

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

**FABIAN TIMMONS V. TAYLOR FARMS TENNESSEE, INC.
AND ZURICH AMERICAN INSURANCE COMPANY**

**Direct Appeal from the Chancery Court for Rutherford County
No. 03-6859-WC J. Mark Rogers, Chancellor**

**No. M2006-00073-WC-R3-CV - Mailed: February 7, 2007
Filed - March 16, 2007**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court findings of fact and conclusions of law. The employer, Taylor Farms Tennessee, Inc., and Zurich American Insurance Company, have appealed the trial court's award of 50% whole body impairment to Mr. Timmons. It is the appellant's contention that expert medical testimony fails to support the trial court's finding that Mr. Timmons' hip condition was aggravated or advanced permanently by the work-related injury. After carefully considering the record, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

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

C. Douglas Dooley and Sean W. Martin, Chattanooga, Tennessee, for the appellant, Taylor Farms Tennessee, Inc. and Zurich American Insurance Company.

Alan D. Johnson, Nashville, Tennessee and Steve Winningham, Chattanooga, Tennessee, for the appellee, Fabian Timmons.

OPINION

I. Facts and Procedural History

Mr. Fabian Timmons initiated a workers' compensation action June 24, 2003, seeking workers' compensation benefits for an injury to his right hip as a result of a work-related accident on August 3, 2002. On August 3, 2002, Mr. Timmons was working for Taylor Farms Tennessee, Inc., as a fork truck driver and was engaged in the business of picking orders. Mr. Timmons' job

required him to go about the warehouse and locate customers' orders, identify those orders, load them on the fork truck, and assemble them for ultimate shipment. The orders consisted of fruits and vegetables located in a refrigerated warehouse in which Mr. Timmons worked. In the course and scope of this activity, Mr. Timmons was attempting to find a particular order in the warehouse when he was struck from the rear by a forklift being driven by a co-employee. The force of the impact of the employee's forklift to Mr. Timmons' right leg knocked him to the ground. Once Mr. Timmons was on the ground, the forklift operator continued driving the machine over Mr. Timmons' right leg, twisting it and injuring his calf and thigh. After a supervisor was able to get the attention of the forklift driver, the forklift came to rest with Mr. Timmons' legs under the machine. After being extricated from the forklift, Mr. Timmons was suffering from pain in his right leg extending from his hip to his ankle and his ankle was bleeding. Chris Lee, who was a supervisor, assisted Mr. Timmons to a break area and ultimately authorized him to leave for medical care. Mr. Timmons was seen at the Smyrna Medical Center within hours of the incident. X-rays were taken of both hips which showed severe degenerative osteoarthritic change in the right hip and mild degenerative change of the left hip. Following the emergency care, Mr. Timmons was treated by Dr. Ray Lowry of the Tennessee Orthopedic Alliance but because of continued hip pain, he was referred to Dr. Dennis L. Stohler who first saw Mr. Timmons January 28, 2003. On that date, Dr. Stohler took new x-rays which showed degenerative change in the right hip and also some questionable changes characteristic of avascular necrosis in the right femoral head. Dr. Stohler's initial medical notes indicated that the change he saw in the physical exams was related to the injury that had occurred on August 3, 2002. However, ultimately, Dr. Stohler opined that Mr. Timmons had "avascular necrosis with degenerative arthritis, right hip, pre-existing the workman's compensation injury." Dr. Stohler treated Mr. Timmons with an injection of medication into his hip which relieved the pain and ultimately dismissed Mr. Timmons from his care April 13, 2003. Dr. Stohler released Mr. Timmons to return to work with restrictions of "no squatting and no climbing." Dr. Stohler informed Mr. Timmons that he would need a total hip replacement because of his advanced avascular necrosis. Mr. Timmons continued to have severe right hip pain and was next seen by Dr. Edgar Scott on June 16, 2003. Dr. Scott, after making an examination of Mr. Timmons and reviewing his medical records, concluded that Mr. Timmons' pre-existing arthritic condition was aggravated by the forklift accident and that the accident likely caused his avascular necrosis. In the interim, Mr. Timmons was dismissed from his employment with Taylor Farms Tennessee, Inc. and as the workers' compensation benefits had been closed through Dr. Stohler, found that he had no place to turn for medical care. Ultimately, Mr. Timmons applied for and received TennCare and was referred to Dr. Walter H. King. Dr. King saw Mr. Timmons September 23, 2003. His examination revealed "marked degenerative changes of the femoral head" from the MRI taken February 5, 2003, and he noted a small area of avascular necrosis involving the right femoral head. Ultimately, Dr. King performed a total right hip replacement on October 6, 2003 and followed Mr. Timmons until he reached his maximum medical improvement on June 7, 2004. Dr. King was of the opinion that Mr. Timmons' hip replacement was attributable to the injury he sustained from the forklift accident.

Dr. Stohler found that Mr. Timmons had suffered a 1% whole body impairment for the injuries that he had received to his lower right leg in the calf and thigh area of his leg and found no impairment associated with the work accident related to the hip. Dr. King opined that Mr. Timmons suffered a 20% whole body impairment as it relates to the work-related hip injury. Dr. Scott found that the right hip injury was work-related and assessed a 17% anatomical whole body impairment.

All of these ratings were in accordance with AMA Guidelines, Fifth Edition.

The trial court, after listening to the testimony of Mr. Timmons, found him to be credible, honest and straightforward. The trial court accredited Mr. Timmons' testimony that "he had never had hip or leg problems prior to the work-related incident and that he had continuous pain subsequent to the accident," and awarded Mr. Timmons 50% vocational impairment to the whole body for this work-related incident.

The employer appeals this decision contending that the court erred in concluding that sufficient expert medical testimony existed to support a finding that the hip condition (avascular necrosis) was caused or permanently aggravated by the work injury of August 2, 2002.

II. Standard of Review

Review of the findings of fact made by the trial court 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) (2005). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial judge requires this "panel to examine in depth the trial court's factual findings and conclusions." GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. Workers' Comp. Panel March 26, 2001). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002); Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992). Our standard of review of questions of law is de novo without a presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 626 (Tenn. 2003). When medical testimony is presented by deposition, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000); Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001).

III. Analysis

Expert Medical Testimony Supporting Causation

The employer has appealed the trial court's decision contending that Mr. Timmons' avascular necrosis was a pre-existing condition which was not advanced or aggravated by the work-related incident and that expert medical evidence fails to establish a causal relationship from the collision of the forklift with Mr. Timmons' body and the aggravation or advancement of his hip avascular necrosis.

Our review of the record reveals that all three doctors agree that avascular necrosis is a condition that is slow developing and pre-existed to some extent the August 3, 2002 forklift collision. Dr. Stohler testified that in his opinion the injury of August 2002 was not an advancement of the avascular necrosis. He further testified:

It was not any worse as a result of that injury, but I do feel like he had a flare-up of symptoms and functional use of the right hip that had to be treated. And once it cleared up with both interarticular injection of anti-inflammatories and taking oral anti-inflammatories that it had stabilized to the point of where it was, or may even have been better than before he was injured, because, really, he had no treatment of his hip prior to the time that he had his injury.

Dr. King, who like Dr. Stohler is an orthopedic surgeon, took a history of the injury from Mr. Timmons and examined him as well as examined the previous x-rays and MRIs. Dr. King, when asked whether he had an opinion whether the work accident of August 2002 caused an actual progression or aggravation of the prior condition for which Mr. Timmons suffered, testified that “[i]t made it somewhat - - it made it symptomatic. He never apparently had any symptoms before this and that’s what I have to go on is his history.”

Q: Did it advance the condition?

A: Yes, sir.

Q: State whether or not - - did it require surgery?

A: Yes, sir.

Q: That would be the hip replacement surgery?

A: That’s correct.

Dr. King further justified his opinion by testifying that he observed in the x-rays and other documents anatomical changes. He was asked:

Q: Doctor, assume that he had no pain before this accident with his hip or no disability or any problems, he has this accident, did you see changes on the x-rays or MRIs to justify your opinion?

A: Yes, sir. He had all kinds of changes on his x-ray.

Q: He did?

A: Yes, sir.

Q: After the accident?

A: Yes, sir.

Q: What were they?

A: He had degenerative disease, avascular necrosis and fluid in the joint, narrowing of the joint space.

Q: State in your opinion whether that shows an advancement of the pre-existing condition.

A: It's difficult to say. It seems to be an advancement. You have to take people as you see them, as they are there. It's something that of course is very easily injured again, you know and made worse by some sort of traumatic injury.

Q: And you did see these changes, is that correct?

A: Yes.

Dr. Scott, who is a general surgeon and performed the hip replacement, was asked to give an opinion whether the forklift accident advanced or aggravated the pre-existing condition from which Mr. Timmons suffered and he responded that in his opinion, it did have that effect. The following colloquy occurred in this regard:

Q: It did?

A: Yeah.

Q: Did you find an anatomical changes?

A: Yes. I looked at the x-rays that showed - - from the MRI studies that showed that he did have some changes in his joint which was - - he had flattening of the head of the femur which is one of the main things. He also had some joint narrowing and also some fluid which would be part of the anatomical changes that he had.

Both Dr. King and Dr. Scott were of the opinion that even after the total hip replacement, Mr. Timmons would have intermittent symptoms, would be limited in the use of his hip, and would not have full function of that limb because of the nature of hip replacement surgery which will limit his future activities. The trial court found as follows:

Fabian Timmons testified honestly and truthfully. I thought he answered all questions up front and to the point. I had the opportunity to observe him throughout this trial. I found his demeanor to be such that I would find him to be a very truthful and honest person based upon his testimony here today.

The entire trial of this cause consisted of the live testimony of Mr. Timmons and the depositions of the doctors and one other witness. The trial judge was presented with conflicting medical testimony on the issue of whether the work accident of August 3, 2002, aggravated or advanced the pre-existing avascular necrosis. Dr. Stohler took the position that the accident did not advance the condition. Drs. King and Scott testified that within a reasonable degree of medical certainty the accident did or could have advanced and/or aggravated the pre-existing condition. Both Drs. King and Scott took the medical history from Mr. Timmons and accredited that history with their observations. The trial court made a specific finding as to the credibility of Mr. Timmons. When a trial judge has seen and heard witnesses, “especially when issue of credibility and weight of oral testimony are involved,” on review considerable deference must be accorded to the trial court determination. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987).

In determining medical causation for a workers’ compensation action, any reasonable doubt regarding causation of the injury is to be construed in favor of the workers’ compensation claimant. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). The workers’ compensation law is “a remedial statute which shall be given an equitable construction by the courts to the end that the objects and purposes of this chapter may be realized and attained.” Tenn. Code Ann. § 50-6-116 (2002). Even in cases where the evidence allows inferences which could support either party, we are bound by the strong public policy of our workers’ compensation law to resolve conflicts and doubts in favor of the claimant. See Curtis v. Hamilton Block Co. Inc., 466 S.W.2d 220, 222 (Tenn. 1971). This legislative mandate applies to the issue of causation of an injury, and “any reasonable doubt as to whether an injury arose out of employment is to be resolved in favor of the employee or his dependents.” Williams v. Preferred Dev. Corp., 452 S.W.2d 344, 345 (Tenn. 1970).

Since all the medical testimony was presented by deposition, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek, 19 S.W.3d at 774; Houser, 36 S.W.3d at 71. In evaluating the relative persuasiveness of the testimony of physicians, courts should consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by the expert. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 677 (Tenn. 1991). Our independent assessment of the medical proof presented in this case leads us to the conclusion that the trial court was well within its authority in concluding that the work-related accident of August 3, 2002, advanced and/or caused an anatomical change in Mr. Timmons’ pre-existing condition considering Drs. King and Scott’s testimony.

The employer relies for its position on a line of cases that stand for the proposition that in order to be compensable, a pre-existing condition must be “advanced” or there must be an “anatomical change” in the pre-existing condition or the employment must cause an actual progression of the underlying disease in order to be compensable. Cunningham v. Goodyear Tire & Rubber Co., 811 S.W.2d 888, 890 (Tenn. 1991); Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989); Sweat v. Superior Indus. Inc., 966 S.W.2d 31 (Tenn. 1988). This is a correct statement of the law in cases where there is a pre-existing condition with no work-related injury that triggers symptoms of the underlying disease. We find that each of these authorities are distinguishable from the current case. Mr. Taylor’s hip was asymptomatic until the work-related injury. After the accident, Mr. Taylor’s hip became symptomatic and medical testimony supports

the trial court's conclusion that the accident caused anatomical change or advancement of the pre-existing condition resulting in the hip being symptomatic. "An employer takes the employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if she had not had the pre-existing condition."

Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996). Therefore, the employer is responsible for all injuries which are precipitated by the work-related incident.

Although causation cannot be based upon speculation or conjectural proof, absolute medical certainty is not required and reasonable doubt is to be construed in favor of the employee. White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992).

In conclusion, our review of the record of the medical testimony leads us to conclude that the trial court did not err in finding medical causation by the advancement and/or anatomical change of the pre-existing avascular necrosis making that condition symptomatic and ultimately requiring the hip replacement as a result of the August 2, 2002 forklift accident. We, therefore, affirm the trial court's award of a vocational disability rating of 50% to the whole body of Mr. Timmons and affirm the trial court's finding that the employer is responsible for paying for the medical expenses associated with the continued care of Mr. Timmons and his hip replacement. Costs of this appeal are assessed against Taylor Farms Tennessee, Inc. and Zurich American Insurance Company, for which execution may issue if necessary.

J. S. DANIEL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL

NOVEMBER 27, 2006 SESSION

**FABIAN TIMMONS v. TAYLOR FARMS TENNESSEE, INC. AND ZURICH
AMERICAN INSURANCE COMPANY**

Chancery Court for Rutherford County

No. 03-6859-WC

No. M2006-00073-WC-R3-CV - Filed - March 16, 2007

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 Taylor Farms Tennessee, Inc. and Zurich American Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM