Circuit Court for Cecil County
Case No. C-O7-CV-18-000162

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2397

September Term, 2019

ALLIED PROPANE, ET AL.

v.

JAMES H. CORDER

Fader, C. J.,
Kehoe,
Friedman,
JJ.

Opinion by Kehoe, J.

Filed: April 14, 2022

Allied Propane and The Insurance Company of the State of Pennsylvania (collectively "Allied") appeal from a judgment of the Circuit Court of Cecil County, the Honorable William W. Davis, Jr., presiding, in favor of James H. Corder. Allied presents two issues on appeal which we have reworded:

> 1. Did the trial court abuse its discretion when it denied Allied's motion in limine to exclude the testimony of Mr. Corder's treating physician?
>
> 2. Did the trial court abuse its discretion in overruling Allied's objection to the admission of the treating physician's testimony into evidence?[1]

We will affirm the judgment of the circuit court.

BACKGROUND

At the times relevant to this appeal, Mr. Corder worked as a serviceman/driver for Allied Propane. In 2013, he sought treatment for recurring pain in his left shoulder. His doctor diagnosed the pain as caused by arthritis and successfully treated it. In February 2015, Mr. Corder injured the same shoulder twice in separate work-related incidents. Thereafter, he experienced a great deal of pain and limited mobility in his shoulder. In 2017, Mr. Corder underwent shoulder replacement surgery that alleviated the pain and

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[1] Allied's statement of issues is:

> 1. Whether the Circuit Court for Cecil County erred in denying the Appellant's Motion in Limine to exclude the testimony of Dr. Jeremie Axe from evidence?
>
> 2. Whether the Circuit Court for Cecil County erred in overruling Appellant's objections to the admission of Dr. Axe's expert testimony into evidence?

restored mobility. There is no dispute that the shoulder replacement procedure was medically necessary. The issue was—and is—whether the surgery corrected a pre-existing condition that was aggravated by the 2015 workplace injuries (Mr. Corder's position) or whether the surgery was necessary to correct pain and mobility problems caused by the arthritis and was therefore unrelated to the work-related injuries (Allied's position).

After a hearing, the Workers' Compensation Commission issued two orders on March 18, 2018. First, the Commission ruled that Mr. Corder had reached maximum medical improvement regarding the 2015 injuries on May 1, 2015. Second, the Commission found that the 2017 shoulder replacement surgery was "not causally related to this claim."

Mr. Corder filed a petition for judicial review of the Commission's orders. Pursuant to Md. Code, Lab. & Empl. § 9-745(d), he opted for what is sometimes termed an "essential *de novo* review." *See Board of Education for Montgomery County v. Spradlin*, 161 Md. App. 155, 167 (2005).[2] The jury returned a verdict in Mr. Corder's favor.

Because the parties' appellate contentions involve the validity of conclusions made by Mr. Corder's treating physician based upon his relevant medical history, we will summarize the evidence presented to the jury regarding that history:

[2] In a trial pursuant to Lab. & Empl. § 9-745(d), the decision of the Commission is entered into evidence and is presumed to be correct. Lab. & Empl. § 9-745(b)(1). *Spradlin*, 161 Md. App. at 188–90. However, "the presumption of correctness given to the Commission's decision does not bind the circuit court (or the jury) in its fact-finding mission." *Montgomery County v. Maloney*, 245 Md. App. 369, 380–81 (2020).

On January 28, 2013, Mr. Corder saw Michael Axe, M.D. ("Dr. Axe, Sr."[3]) at First State Orthopaedics because he was experiencing chronic pain in his left shoulder. Based on an x-ray, Mr. Corder's symptoms, and his medical history, Dr. Axe concluded that his patient had glenohumeral arthritis in his left shoulder.[4] To alleviate the pain, Dr. Axe, Sr. gave Mr. Corder a lidocaine injection and recommended that he participate in physical therapy. Dr. Axe, Sr. told Mr. Corder that he could anticipate "a good 50% improvement" through physical therapy. Dr. Axe, Sr. did not discuss with Mr. Corder the possibility that he might need shoulder replacement surgery.

On March 11, 2013, Mr. Corder returned for a follow-up appointment. Dr. Axe, Sr.'s notes show that Mr. Corder was "making progress" in physical therapy, the injection was helpful, he maintained "full duty status at work," and he no longer needed to take medications at night because of shoulder pain. Dr. Axe, Sr. advised Mr. Corder that, if he took a "step backward," they could consider injecting his shoulder with hyaluronic acid.[5] The notes do not indicate that physician and patient discussed the possibility of shoulder

[3] We will refer to Dr. Michael Axe as "Dr. Axe, Sr." to distinguish him from his son, Jeremie Axe, M.D. ("Dr. Axe"), who was another of Mr. Corder's physicians.

[4] The glenohumeral joint is the ball-and-socket part of the shoulder joint. *See https://www.ncbi.nlm.nih.gov/books/NBK537018/#:~:text=The%20glenohumeral%20joint%20is%20a,or%20fossa)%20of%20the%20scapula.* (last visited April 12, 2022).

[5] Dr. Axe testified that hyaluronic acid is a substance produced by the human body that acts as a lubricant in joints. Persons with arthritis produce less of the substance. Injections of hyaluronic acid can relieve symptoms for patients with arthritis.

replacement surgery. Mr. Corder had no further contact with the doctors at First State Orthopaedics until the events that we will now relate.

On February 7, 2015, Mr. Corder was pulling wrenches[6] at an Allied jobsite. He felt a tearing sensation in his left shoulder. On February 26, 2015, he slipped on ice at the same jobsite and re-injured the same shoulder.

On April 13, 2015, Mr. Corder returned to First State Orthopaedics and was evaluated by Leo Raisis, M.D. Mr. Corder described the two work-related accidents to Dr. Raisis. He told Dr. Raisis that, up until these incidents, he "[had been] having no problem with [his] left shoulder." Dr. Raisis ordered an x-ray and an MRI of Mr. Corder's shoulder because he was concerned that Mr. Corder might have torn his rotator cuff. He also gave Mr. Corder a cortisone injection and scheduled him for a follow-up appointment.

On May 1, 2015, Mr. Corder returned to see Dr. Raisis and told him that the injection had not helped much. The MRI showed a small rotator cuff tear. The radiologist told Dr. Raisis that the "primary problem" was Mr. Corder's glenohumeral osteoarthritis. Dr. Raisis noted that Mr. Corder's shoulder had been doing well before the accidents at work and that the February 7th injury "aggravated the underlying osteoarthritis of the left shoulder." Dr. Raisis told Mr. Corder that "[i]n the future, if symptoms warrant, he may need shoulder replacement surgery."

[6] Sometimes in the record counsel and witnesses refer to Mr. Corder's activity as "pulling wire."

On November 1, 2016, Mr. Corder returned to First State Orthopaedics, but this time he saw Jeremie Axe, M.D. ("Dr. Axe"), Dr. Axe, Sr.'s son. Mr. Corder told Dr. Axe that since he was injured at work, his shoulder pain had "occur[ed] occasionally," and that "[t]he problem was worse." Mr. Corder characterized his level of pain as "moderate [to] severe" and "piercing," and told Dr. Axe that he was experiencing "night pain and numbness." Dr. Axe determined that Mr. Corder's subjective shoulder value was 25%, that he was "in pain at all times," and that this "was a work-related injury from slipping and falling with posttraumatic arthrosis in February 2015." Dr. Axe ordered another MRI and a CT scan of Mr. Corder's left shoulder to evaluate whether Mr. Corder was a candidate for a shoulder replacement.

Mr. Corder had the MRI and the CT scan. On November 16, 2016, Mr. Corder returned to see Dr. Axe to discuss the results. The images showed a small rotator cuff tear. Based on his previous evaluations of Mr. Corder, as well as the MRI and CT scan results, Dr. Axe recommended shoulder replacement surgery. Mr. Corder agreed.

On January 5, 2017, Dr. Axe performed the surgery with no complications. Dr. Axe's post-surgical notes include the following:

> INDICATIONS FOR PROCEDURE: This is a 59-year-old male who on 02/07/2015 was pulling wrenches at Allied Propane. He felt a tear in his shoulder and re-injured it again on 02/27/2015 after slipping on ice. MRI of his shoulder on 04/18/2015 showed the above findings. We repeated his MRI and it showed significant glenohumeral arthrosis which was likely causative from his slip and fall. MRI confirmed he had an intact rotator cuff. . . .

On November 22, 2017, Mr. Corder saw Dr. Axe for a post-surgical evaluation, and reported he had returned to working regular duties and was doing well.

At some point thereafter, Mr. Corder filed issues with the Workers' Compensation Commission which resulted in the Commission's orders of March 18, 2018. Mr. Corder then filed a petition for judicial review. As part of pre-trial discovery, counsel conducted *de bene esse* depositions of Dr. Axe and of David L. Drake, M.D., an orthopedic surgeon who conducted an independent medical evaluation of Mr. Corder for Allied. Relevant to the issues raised in this appeal, Dr. Axe's testimony can be summarized as follows:

Dr. Axe testified that he graduated from the Jefferson Medical College, served an internship and a residency at Tufts Medical Center, and then participated in two post-residency fellowships, the first at the American Sports Medicine Institute in Birmingham, Alabama, and the second at Harvard Medical School. He is certified by the American Academy of Orthopaedic Surgeons. He also testified that he was the "shoulder specialist" for First State Orthopaedics and that 65% of the more than 700 cases he handles each year were "shoulder related."

Dr. Axe noted that, starting in 2013, Mr. Corder had been treated by Dr. Axe, Sr. and had experienced a good result from the injection given to him at that time. Dr. Axe stated that it was "significant" that, before the 2015 work-related injuries, Mr. Corder "did not have any significant shoulder pain and was doing well[.]" He also testified that the

> most important part[] [of Mr. Corder's medical history] is how [he] was . . . doing before, how he is currently doing, and what's the progression after. Unfortunately, he . . . hurt his shoulder lifting on the 7th of February and then

fell and hurt his shoulder more so possibly on the 26th of February of the same year and then had significant pain.

Dr. Axe reiterated that, after the 2015 work-related accidents, "unfortunately, [Mr. Corder] was not doing well" and that, after the accident, Mr. Corder was experiencing "pretty decent pain." Dr. Axe noted that Mr. Corder described his shoulder as functioning at 25% of normal, which Dr. Axe characterized as "very poor."

At the end of Dr. Axe's direct examination, Mr. Corder's counsel and Dr. Axe had the following exchange:

Q. Now, Doctor, do you have an opinion to a reasonable degree of medical probability as to whether or not the January 2017 shoulder replacement was causally related to the work injury of February 7th, 2017?

A. I do.

Q. And what is that opinion?

A. That they were related.

Q. It was causally related?

A. Causally related, yes.

Q. And same question as to the second incident, do you have an opinion to a reasonable degree of medical probability as to whether or not the January 17 shoulder replacement was causally related to the February 26, 2015 fall on the ice?

A. I do.

Q. And what is that opinion?

A. They're causally related.[7]

On cross-examination, Dr. Axe testified that his office notes after the surgery included the following passage:

> [T]his is a work-related injury from slipping and falling with posttraumatic arthritis from February of 2015.

Finally, on re-direct, he testified that there was nothing in Mr. Corder's records that suggested that there had been any discussion of shoulder replacement surgery prior to Mr. Corder's work-related injuries in February 2015.

Before trial, Allied moved to exclude Dr. Axe's testimony because it failed to "meet the threshold for admissibility under Maryland law and Rule 5-702." The trial court denied Allied's motion, stating that although Dr. Axe's testimony was "not neatly packaged in a pretty little—pretty little bow; . . . [I] think there's enough in there that we can understand the basis of his opinion, though it wasn't one question in the end, that he just gave it all to us; so I will deny the motion." Allied objected when Mr. Corder's counsel sought to introduce the video of Dr. Axe's deposition into evidence. The court overruled the objection.

The jury returned a verdict that Mr. Corder's January 5, 2017 left shoulder replacement surgery was causally related to the February 7, 2015, and February 26, 2015 work injuries.

[7] In the deposition, Dr. Axe also discussed various non-surgical treatments that were available to address Mr. Corder's shoulder pain and explained why they were not appropriate. Allied does not challenge this part of Dr. Axe's analysis.

ANALYSIS

Md. Rule 5-702 states:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the 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 court shall determine
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> (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
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> (2) the appropriateness of the expert testimony on the particular subject, and
>
> (3) whether a sufficient factual basis exists to support the expert testimony.

The issue in this appeal is whether Dr. Axe articulated a sufficient factual basis to support his conclusion that Mr. Corder's shoulder replacement surgery was causally related to his 2015 workplace injuries. "When the basis of an expert's opinion is challenged pursuant to Maryland 5-702, the [standard of] review is abuse of discretion." *Rochkind v. Stevenson*, 471 Md. 1, 10 (2020), *reconsideration denied* (Sept. 25, 2020). "Abuse of discretion [exists] where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to guiding rules or principles." *State v. Robertson*, 463 Md. 342, 364 (2019) (cleaned up).

One way that a trial court can abuse its discretion in the context of expert testimony is to admit such testimony when there is not a factual basis to support the witness's conclusions. *See, e.g., Savage v. State*, 455 Md. 138, 166 (2017) (holding that the trial court did not err in refusing to accept a witness as an expert when the witness did "not adequately reveal . . . how his ultimate conclusions are derived from the evidence he set[] forth at the

hearing and in his report."); *Blackwell v. Wyeth*, 408 Md. 575, 606 (2009) (A trial court is not required "to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

To this Court, Allied argues Dr. Axe's opinion was nothing more than an exercise in ipse-dixitism:

> Dr. Axe did not offer any explanation for how or why [Mr. Corder]'s subjective pain, which was the basis for Appellee's request for surgery, was caused by the February 2015 work incidents. Dr. Axe testified that [Mr. Corder] had significant pain in 2015 when he saw Dr. Raisis, and again in 2016 when he came under Dr. Axe's care. . . . Dr. Axe provided a "because I say so" opinion, asking the jury to accept his opinion that the surgery was causally related to the February 2015 work incidents simply because he is "the shoulder specialist here" and because he said it is so. Dr. Axe never explained why the shoulder surgery was causally related to the February 2015 work incidents, nor did he offer any explanation or reasoning to assist the jury in parsing out the factual complexities and medical questions pertinent to the causal relationship analysis, as is required of expert opinions by Maryland law.[8]

Allied contends that Dr. Axe should have addressed "what, if any, pain [Mr. Corder] experienced during his eighteen-month gap in treatment, or the causes of any such pain if it existed. Additionally, Allied points out that "Dr. Axe similarly did not rule out that [Mr. Corder] was suffering from arthritic pain in 2016, which Dr. Axe testified can be caused by weather fluctuations, activity fluctuations or nothing at all.

We do not agree with Allied's characterization of Dr. Axe's testimony.

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[8] Allied presents the same argument for both of its issues.

This Court has explained that:

> It is established in this State that in Workmen's Compensation cases proximate cause means that the result could have been caused by the accident and no other efficient cause has intervened between the accident and the result. Possibility that the injury caused the result must amount to more than a guess and the relation of the accident to the condition complained of in point of time and circumstance must not be merely fanciful.

Continental Group v. Coppage, 58 Md. App. 184, 191 (1984) (quoting *Reeves Motor Co. v. Reeves*, 204 Md. 576, 581 (1954)); *Wilson v. Shady Grove Adventist Hosp.*, 191 Md. App. 569, 580 (2010) (same).

In reaching his conclusion that the surgery was causally related to the February 2015 injuries, Dr. Axe stated that it was "significant" that, before the 2015 injuries, Mr. Corder "did not have any significant shoulder pain and was doing well[.]" He also testified that

> the most important part[] [of Mr. Corder's medical history] is how [he] was . . . doing before, how he is currently doing, and what's the progression after. Unfortunately, he . . . hurt his shoulder lifting on the 7th of February and then fell and hurt his shoulder more so possibly on the 26th of February of the same year and then had significant pain."

Dr. Axe's conclusions established that the recurrence of "significant pain" in Mr. Corder's shoulder could have been caused by his work-related accidents in 2015. His conclusions were based on, and were fully consistent with, Mr. Corder's medical history. Dr. Axe's opinion was neither a guess nor an exercise fanciful thinking.

We recognize that the recurrence of Mr. Corder's shoulder pain might have been caused by something other than the two incidents in February 2015. But there was nothing in his medical history that suggested any other cause. Dr. Axe was not required to proactively

address the hypothetical issue of "what, if any, pain [Mr. Corder] experienced during his eighteen-month gap in treatment," when there was no evidence that Mr. Corder had reported any pain in that period. By the same token, Dr. Axe was not required to consider the equally hypothetical question of whether his patient's pain fluctuated with changes in the weather because there was no evidence that it did.

"Because I said so" reasoning by an expert witness was the issue in *Giant Food, Inc. v. Booker*, 152 Md. App. 166 (2003), a case that Allied relies on in its brief. We agree with Mr. Corder that this case is distinguishable.

The issue in *Booker* was whether the claimant developed adult-onset asthma as the result of a brief exposure to Freon gas in a Giant Food warehouse. *Id.* at 174–75. Mr. Booker's treating physician testified as an expert witness and opined that the asthma was caused by exposure to Freon or another, unidentified gas released in the same incident.[9] *Id.* On cross-examination, the witness conceded that he had no prior professional experience treating individuals who had been exposed to Freon, and that he had been unable to find a medical textbook or research paper that supported his theory that exposure to Freon could cause asthma. *Id.* at 186. The witness also conceded that there was nothing in the emergency room records that suggested that Mr. Booker showed any signs of respiratory

[9] The experts unidentified gas theory was not consistent with the evidence, which showed that OSHA investigators had concluded that no gases other than Freon had been released in the incident involving Booker. 152 Md. App. at 172.

distress after his exposure to Freon. *Id.* Instead, his conclusion was based on the fact that his patient "was exposed to something and [then] went to the emergency room for evaluation." *Id.* at 187–88. Unsurprisingly, this Court held that the expert's conclusion was an example of "because I said so" reasoning. *Id.* at 188.

We do not believe that the expert testimony in *Booker* is comparable to the testimony in the case before us. In contrast to what occurred in *Booker*, Dr. Axe articulated a logical explanation for his conclusions based on Mr. Corder's medical history, his evaluation of his patient, and his professional experience.

In our view, the trial court did not abuse its discretion when it concluded that there was an adequate factual basis for Dr. Axe's opinion that Mr. Corder's surgery was necessitated by his 2015 work-related injuries. We agree with the trial court that his conclusions were "not neatly packaged," but the court correctly focused on the substance, as opposed to the rhetorical qualities, of Dr. Axe's testimony.

In conclusion, we cannot characterize the trial court's decisions to deny the motion in limine and to overrule the objection to the introduction of Dr. Axe's testimony as being ones that no reasonable person would make or that were made "without reference to guiding rules or principles." *Robertson*, 463 Md. at 364. For these reasons, we affirm the judgment of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.