IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

DENISE STAVROPOULOS,	)	MAURY CIRCUIT
	)	
Plaintiff/Appellee	)	NO. 01S01-9711-CV-00251
	)	
v.	)	
	)	
SATURN CORPORATION,	)	HON. JIM T. HAMILTON,
	)	JUDGE
	)	
Defendant/Appellant	)	

For the Appellant:

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M E M O R A N D U M O P I N I O N

Members of Panel:

Frank F. Drowota, III, Justice
William H. Inman, Senior Judge
Joe C. Loser, Special Judge

AFFIRMED as
MODIFIED

INMAN, Senior Judge

O P I N I O N

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Denise Stavropoulos (employee), suffered bilateral hand numbness and later severe neck pain with no identifiable precipitating event. Massive cervical disc herniation was diagnosed and corrective surgery was performed. The trial court found the condition to be work-related and awarded 90 percent permanent partial vocational disability, in lump sum, and temporary total disability benefits, set off by group disability benefits which had been *paid as of the date of trial.*

Employee is 42 years old and has a high school education. After 14 years' work as a sewing machine operator and press operator for General Motors in Michigan, she began working for Saturn Corporation (employer) in 1992 as an Inventory Management team member. Her duties included operating a forklift truck with an overhead computer screen and reaching up to the computer to enter data about the work that was being performed.

She had been treated by a therapeutic masseuse on two occasions in November 1995, for tension, headaches, and mild thoracic stiffness. On November 15, 1995, the masseuse found tight levator, rhomboid and supraspinous muscles, i.e., the muscles surrounding the shoulder blades and cervical spine. She performed an hour-long "myofacial release technique" to the shoulder blades and cervical spine, with good results.[1]

The employee first noticed numbness in her hands during the second week of July, 1996, and does not recall any precipitating event. She testified that the

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[1] Performed to treat inflammation where the muscle is attached to the bone. *The Sloane-Dorland Annotated Medical-Legal Dictionary,* West Publishing, 1987.

numbness occurred at work or at home, and that no particular kind of activity made it better or worse.

On July 30, 1996, the employee returned to the masseuse, who performed another hour-long treatment for moderate neck stiffness and numbness in the arms and hands. When the massage failed to relieve the employee's symptoms, the masseuse recommended she see her doctor.

The employee went to her family physician, Dr. Paul Perryman, who ordered nerve conduction tests and ruled out carpal tunnel syndrome. He referred her to Dr. Michael Muha, a hand specialist, after which she filed an injury report. She testified that she remembered the onset of numbness the week of July 9, 1996, because it was her aunt's birthday.

On August 30, 1996, when Dr. Muha first examined the employee, he noted that "etiology of symptoms are unclear." Cervical spine x-rays revealed:

> some degenerative disc disease at C5-6 level with mild interspace narrowing with some associated proliferative change but with no significant neuroforaminal encroachment evident.

He prescribed pain medication and physical therapy and told her to temporarily avoid work at or above shoulder level and use of any power or vibrating equipment, and to return in two weeks.

After the employee had physical therapy three times a week for two weeks, she returned to Dr. Muha with no improvement in her symptoms; in fact her symptoms had deteriorated to "intense" pain in her neck and the back of her shoulders. Her right hand numbness and tingling had become constant. Because of severe pain, she had been unable to work for six days. He ordered an MRI.

Results of the September 13, 1996 MRI revealed a "massive" central C4-5 cervical disc herniation with spinal cord compression, osteophyte formation and degenerative changes, with left C5-6 foraminal stenosis. Dr. Muha referred her to

his partner, Dr. Joseph Wade, who performed a diskectomy and fusion of C4-5 and C5-6, and placed a cervical locking plate in her neck.

Post-surgically, the employee was released to light duty on January 24, 1997 with no lifting more than 20 pounds and no exposure to vibratory stimuli. Those restrictions were made permanent on March 6, 1997.

On May 1, 1997, she returned to see Dr. Wade with fairly severe posterior neck pain and radial lucency between C4 and the bone graft, but solid fusion everywhere else and no evidence of instability. Permanent restrictions included those mentioned above, plus no repetitive rotation or flexion extension of her neck and no work above the level of the shoulders.

The evidence on the issue of causation consists of the depositions of the employee and Dr. Joseph Wade and the employee's trial testimony.

Employee's Deposition

When deposed, the employee testified:

> Q: Tell me what you remember about having pain or problems on that particular day.
>
> A: It was the numbness that I'm still telling - - you know, that still occurs.
>
> Q: Okay. And what were you doing when you were having that numbness?
>
> A: I don't recall.
>
> Q: Do you remember what you were - -
>
> A: I don't have to be doing anything. I'm sitting here right now.
>
> Q: I'm talking about July - -
>
> A: Back then the same thing, the same thing was happening. I could be sitting and the numbness was there just as it is here right now, as I'm sitting here.
>
> Q: So it wasn't particularly you being at work?

A: Anything, it was just this happening to your - - tingling happening to your hands and your arms all the way around.

Q: And was that true whether you were at home or at work; you were just having numbness that you didn't understand?

A: Yes.

Q: Did you associate it with work?

A: No.

Q: Why was that, because it was happening at any point in time?

A: Exactly, it didn't make a difference if I was at work or if I was at home, it was doing it. But I did find later on the pain started coming onto it, and that was while I was at work. The numbness was one thing but the pain afterwards was going on the more I did my job.

Employee's Trial Testimony

Q: And you said that it [numbness] started in the week of July the 9th, right?

A: Yes.

Q: And during that time period you had gone to both a therapeutic masseuse and a Dr. Perryman and you didn't ask worker's compensation to pay for that?

A: No.

Q: That's because you didn't associate it with the work?

A: I didn't know what it was at the time. It was numbness.

Q: And it happened at any point in time; you didn't know?

A: Yes.

Q: Off work, on work?

A: Right.

Q: And you didn't know what you were doing when you first started having that numbness; right?

A: Right.

Q: Still don't know?

A: Right.

Deposition of Dr. Joseph F. Wade

Q: Dr. Wade, did you ultimately form an opinion as to the likely cause of the disc herniation at C4-5 in Ms. Stavropoulos' case?

A: Yes, I did.

Q: And what is your opinion?

A: Well, certainly the history that I took from her was that she had the onset of numbness in her hands *at work*, and that she had a job that allowed frequent extension and rotation of the neck, and this seemed like a consistent and likely cause of her herniation. (emphasis added)

Q: And is that opinion based upon a reasonable degree of medical probability?

A: Yes, it is.

Q: Okay. For the 5-6 disc, do you have an opinion as to the cause of what was wrong with that disc?

A: I think that it was predominately degenerative and probably no more related to work than it was to outside activities. I felt that it was bad enough, however, that if it had a fused disc above it, that its degeneration would quickly worsen and probably lead to problems, so I didn't think that it could be left alone.

* * *

CROSS-EXAMINATION:

(Counsel for employer read extensively from employee's deposition, as quoted above, and further, wherein she testified that she did not associate her symptoms with her job *until she first saw Dr. Wade* on the day of her MRI, and he said something to her that indicated to her for the first time that it might be work-related.)

Q: Now, having read that testimony to you, my question to you is:

I want you to assume that that is the history of the onset of these problems as she testified to in that deposition.

Based upon that history as opposed to any history she gave to you when you treated her, can you state with a reasonable degree of medical certainty that the ruptured disc that you treated her for was caused by her work?

A: No, I cannot.

Q: Can you state with a reasonable degree of medical certainty that the disc problem was aggravated or was advanced - - the severity of it was - - the severity of the disc rupture was caused by her work?

A: No, I cannot.

RE-DIRECT:

Q: But again, if, as she stated, she really wasn't looking up a whole lot at home more than just normal everyday household chores, yet at work a good part of her shift involved repetitive bending and flexing of her neck, do you think that the work then is most likely a cause of this condition?

A: I don't think you can say that, no.

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 finding, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995).

The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

In order to be eligible for workers' compensation 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(a)(5). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v.*

Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted).

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. An award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

The material elements of a workers' compensation case must be proved, as in all other civil cases, by a preponderance of all the evidence. But a workers' compensation case enjoys a distinction not otherwise shared: because it is remedial in nature, "any reasonable doubt as to whether an injury arose out of and in the course of employment is to be resolved in favor of the employee." *Parker v. Ryder Truck Lines*, 591 S.W.2d 755 (Tenn. 1979). Absent this statutorily mandated principle, *see:* T.C.A. § 50-6-116, the argument of the appellant would prevail.

The issue is closer than we like, but we cannot say that the evidence preponderates against the finding of the trial judge, and his finding of 90 percent impairment is affirmed.

The Lump Sum Issue

The award of benefits (360 weeks) was commuted to a lump sum. The appellant complains of this action, arguing that T.C.A. § 50-6-114(b) allows such

commutations if (1) it is established that a lump sum is in the best interest of the employee, and (2) she is capable of wisely managing and controlling the commuted award. Our Supreme Court has held in the clearest of language that a commutation should not be ordered perfunctorily, as was done in this case. *No. Amer. Ray., Inc. v. Thrasher,* 817 S.W.2d 508 (Tenn. 1991).

We find no sufficient evidence to justify the commutation, and the order directing a lump sum award is accordingly vacated. *See: Bailey v. Colonial Freight Systems,* 836 S.W.2d 534 (Tenn. 1992).

The Setoff Issue

T.C.A. § 50-6-114 provides:

> **Supremacy of chapter - Setoffs for payments by disability plan.**
> (a) No contract or agreement, written or implied, or rule, regulation or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this chapter except as herein provided.
> (b) However, any employer may set off from temporary total, temporary partial, and permanent partial and permanent total disability benefits any payment made to an employee under an employer funded disability plan for the same injury, provided that the disability plan permits such an offset. Such an offset from a disability plan may not result in an employee receiving less than the employee would otherwise receive under the Workers' Compensation Law. In the event that a collective bargaining agreement is in effect, this provision shall be subject to the agreement of both parties.

There was in effect at the time of the injury an employer funded disability plan which was approved by a collective bargaining agreement. Under this plan, the employee made disability payments to the plaintiff. The trial judge properly ordered such payments off-set against the workers' compensation award, but limited the off-set to disability payments made "as of the time of trial."

There *prima facie* appears to be no language in the statute limiting the off-set to payments made "as of the time of trial."

The language of the statute is clear. *Any payment* to an employee under an employer funded plan which permits an offset and which involves the same injury,

and is approved by the parties to any collective bargaining agreement, may be off-set from workers' compensation benefits. There is no de-limiting language.

The intent of the statute is to guarantee that employees receive the full benefit of the workers' compensation statute, and to relieve employers from the burden of twice compensating its employees by paying both disability and workers' compensation benefits for the same injury and at the same time. It is undisputed that Plaintiff received such disability benefit payments during the time that she was not able to work as a result of her cervical disc condition. It is also clear that the collective bargaining agreement in place between its represented employees allows such a setoff to be coordinated between disability payments and workers' compensation benefits.

The record reveals no reason why the statute should not be enforced. Its provisions are clear and unequivocal, and the judgment will be modified to provide that the employer may off-set all disability payments made to the plaintiff at any time for the same injury, from the compensation award.

As modified, the judgment is affirmed, with the costs taxes equally to the parties. The case is remanded for all appropriate purposes.

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William H. Inman, Senior Judge

CONCUR:

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Frank F. Drowota, III, Justice

_____

Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

DENISE STAVROPOULOS,	)	Maury Circuit
	)	No. 7515
Plaintiff-Appellee,	)	
	)	Hon. Jim T. Hamilton, Judge
vs.	)	
	)	
SATURN CORPORATION,	)	NO. 01S01-9711-CV-00251
	)	
Defendant-Appellant.	)	Affirmed as Modified

JUDGMENT ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; 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 are taxed equally to the parties.

It is so ordered.

PER CURIAM

Drowota, J., not participating