

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

November 24, 2008 Session

LYNNE SUMMERS v. NISSAN NORTH AMERICA, INC., ET AL.

**Direct Appeal from the Circuit Court for Rutherford County
No. 52079 J. Mark Rogers, Judge**

**No. M2008-00391-WC-R3-WC - Mailed - April 6, 2009
Filed - May 8, 2009**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee alleged that she sustained a gradual injury to her hip as a result of her work. She ultimately required a total hip replacement. The doctor who performed that surgery testified that she had a congenital condition which caused the hip to become arthritic, and which usually caused the need for hip replacement surgery. He gave conflicting testimony concerning the effect of her employment on the condition. The trial court held that she had sustained a compensable aggravation of the congenital condition and awarded 22.5% permanent partial disability. Employer has appealed, contending that the evidence preponderates against the trial court's decision. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court
Affirmed**

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and JON KERRY BLACKWOOD, SR. J., joined.

T. Franklin Gilley, Murfreesboro, Tennessee, for the appellants, Nissan North America, Inc. and Ace Insurance Company.

Sonya W. Henderson, Murfreesboro, Tennessee, and Howard Romaine, Nashville, Tennessee, for the appellee, Lynne Summers.

MEMORANDUM OPINION

Factual and Procedural Background

Lynn Summers ("Employee") alleged that she sustained a compensable aggravation of a pre-existing condition in her right hip. She worked for Nissan North America, Inc. ("Employer") as a "sanding technician" from 1992 until 2007. Her job consisted, in large part, of inspecting

automobile bodies for blemishes, which she then sanded off. The job required substantial bending, especially when she worked on the hood areas of the automobiles, and also stretching and reaching when she worked on the roof areas. In July 2004, she began to experience pain in her hip. These symptoms gradually worsened until, in March 2005, she advised her supervisor of her symptoms. The condition was initially accepted as compensable. She was provided with treatment at Employer's on-site clinic. When this did not improve her condition, she was referred to Dr. Rick Rogers, an orthopaedic surgeon. In July 2005, Dr. Rogers referred her to Dr. Philip Karpos, an orthopaedic surgeon who specialized in hip surgery. Dr. Karpos performed a hip replacement procedure in October 2005. Employee returned to work for Employer in March 2006.

Dr. Karpos testified by deposition. He stated that Employee had a condition in her right hip known as Perthes disease. This is a deformity of the ball of the hip joint, which is caused by insufficient blood supply to that area during early childhood. The ball becomes misshapen, which in turn causes the joint to wear out sooner than a normal hip. Dr. Karpos testified that persons with this condition have a ten times greater risk than the population at large of developing arthritis of the hip, and also that such arthritis typically manifested itself two decades earlier than the general population. Employee was forty-eight years old when her symptoms arose. Dr. Karpos said this was "pretty close" to the age at which persons with Perthes disease developed arthritis.

Dr. Karpos was asked on direct examination if it was "more probable than not that this diagnosis requiring [Employee] to undergo this surgery was aggravated by her work activities . . . ?" He responded: "Certainly, if you've got a bad hip or it's a hip that's prone to being bad, high demand activity can certainly aggravate that. I don't think there's any question about that. The flip side to that is, you know, this was a hip that was not a normal hip to start with."

On cross-examination, he was asked if "regardless of her work activity, [Employee] was on target for when this would start bothering the average [person] who had this syndrome?" He responded that she was "not far off from that." He also agreed that persons with Perthes disease were "ultimately going to have these problems regardless of work," and stated that he "didn't think the job caused the need for a total hip replacement. I think, you know, activity may have aggravated it. But I don't think there was causation." However, he also stated that "if you have a sedentary job, you'd probably be less likely to have [arthritis as a result of Perthes disease] as soon as if you had a . . . very active job or lifestyle." He assigned a 15% permanent anatomical impairment to Employee due to her hip replacement surgery.

On the date of the trial, Employee was fifty-one years old. She was a high school graduate. Her previous work included teaching English as a second language. She returned to work after being released by Dr. Karpos, with no activity restrictions. She continued to work until 2007. She was terminated for allegedly altering a document concerning work restrictions from a later injury. There is no evidence in the record concerning subsequent employment.

The trial court issued its findings and conclusions from the bench. It found that Employee had sustained a compensable aggravation of her pre-existing hip condition and that she had given timely notice of her injury. It awarded permanent partial disability benefits of 22.5% to the body as a whole and temporary total disability benefits. Employer has appealed, contending that the trial

court erred by finding that Employee sustained a compensable aggravation of her pre-existing condition; by finding that Employee gave timely notice of her injury; and by finding that Employee was a credible witness.

Standard of Review

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tennessee Code Annotated section 50-6-225(e)(2) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

Analysis

1. Causation

Issues concerning the work-related aggravation of pre-existing conditions not caused by the employment have been the subject of many appellate decisions, and many more trial court decisions, over the years. The Tennessee Supreme Court has revisited the subject in three recent decisions: *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638 (Tenn. 2008); *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598 (Tenn. 2008); and *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560 (Tenn. 2008). The Court in *Trosper* summarized the operative principle as follows:

We reiterate that the employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain. However, if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable.

273 S.W.3d at 607.

We review the evidence in this case in accordance with that standard. It is undisputed that Employee had Perthes disease, which is a congenital condition unrelated to her work. It is also undisputed that Perthes disease caused arthritis to develop in her hip joint, and that, as a consequence of that arthritis, she was required to undergo hip replacement surgery. The issue presented is whether or not her work activities "in some way advanced the severity of the pre-existing condition

or caused a new, distinct permanent disability as a result of the pre-existing condition.” *Foreman*, 272 S.W.3d at 573. For the purposes of this case, we conclude that Employee suffered a compensable injury if her work activities accelerated the progression of her arthritis and thereby the need for the resulting surgery.

Dr. Karpos’ testimony, which is the only evidence on the subject, is problematic. On one hand, he stated that “high demand activity,” such as Employee’s work for Employer, “can certainly aggravate” osteoarthritis caused by Perthes disease. He also testified that a person with “a sedentary job [is] probably . . . less likely to have [arthritis caused by Perthes disease] as soon as if you had . . . a very active job or lifestyle.” He agreed with the statement that “it is more probably than not that the aggravation of the disease has caused her to have to undergo the surgery.”

Counterbalancing that testimony, Dr. Karpos also stated that a person with Perthes disease “is almost doomed to [arthritis] developing sooner or later regardless [of job activity].” He also testified that such arthritis typically develops “around the fifth decade of life [and Employee is] pretty close to the fifth decade of life.” He agreed with statements that “regardless of her work activity, [Employee] was on target for when this would start bothering the average [person] who had this syndrome,” and that “people with Perthes disease are ultimately going to have these problems regardless of work.” He stated that the “natural history of that disease process” led to the early development of arthritis in the hip. Dr. Karpos’ most direct statement on the subject of causation was: “I don’t think the job caused the need for a total hip replacement. I think, you know, activity may have aggravated it. But I don’t think there was causation.”

In workers’ compensation cases, absolute certainty with respect to causation is not required, and our courts have recognized that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. *Fritts v. Safety Nat’l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. *Phillips v. A & H Constr. Co.*, 134 S.W.3d 145, 150 (Tenn. 2004). Nevertheless, the employee bears the burden of proving each element of his case by a preponderance of the evidence, *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543 (Tenn. 1992), and that proof may not be speculative, conjectural, or uncertain. *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004).

Because Dr. Karpos testified by deposition, we review his testimony without deference to the trial court’s conclusions. *Orrick*, 184 S.W.3d at 216. Based upon that review, we have no difficulty in concluding that hip replacement surgery was the nearly inevitable result of Employee’s Perthes disease. Further, at forty-eight years old, Employee was near the age at which the arthritis caused by Perthes disease is likely to manifest itself. Dr. Karpos’ deposition contains statements which provide a basis for finding that her work advanced the severity of her condition. However, there are corresponding statements which support the opposite conclusion. Viewing his testimony in its entirety, we cannot say that we would have reached the same conclusion as the trial court, i.e., that Employee’s work accelerated her need for a hip replacement. However, there is certainly credible evidence to support that conclusion, and the evidence to the contrary is not so compelling that we are able to find that the evidence preponderates against the trial court’s finding that Employee sustained a compensable injury.

2. Notice

Employer contends that notice was not timely given because Employee's symptoms began several months before she reported them. There is no evidence that her condition caused her to miss work, or that she received any medical treatment, or that she had any reason to know or even suspect that she had a work-related injury that would result in a permanent impairment, prior to the date she gave notice to her supervisor in March 2005. Moreover, there is no evidence that Employer suffered any prejudice as a result of the alleged delay. Employer does not cite any case or statute in support of its position that the onset of symptoms is the triggering event for the giving of notice of a gradual injury. That position is in direct conflict with Tennessee Code Annotated section 50-6-201(b) (2008). *See Banks v. United Parcel Service, Inc.*, 170 S.W.3d 556, 561 (Tenn. 2005). We conclude that the trial court correctly found that Employee satisfied her obligation to provide timely notice of her injury.

3. Credibility Finding

The trial court found Employee to be a credible witness. Employer contends that this finding was erroneous. Its position is based upon testimony that, subsequent to her return to work from this injury, she was terminated from her employment for altering a medical document concerning restrictions arising from an unrelated injury. At trial, Employee admitted that she had written on the document. She testified that she had merely made a note of something that her treating physician's nurse had told her and had no intention to deceive Employer by doing so.

In making its finding, the trial court disregarded the evidence presented by Employer on this subject. In doing so, it noted that the events at issue occurred after the injury in this case, and also that Employee's former supervisor testified that she was honest and hard-working.

We find this issue to be without merit. Employee's credibility was irrelevant to the central issue in the case, causation. There was no dispute concerning the specific tasks included in Employee's job, which was the only aspect of the causation issue amenable to lay testimony. The relationship between those tasks and the hip replacement surgery she required was solely a matter for expert medical evidence. For that reason, any error in the trial court's assessment of Employee's credibility was harmless. Moreover, we find that the record contains ample evidence to support the trial court's finding on that subject.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Nissan North America, Inc. and Ace American Insurance Company, and their sureties, for which execution may issue if necessary.

ALLEN W. WALLACE, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NOVEMBER 24, 2008 SESSION

LYNNE SUMMERS v. NISSAN NORTH AMERICA, INC., ET AL

**Circuit Court for Rutherford County
No. 52079**

No. M2008-00391-WC-R3-WC - Filed - May 8, 2009

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 Nissan North America, Inc. and Ace American Insurance Company and their sureties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM