

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 29, 2006 Session

KENNETH POLLY v. SATURN CORPORATION

**Direct Appeal from the Circuit Court for Marshall County
No. 16409 F. Lee Russell, Judge**

**No. M2006-00488-WC-R3-CV - Mailed: February 8, 2007
Filed - April 18, 2007**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. On this appeal, the employer, Saturn Corporation (Saturn), challenges the finding of the trial court that the avascular necrosis (AVN) suffered by the employee, Kenneth Polly, was advanced by his work activities and that the injury sustained by him was compensable under the Workers' Compensation Law. We agree with the trial court's finding and 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 CORNELIA A. CLARK, J., and MARIETTA M. SHIPLEY, SP. J., joined.

Marcia McShane Watson, Nashville, Tennessee, for the appellant, Saturn Corporation.

Barbara Medley, Lewisburg, Tennessee, for the appellee, Kenneth Polly.

MEMORANDUM OPINION

Kenneth Wayne Polly was 43 years of age at the time of the trial of this case. He graduated from Marshall County High School in 1980 where he received training in metal working. Following his graduation, he worked in construction as a mason and, later, in the metal fabrication business.

In 1995, Mr. Polly began working for Saturn. There he worked on the assembly line and in materials handling. While he had performed a variety of assembly jobs in recent years, the assignment he believes aggravated the condition in his left hip was installing dash assemblies. The

installation required him to sit on the frame of the vehicle and lean over into the chassis in order to guide wires from the dash to other devices in the vehicle. According to Mr. Polly, this constant sitting on the frame and twisting on the metal edge wore on his hip.

In March 2004, Mr. Polly was assigned to installing motor mounts in vehicles. When the installation was complete, he had to raise his left foot to break a beam of light that signaled the computer the correct motor mount had been installed. The beam was about a foot off the ground and each installation took about three minutes. Mr. Polly testified that he began having problems with his hip in May 2004. According to the medical records at Saturn, Mr. Polly first came to the employee clinic and complained of hip pain on August 3, 2004. He reported that the injury resulted from repeatedly breaking the motor mount beam with his left foot. Mr. Polly was sent to his personal physician, Dr. Benny McKnight. Dr. McKnight ordered an MRI and, after reviewing the results, informed Mr. Polly that his hip had deteriorated due the loss of its blood supply. Dr. McKnight referred Mr. Polly to Dr. Fredrick Wade.

Mr. Polly underwent hip replacement surgery on October 4, 2004. Mr. Polly did not receive any workers' compensation benefits, but did receive temporary disability pay. He was released to return to work on January 13, 2005, but Saturn was unable to place him and he continued to receive disability pay. Mr. Polly actually returned to work on March 21, 2005.

Mr. Polly testified that he was aware that the use of alcohol might have played some part in his hip injury. He acknowledged telling Dr. Wade's assistant that he drank about 18 beers every two weeks. He also admitted that he had been charged with public intoxication in 1997 and 1998 and had been convicted of driving under the influence in 1995. He confirmed that he had been admitted to Cumberland Heights for treatment of alcoholism in 2001 and again in 2004 and also received such treatment from an outpatient facility in 1999. Mr. Polly acknowledged that for many years he had tried to stop drinking, but was unable to do so.

A C-32, Standard Form Medical Report for Industrial Injuries prepared by Dr. Richard F. Fishbein, along with two depositions taken of him, were submitted into evidence. The C-32 form indicated that Mr. Polly had undergone a total left hip replacement on October 4, 2004. As a result of that procedure, Dr. Fishbein believed Mr. Polly will retain a fifty percent impairment to the scheduled member, which translates into twenty percent impairment of the whole body. Dr. Fishbein was further of the opinion that the injury more probably than not arose from Mr. Polly's employment. He imposed restrictions of lifting no more than twenty pounds occasionally and ten pounds frequently.

The report indicates that Mr. Polly stated he was in vehicles twisting at the hip and pulling wires repetitively from this position which placed additional stress on his hip. The social history included in the report contained no mention of the use of alcohol. The report stated, "In my best medical opinion, Mr. Polly is one-hundred percent medically disabled due to his left hip arthroplasty that was the result of repetitive motion injury incurred while working at Saturn. His repetitive duties

of hip flexion and leg reaching that were added to his job in mid-2004 aggravated and/or exacerbated any underlying or pre-existing medical condition.”

In his initial deposition, Dr. Fishbein described avascular necrosis as loss of the blood supply to the femoral head or the hip joint. According to Dr. Fishbein, avascular necrosis is a progressive problem that can be caused by the excessive use of alcohol. Most instances of the condition are described as idiopathic, or of unknown origin, but other possible causes, in addition to the excessive use of alcohol, are rheumatoid arthritis, Gaucher’s Disease, and certain blood diseases. Dr. Fishbein testified he believed Mr. Polly’s work at Saturn aggravated the condition as a result of the history provided him. He admitted that Mr. Polly’s use of alcohol had not been addressed during Dr. Fishbein’s examination.

In the second deposition, Dr. Fishbein maintained his position that Mr. Polly’s work conditions at Saturn caused a progression or an advancement of Mr. Polly’s avascular necrosis. According to Dr. Fishbein, while it was possible that Mr. Polly’s alcohol use had contributed to the avascular necrosis, he was relatively asymptomatic until his work activities changed in mid-2004. Dr. Fishbein testified, “If in fact the alcohol played a part in giving him avascular necrosis, I think the repetitive bending on his left hip when he had to sit repetitively on his left hip and do this work for seven, eight hours a day, caused him continual pain and progression of his disease.” According to Dr. Fishbein, if one puts extra force, extra torque or abnormal position on someone who has avascular necrosis, it will hasten the deterioration caused by this disease.

Dr. J. Fredrick Wade, a board-certified orthopaedic surgeon, testified by deposition. He first saw Kenneth Polly on September 21, 2004. The history provided by Mr. Polly indicated that he first noticed a problem with his left hip when he was assigned a job that required him to flex his hip forward and, using his foot, reach to break a beam of light. In his evaluation with Dr. Wade, Mr. Polly denied any extensive use of alcohol or any fall or other traumatic injury to the hip.

Dr. Wade reviewed the MRI ordered by Dr. McKnight and found that it revealed avascular necrosis of Mr. Polly’s left hip. The condition had progressed to a stage beyond the hip’s ability to heal itself and would require surgical treatment. According to Dr. Wade, the hip is a ball-and-socket joint. Avascular necrosis primarily affects the ball part of it. The ball basically loses its blood supply causing it to become brittle and to fragment and crack over a period of time, usually one to two years after onset of the problem. The patient experiences pain because the ball has become fragmented and worn. The most common treatment for this condition is a total hip replacement, where an artificial ball and socket are inserted, relieving the pain. That surgical treatment was recommended to Mr. Polly and was performed by Dr. Wade on October 4, 2004.

According to Dr. Wade, AVN may be described as idiopathic. It may also be caused by trauma, such as a fractured or dislocated hip, or the use of alcohol or Prednisone and other cortisone-type medicines. When Mr. Polly’s history of alcohol-related arrests was revealed to Dr. Wade, he testified that this background created a suspicion that alcohol was the cause of Mr. Polly’s problem, but there was no medical test that could confirm that suspicion. According to Dr. Wade, the amount

of alcohol one has to consume to cause AVN is poorly defined and poorly known. Dr. Wade refused to state that it was more probable than not that alcohol use was the cause of the AVN in Mr. Polly's case. He did not believe, however, that Mr. Polly's work activities were the cause of his avascular necrosis. According to Dr. Wade, AVN is not associated with repetitive use or repetitive micro-trauma to the hip. Dr. Wade admitted that Mr. Polly's work may have exacerbated his symptoms.

In the opinion of Dr. Wade, Mr. Polly will retain a fifty percent impairment to the lower extremity which equates to twenty percent to the body as a whole. His opinion was based upon a rating contained within the AMA Guidelines that allows the physician to quantify how well a patient that has undergone hip replacement is doing. Dr. Wade placed Mr. Polly at maximum medical improvement as of January 13, 2005, and assigned permanent restrictions of no lifting more than forty pounds and no squatting or kneeling. According to Dr. Wade, if Mr. Polly abides by those restrictions, he should be able to return to the workforce at Saturn.

The trial court found that Mr. Polly had met his burden of proof on the issue of causation for his injury. Specifically, the trial court found, based upon Dr. Fishbein's deposition, that Mr. Polly's condition was not only rendered more painful, but was actually worsened by his work activities. The trial court found Mr. Polly had sustained a thirty percent vocational disability of the body as a whole and awarded benefits based upon that finding. Saturn has appealed this decision, challenging the trial court's finding that Mr. Polly's injury was compensable under the Workers' Compensation Law.

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 questions of the credibility and the 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. Nakhoneinh, 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 a workers' compensation case, the employee has the burden of proving every essential element of his or her claim. White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992). In order to be eligible for benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death . . ." Tenn. Code Ann. § 50-6-102(13) (Supp. 2004). In the instant case, it is apparent to us, that Mr. Polly had a condition in his hip, avascular necrosis, that was not shown to be caused by his employment. Whether it was caused by the use of alcohol is, thus, not important to our inquiry. The issue this case presented to the trial court and now presents to us is whether the condition in Mr. Polly's hip was sufficiently aggravated by Mr. Polly's employment to be compensable.

The general rule is that aggravation of a pre-existing condition may be compensable but not if it results only in increased pain or other symptoms caused by the underlying condition. Cunningham v. Goodyear Tire & Rubber Co., 811 S.W.2d 888, 891 (Tenn. 1991). An employer is responsible for workers' compensation benefits, even though the claimant may have been suffering from a serious pre-existing condition or disability, but only if the employment causes an actual progression or aggravation of the prior disabling condition or disease. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 488 (Tenn. 1997) ; White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992); Talley v. Va. Ins. Reciprocal, 775 S.W.2d 587, 592 (Tenn. 1989). While it is true that 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 greater than if he or she had not had the pre-existing conditions; if work aggravates a pre-existing condition merely by increasing pain, there is no injury by accident. Sweat v. Superior Indus., Inc., 966 S.W.2d 31, 32-33 (Tenn. 1998). To be compensable, the pre-existing condition must be advanced, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. Id.

We acknowledge that application of the foregoing standard to the case under review is difficult. Dr. Wade testified that with AVN of the femoral head, the "ball" of the hip joint loses its blood supply and, as a result, becomes brittle, and fragments and cracks over a period of time. A person with this condition experiences pain because this "ball" has become so cracked, fragmented and worn. Dr. Wade testified Mr. Polly's work may have exacerbated his symptoms. Since, according to Dr. Wade, the symptoms are caused by the wearing and fragmentation of the femoral head, one could reason that if the symptoms have been made worse, the wearing and fragmentation of the bone have been made worse as well. Dr. Fishbein clearly stated his opinion that Mr. Polly's avascular necrosis was advanced and the deterioration caused by it was hastened by Mr. Polly's work activities. It is well-settled that when medical testimony differs, it is within the sound discretion of the trial judge to determine which expert testimony to accept. The trial court has the discretion to accept the opinion of one medical expert over another, Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990), and, while a treating physician's testimony is entitled to considerable weight, no rule of law requires a trial court to accept the testimony of the treating physician over any other conflicting medical testimony.

We have carefully reviewed the record in this case and agree with the trial court that Mr. Polly's avascular necrosis, while not caused by Mr. Polly's employment, was advanced by it. In our view, Mr. Polly was entitled to the workers' compensation benefits awarded by the trial court. Accordingly, the judgment of the trial court is affirmed. The costs of this appeal are taxed to the employer, Saturn Corporation.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

KENNETH POLLY v. SATURN CORPORATION

**Circuit Court for Marshall County
No. 16409**

No. M2006-00488-SC-WCM-WC - Filed - April 18, 2007

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Saturn Corporation pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Saturn Corporation and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating.



Supreme Court State of Tennessee

CHIEF JUSTICE
WILLIAM M. BARKER

JUSTICES

JANICE M. HOLDER
CORNELIA A. CLARK
GARY R. WADE

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MEMORANDUM

TO: Sandra Vance, Deputy Clerk - Nashville

FROM: Justice Gary R. Wade

RE: Kenneth Polly v. Saturn Corporation
(Marshall County Circuit, No. 16409)
Appeal No.: M2006-00488-SC-WCM-WC

DATE: April 13, 2007

APPLICATION FOR PERMISSION TO APPEAL: **Denied**

RELEASE DATE: **Next Available Date**

DISPOSITION OF RECORD: **Previously returned**

cc: Tracy Skiba, Deputy Clerk - Nashville

