromes.

DISCUSSION

Trey argues on appeal that the trial court abused its discretion in admitting the testimony of Drs. Innis and Rozmaryn. She also argues that because the testimony of Innis and Rozmaryn failed to meet the employer and insurers' burden as to causation to submit the case to the jury, the trial court erred in not entering judgment in her favor. Trey has failed to preserve her first argument for our review, but even if she had, we would have found that argument, as with her second argument, without merit.

We shall address each argument in turn.

I. Expert Testimony

Md. Rule 5-103(a)(1) provides that where a ruling is made to admit evidence, a timely objection must be made. Md. Rule 2-517(a) reinforces this direct approach and provides that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection

is waived." When a party moves *in limine* to exclude evidence, that party must object once again when the particular evidence is offered at trial in order to preserve the issue for appellate review. *Lewin Realty III, Inc. v. Brooks*, 138 Md. App. 244, 260-61 (2001), *aff'd on other grounds*, 378 Md. 70 (2003).

On the morning of trial, Trey moved *in limine* to strike Rozmaryn's testimony, which the trial court denied. At no time during trial did Trey object to Rozmaryn's testimony. Moreover, Trey made no objection to Innis's testimony, either in a preliminary motion or when his testimony was offered at trial. Accordingly, she has failed to preserve her first argument for our review.[3] Even if she had she done so, we would have found it without merit. Md. Rule 5-702 permits the admissibility of expert testimony if the trial court "determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." In making that determination, the trial court must find that the "witness is qualified as an expert by knowledge, skill, experience, training, or education, ... the appropriateness of the expert testimony on the particular subject, and ... whether a sufficient factual basis exists to support expert testimony." *Id*. *See also Buxton v. Buxton*, 363 Md. 634 (2001). "[T]he admissibility of expert testimony is within the sound discretion

[3] During oral argument before this court, Trey recognized her preservation problem and suggested that the rules on contemporaneous objections and preservation are different when the testimony is not live but *de benne esse*. Trey offered no authority for recognizing such a distinction (other than to preserve her clearly unpreserved argument) and was unable to cite any case law to support it. Accordingly, we reject her argument.

of the trial judge and will not be disturbed on appeal unless clearly erroneous." *Blackwell v. Wyeth*, 408 Md. 575, 618 (2009)(quoting *Wilson v. State*, 370 Md. 191, 200 (2002)). Because admissibility or exclusion of expert testimony is a matter substantially within the trial court's discretion, the court's ruling will seldom constitute a reason for reversal. *Ditto v. Stoneberger*, 145 Md. App. 469, 495 (2002). We will not disturb the trial court's broad discretion on appeal absent an error of law or fact, a serious mistake, or clear abuse of discretion. *Id*.

We find no abuse of discretion in the admission of either Innis's or Rozmaryn's opinion on whether Trey had sustained a compensable occupational disease. Both were qualified as experts. Their opinions were appropriate on the subject of whether Trey suffered from carpal and cubital tunnel syndromes, and were given within a reasonable degree of medical probability. Lastly, both experts offered a sufficient factual basis to support their opinions. Innis testified that during his medical examination of Trey, she told him that she worked at a Call Center and most of her work involved data entry while wearing a headset. Rozmaryn testified that he was Trey's treating physician from 2007 to 2008 and was aware of her job and her work activities. There was no dispute that Trey worked extensively with her hands on a keyboard. Accordingly, the trial court did not abuse its discretion in admitting their testimony and opinions into evidence.

II. Sufficiency of the Evidence

Trey next argues that the trial court erred in denying her motion for judgment because the evidence was legally insufficient to submit the case to the jury. Specifically, she argues that appellees' experts were required to testify not only that her work had not caused her condition, but were also required to testify as to what had in fact caused her condition. She is wrong.

The Workers' Compensation Act provides for the compensation of occupational diseases that are contracted "as the result of and in the course of employment[.]" Md. Code Ann., Lab. & Empl. ("LE"), §§ 9-101, 9-502. "It is a well-settled rule that '[t]he Workmen's Compensation Act should be construed as liberally in favor of injured employees as its provisions will permit in order to effectuate its benevolent purposes.'" *Livering v. Richardson's Restaurant*, 374 Md. 566, 574 (2003).

A party may appeal the ruling of the Commission to the circuit court for judicial review in one of two ways: (1) before a judge on the basis of the record made before the Commission, or (2) as a *de novo* evidentiary hearing before either a judge or a jury. *Wilson v. Shady Grove Adventist Hospital*, 191 Md. App. 569, 574, *cert. denied*, 415 Md. 43 (2010). When (as here) the latter course is chosen, the review is essentially a *de novo* trial in the circuit court, unlike the procedure in other administrative review cases where appeal to the circuit court is determined on the record made at the agency hearing. *Applied Industrial*

Technologies v. Ludemann, 148 Md. App. 272, 282-83 (2002), *cert. denied*, 374 Md. 82 (2003).

On appeal, the decision of the Commission is presumed to be prima facie correct[.] LE § 9-745(b)(1). "[T]he presumptively correct outcome of that adjudication is admissible as an item of evidence and is the proper subject of a jury instruction." *Keystone Masonry Corp. v. Hernandez*, 156 Md. App. 496, 505 (2004)(internal quotation marks and citations omitted). The jury is free to interpret the facts as if the Commission had not previously determined them, but if the "jury's mind is in a state of equipoise, then the Commission's decision should be affirmed." *Id*. at 505-06 (internal quotation marks and citations omitted). Additionally, "the party challenging the decision has the burden of proof." LE § 9-745(b)(2).

When we review a challenge to the sufficiency of the evidence to support jury verdict, "[i]t is not our function to inquire into the weight of the evidence, rather, we determine only whether there was legally sufficient evidence to support the jury verdict" and the decision to submit the matter to the jury. *Wilson*, 191 Md. App. at 575 (2010)(internal quotation marks and citation omitted). The only issue for our resolution is whether the evidence was sufficient to submit to the jury, not whether the jury correctly decided the case based on the evidence. *Id*. "[T]o meet the test of legal sufficiency, evidence (if believed) must either show directly, or support a rational inference of, the fact to be proved." *Keystone*, 156 Md. App. at 506 (internal quotation marks and citation omitted).

Trey's argument that appellees' experts were required to determine the cause of her condition is contrary to established Maryland law and, hence, without merit. Appellees' experts were not required to prove the cause of Trey's condition. It was sufficient that Innis testified within a reasonable degree of medical certainty that Trey's job performance did not cause her condition. *See Wilson*, *supra* (employer, on appeal from presumptively correct decision of Commissioner, must prove that disease is not caused by work-related duties or that there was an intervening cause).

Additionally, Innis opined that Trey did not suffer from cubital tunnel syndrome because she did not have complaints at the ulnar nerve, and had a normal physical examination of that area. Trey's argument that the doctor's opinion should be rejected because that issue was uncontested at the hearing before the Commissioner is rebutted by the record. Whether Trey had cubital tunnel syndrome and whether the condition was related to her employment was contested at the hearing.

Accordingly, we shall affirm the judgment of the circuit court.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED;

COSTS TO BE PAID BY APPELLANT.