

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 27, 2006 Session

**CHRISTINE PESCE v. AEROSTRUCTURES/VOUGHT AIRCRAFT
INDUSTRIES, ET AL.**

**Direct Appeal from the Circuit Court for Davidson County
No. 03C-3354 Thomas W. Brothers, Circuit Judge**

**No. M2006-00012-WC-R3-CV - Mailed: February 13, 2007
Filed - March 23, 2007**

In this case, the employee, Christine Pesce, suffered an acute injury to her left knee during the course of her employment with Aerostructures/Vought Aircraft Industries (Vought) resulting in the dislodging of a large osteochondral fragment in the knee. This fragment was surgically removed and her treating physician found she had sustained a loss of joint space in the patellofemoral joint. Because the injury is not covered by the American Medical Association Guides to the Evaluation of Permanent Impairment, the physicians who testified both for Ms. Pesce and Vought based their determinations on injuries that were covered by the Guides and thought by the testifying physician to be similar. The trial court found Ms. Pesce to have sustained a fifteen percent impairment to her left leg resulting in a fifty percent disability to that extremity. Vought has appealed challenging the amount of the award and the admissibility of the testimony of Ms. Pesce's treating and evaluating physicians based upon an alleged lack of their reliability. We find that the evidence does not preponderate against the disability award and that the trial court properly admitted the testimony of Ms. Pesce's expert witnesses. Accordingly, we affirm.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court
Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which GARY R. WADE, J., and J. S. (STEVE) DANIEL, SR. J., joined.

Aaron S. Guin, Nashville, Tennessee, for the Appellants, Aerostructures/Vought Aircraft Industries, and AIG Claim Services, Inc.

Joseph D. Dughman and James W. Tiller, Nashville, Tennessee, for the Appellee, Christine Pesce.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Christine Pesce was fifty-one years of age at the time of the trial. She graduated from high school in 1972. About 1973, Ms. Pesce began working for Pratt & Whitney Aircraft where she became a computerized numerical control (CNC) machine operator. She began working for Vought Aircraft Industries in 1998, where she also operated a CNC machine. The CNC machines that Ms. Pesce operated at Vought did computer controlled milling of metal parts for aircraft from raw stock. The longest machine Ms. Pesce operated was 104 feet long and was four feet off the ground. During the milling process, metal chips or flakes accumulated around the cutting heads. These chips periodically had to be cleaned away by climbing onto the machine and sweeping the chips away with an industrial sized broom. The operator also had to climb onto the machine in order to install cutters, weighing from twelve to fifty-four pounds. An operator had to climb onto the machine from as few as four to as many as sixty times each eight hour shift.

At the time of her injury, August 23, 2003, Ms. Pesce was working on a smaller CNC machine about fifty to sixty feet in length. The machine milled stringers which was a part of the framework for an aircraft wing. These stringers were stacked on two by fours placed crosswise on the floor and between each level of product. While adding a stringer to the stack, Ms. Pesce tripped over a two by four lying on the floor. When she tripped, she heard something pop in her knee and experienced immediate pain. Her knee began to swell and she could walk only with a limp. She immediately reported the injury.

Ms. Pesce received medical treatment at Concentra on September 9, 2003. Thereafter, her knee worsened and, at times, would click and become stuck at such an angle that she was unable to walk. She was eventually directed to see Dr. J. Thomas Byrd. Dr. Byrd reported to her that she had a bone fragment in her knee and immediately took her off work. She was not paid temporary total disability benefits because she had been laid off by Vought three days after she first received medical treatment for her knee injury.

Dr. Byrd performed surgery on Ms. Pesce's knee on October 20, 2003. After a period of recovery, Ms. Pesce reached maximum medical improvement and was released by her physician on March 8, 2004. At the time of her injury, Ms. Pesce was earning \$19.98 per hour at Vought. She was hired by T.R.W. as a CNC machine operator on May 20, 2004, where her starting pay was \$13.68 per hour. While she now earns \$15.30 per hour there, T.R.W. is an auto parts vendor and the automobile industry does not pay CNC machine operators as much as the aerospace industry. The machines at T.R.W. are smaller and are at floor level. There is no climbing or getting up and down on the machine so that Ms. Pesce was able to do this work. Ms. Pesce testified that she could no longer operate one of the machines at Vought because of the climbing involved. Even the job at T.R.W. has become difficult because the operator is not allowed to sit. Consequently, the job is taxing on her knee and causes her to limp. As a result, she has begun seeking other employment because she believes that, in order to continue working, she will have to do something that does not

involve constant standing, kneeling, bending, twisting or climbing.

II. MEDICAL EVIDENCE

A C-32 Standard Form Medical Report for Industrial Injuries prepared by Dr. J. Thomas Byrd was admitted into evidence. The report contained Dr. Byrd's office notes which indicate that he had performed arthroscopic surgery on Ms. Pesce on October 20, 2003, to remove a large osteochondral fragment lodged in the lateral gutter of Ms. Pesce's knee. An MRI taken October 1, 2003, indicated a deformity of the medial facet of the patella suggesting this was the donor site of the loose body. In an office note dated March 19, 2004, Dr. Byrd stated, "The articular loss of her patellofemoral joint gives her a fifteen percent impairment of the lower extremity which represents a six percent impairment of the whole person." Dr. Byrd imposed no restrictions but returned her to full duty with a brace. Dr. Byrd restated these percentages in his Medical Report and indicated he relied upon Table 17-31 on page 544 of the AMA Physicians Guide to Evaluation of Permanent Impairment (5th Ed.).

In his deposition, Dr. Byrd indicated he first saw Ms. Pesce on October 8, 2003. She was released from his care on March 8, 2004, the date he determined she had reached maximum medical improvement. He assessed no permanent restrictions. Dr. Byrd testified he relied upon the AMA Guidelines (5th Ed.) in assessing the impairment, specifically Table 17-31 on page 544. Then the following question and answer appeared:

- Q. (By Mr. Guin.) Okay. I have a copy of the A.M.A. Guides here. And on Page 544, that's a table involved with impairments based on arthritis, is that correct.
- A. Well, it's stated as arthritis impairments. But also in this case just based on the joint space loss, we use the same table for that. It's the only thing we have to go by.

And later during his deposition:

- Q. (By Mr. Tiller) And you gave an impairment of 15 percent to the knee regarding this injury, is that correct.
- A. Well, regarding the cartilage damage in her knee, yes.

Dr. Byrd indicated Ms. Pesce had pre-existing arthritic changes in her knee. In a note dated April 19, 2004, he indicated that five percent of the fifteen percent impairment may be due to the underlying degenerative changes. During his deposition, however, he stated it was impossible to specifically quantify how much of Ms. Pesce's damage was due to the acute trauma and how much was due to the underlying degenerative changes. Dr. Byrd was never asked how much, if any, joint space interval was retained by Ms. Pesce following the surgery or whether he had measured that interval.

A C-32 Report of Dr. John W. Bacon was also admitted into evidence. He agreed with Dr. Byrd's assessment that Ms. Pesce had sustained an impairment of fifteen percent to the lower extremity based upon Table 17-31, Page 544 of the AMA Guides. Dr. Bacon would impose restrictions of lifting no more than twenty-five pounds, frequently; carrying ten pounds, occasionally; and carrying less than ten pounds frequently. He would also restrict her from standing or walking more than six hours per day, sitting more than a total of six hours per day, and no climbing, kneeling, crouching or crawling. Dr. Bacon specifically disagreed with Dr. Byrd, however, that five percent of Ms. Pesce's impairment was due to her pre-existing condition, since she had no prior symptoms or restrictions regarding her knee.

Dr. Bacon also testified by deposition. After being asked by Ms. Pesce's attorney to conduct an independent medical examination, he reviewed the records from Dr. Byrd and Dr. Dyer and personally examined Ms. Pesce on April 29, 2005. Dr. Bacon testified that the injury sustained by Ms. Pesce was an osteochondral fracture where some of the surface of the joint had actually broken free. According to Dr. Bacon, this occurrence was not related to her underlying arthritis. Part of the bone is now absent and that surface has to move against other bones as her knee moves. Dr. Bacon indicated that he agreed with Dr. Byrd that she has a permanent impairment from her osteochondral injury of fifteen percent to the knee. He based his opinion on the same table that had been used by Dr. Byrd and indicated that he used Dr. Byrd's measurement as to loss of joint space. Using this table, according to Dr. Bacon, was the only fair way to come up with a rating for her since there was nothing in the AMA Guides that specifically dealt with removal of a large osteochondral fragment. After reviewing Dr. Byrd's records, Dr. Bacon was unable to find any notation as to measurement of the joint space in Ms. Pesce's knee.

Dr. C. Robinson Dyer, an orthopaedic surgeon certified by the American Board of Orthopaedic Surgery testified by deposition. Dr. Dyer was asked to conduct an independent medical examination of Ms. Pesce by her employer, Vought. He saw her on December 21, 2004. Upon examination, Dr. Dyer noted crepitation with flexion and extension in the patellofemoral area. He noted no significant instability to the left knee. Dr. Dyer's diagnosis was that she had severe underlying degenerative changes of the knee. He believed she had reached maximum medical improvement and would retain a five percent permanent partial impairment to her left lower extremity related to this work injury. According to Dr. Dyer, the AMA Guides to Evaluation of Permanent Impairment does not specifically address a chondral injury. Dr. Dyer referred to Table 17-33, Page 546 of the Guides which relates to meniscus surgery, which was similar to the procedure performed on Ms. Pesce, and provides for impairments for both a partial and a full meniscectomy of the knee. Relying upon his experience, Dr. Dyer believed Ms. Pesce's injury fell between a partial and full meniscectomy and based his opinion on an average of the two impairments provided. Dr. Dyer did not find any restrictions necessary based upon the injury but, in view of the degenerative changes in her knee, felt she should avoid frequent squatting, stooping, and climbing.

III. RULING OF THE TRIAL COURT

The trial court found Ms. Pesce to be a credible witness and noted that everyone indicated she was a hard worker. The court also noted that other than being a high school graduate, she had a limited educational background and that her training and vocational experience was limited in that it was focused on one particular area of work. As a result, the trial court was of the opinion she did not have as wide a universe of jobs available to her as others might have and, because of her age, was further limited as to what she could do if she decided to move into a different field. The court found that there was no indication of any prior problems with her knees. The court further found that Dr. Byrd's and Dr. Bacon's assessment to be credible. The trial court noted that all three physicians acknowledged that this particular type of injury was not specifically covered by the AMA Guides. The court found that based upon the evidence presented, Ms. Pesce had sustained a fifteen percent anatomical impairment to the left leg and that she had sustained a fifty percent vocational disability in that extremity.

IV. ISSUES PRESENTED FOR REVIEW

From the judgment of the trial court, Vought has appealed alleging two errors. First, Vought alleges the trial court erred in admitting the reports and depositions of Drs. Byrd and Bacon because they were not reliably based upon the American Medical Association Guide to the Evaluation of Permanent Impairment (5th Ed.). Second, Vought alleges the trial court erred in finding Ms. Pesce had sustained a fifty percent disability to her lower extremity.

V. ANALYSIS

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakthoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

In rendering his opinion as to Ms. Pesce's impairment, Dr. Byrd relied upon Table 17-31, page 544, of the AMA Guides to the Evaluation of Permanent Impairment (5th Ed.) That table is designed for guiding the physician in making a determination of impairment for persons suffering from arthritis. In the explanation of this table, the following language appears:

The best roentgenographic indicator of disease stage and impairment for a person with arthritis is the cartilage interval or joint space. The hallmark of all types of

arthritis is thinning of the articular cartilage; this correlates well with the disease progression.

The table then provides that where the cartilage has thinned to one millimeter in the patellofemoral joint, the proper impairment is fifteen percent to the lower extremity which equates to six percent to the body as a whole. These are the only numbers in the table that match the opinion of Dr. Byrd.

Vought alleges that because Dr. Byrd did not testify that he measured the cartilage interval and relate what the measurement was found to be, the trial court should have refused to admit his report and deposition testimony as being unreliable. In reviewing Dr. Byrd's testimony with regard to the bases for his impairment rating, as set out above, we find in one instance that his rating was based upon the articular or joint loss in the patellofemoral joint. In other testimony, he indicated the rating was based on "joint space loss" and "cartilage damage." Unfortunately, he was not asked upon what observations he grounded his opinions. He may have measured or estimated the thickness of the joint space by actual observation. He may have observed damage to the cartilage he thought to be equivalent to a one millimeter thinning of the joint space. The answer is simply not revealed by the evidence presented to the trial court.

Vought urged the trial court to accept the testimony of Dr. Dyer with regard to the degree of impairment sustained by Ms. Pesce. Dr. Dyer, who did not observe the injury as Dr. Byrd did during surgery, evaluated Ms. Pesce's injury by equating it to an extrapolation between a partial meniscectomy and a full meniscectomy. Dr. Dyer's testimony contained no explanation of the relationship between the meniscus and the patellofemoral joint or why surgery to the meniscus should be considered the equivalent of loss of joint space in the patellofemoral joint.

All the doctors who testified agreed that the AMA Guides do not cover the specific injury suffered by Ms. Pesce. All the physicians attempted to equate the injury that was sustained by Ms. Pesce to similar injuries or surgical procedures that were covered by the Guides. While the foundation information supporting the opinions of all the physicians was clearly lacking, the trial court did not err in permitting the introduction of each physician's testimony. This court reviews a trial court's decision to admit or exclude evidence by an abuse of discretion standard. Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 131 (Tenn. 2004). A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. Id.; Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001). In our view, the trial court properly admitted the testimony of Drs. Byrd and Bacon.

In making this determination, the trial court accepted the opinion of Ms. Pesce's treating physician over an evaluating physician. It is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). In this case, the trial court chose to accept the testimony of the treating physician who personally observed the loss of joint space in the patellofemoral joint of Ms. Pesce's knee and equated that loss to a table in the A.M.A. Guides that specifically deals with loss of joint space in the patellofemoral joint of arthritis patients. This

compared to the testimony of a physician who did not observe the injury and equated the injury to surgery on the meniscus which is located in another joint of the knee. In our opinion, under these circumstances, it was appropriate for the trial court to have relied on the testimony of the treating physician, Dr. Byrd, in determining the degree of Ms. Pesce's impairment.

The next issue raised on this appeal is whether the trial court's award of fifty percent permanent partial disability to the left lower extremity was excessive. Vought first alleges the finding was excessive because it was not reduced by some percentage because of the pre-existing degenerative changes in Ms. Pesce's knee caused by arthritis. The rule in Tennessee is that an employer takes an employee as he finds him. The employer is liable for disability resulting from injuries sustained by an employee arising out of and in the course of his employment even though it aggravates a previous condition with resulting disability far greater than otherwise would have been the case. McCormick v. Snappy Car Rentals, Inc., 806 S.W.2d 527, 529-30 (Tenn. 1991); Baxter v. Smith, 364 S.W.2d 936, 942-43 (Tenn. 1962). While there was evidence Ms. Pesce had a pre-existing arthritic condition, there was no evidence this condition was significantly symptomatic or disabling in any way. Even though the damage caused by the dislodging of the osteochondral fragment may have been greater because of her pre-existing arthritic condition, under the principles stated above, such evidence is no basis for reducing or apportioning the resulting disability.

The existence and extent of a permanent vocational disability are questions of fact for determination by the trial court and, as stated above, are reviewed de novo, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Whirlpool Corp., 69 S.W.3d at 170; Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). In assessing the extent of an employee's vocational disability, the trial "court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. § 50-6-241(b) (2005); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). Further, the claimant's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 778 (Tenn. 1972). Ms. Pesce was fifty-one years of age at the time of trial. She had, for some twenty-three years, virtually the entirety of her employment career, operated a CNC machine. Ms. Pesce testified that she was no longer able to operate the larger machines onto which she had to climb. She had encountered such difficulty operating the smaller floor-level machines because of the amount of standing required that she feared she could not continue that type of work. She testified she had begun seeking other types of employment. The trial court noted that she had a high school education but no other training or job skills that would enable her to find employment at the level of compensation she previously enjoyed. The evidence does not preponderate against the trial court's finding that she has sustained a fifty percent disability to her left lower extremity.

V. CONCLUSION

The judgment of the trial court is affirmed. The costs of this appeal shall be taxed against the Appellants, Aerostructures/Vought Aircraft Industries, and AIG Claim Services, Inc.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NOVEMBER 27, 2006 SESSION

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**Circuit Court for Davidson County
No. 03C-3354**

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JUDGMENT

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 Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appeals to the Court that the Memorandum 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 will be paid by the Appellants, Aerostructures/Vought Aircraft Industries, and AIG Claim Services, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM