

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

October 29, 2018 Session

**TINA E. HAYES v. COSTCO AND LIBERTY MUTUAL INSURANCE
COMPANY**

**Appeal from the Court of Workers' Compensation Claims
No. 2016-08-0500 Amber E. Luttrell, Chancellor**

No. W2017-02130-SC-R3-WC – Mailed January 4, 2019; Filed February 12, 2019

Tina E. Hayes (“Employee”) alleged that she sustained a compensable injury to her left knee on April 8, 2015, in the course of her work as a stocker for Costco (“Employer”). She alleged that this injury required her to undergo a left knee replacement surgery. The Court of Workers’ Compensation Claims held that Employee failed to establish by a preponderance of the evidence a compensable injury or aggravation arising primarily out of and in the course and scope of her employment with Employer. Employee has appealed. The appeal has been referred to the Special Workers’ Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(a)(1) (2014) (applicable to injuries occurring on
or after July 1, 2014) Appeal as of Right;
Judgment of the Court of Workers’ Compensation Claims Affirmed**

WILLIAM B. ACREE, SR.J., delivered the opinion of the court, in which HOLLY KIRBY, J., and ROBERT E. LEE DAVIES, SR.J., joined.

Christopher L. Taylor and Shannon Toon, Memphis, Tennessee, for the appellant, Tina E. Hayes.

W. Troy Hart and Kristen C. Stevenson, Knoxville, Tennessee, for the appellees, Costco and Liberty Mutual Insurance Company.

OPINION
Factual and Procedural Background

Tina E. Hayes (“Employee”) was born September 20, 1965. She graduated from high school and completed a vocational course in cosmetology, but her license was inactive at the time of trial. In August 2009, Employee was employed by Costco (“Employer”), and she held a variety of jobs.

On April 8, 2015, Employee was working as a stocker in the clothing section when she twisted her left knee on a pallet. Employee immediately experienced pain followed by swelling, but she continued to work. Employee notified Employer of the injury the following day and was sent to the company physician, Dr. Wallace. Dr. Wallace examined Employee, took an X-ray, and indicated he would need to refer her to another physician for further treatment. Employer provided Employee with a panel of physicians, from which Employee selected Dr. Thomas Giel.

Employee first saw Dr. Giel, a board certified orthopedist and sports medicine specialist, on May 11, 2015. Employee provided Dr. Giel a history of twisting her left knee at work and experiencing pain and some popping and clicking. On physical examination, Dr. Giel found Employee had a well-maintained range of motion, but had some tenderness to palpation along her medial and lateral joint lines, as well as pain with McMurray’s testing. Dr. Giel diagnosed Employee as suffering from osteoarthritis with an arthritic flare. He recommended conservative treatment and discouraged arthroscopic surgery.

On May 13, 2015, Dr. Giel prepared an addendum to his notes from Employee’s May 11, 2015, visit in which he stated as follows:

I am addressing a question raised by Liberty Mutual regarding causation of the patient’s injury. Based on the fact that patient’s pain developed after she reported a twisting injury to her left knee that occurred at work, I do believe that Mrs. Hayes’ current symptoms are more likely than fifty percent or more caused by her employment with Costco.

Once again, this is based on the fact that the patient, per her report, sustained the injury at work.

In a follow-up visit on June 1, 2015, Dr. Giel noted Employee was still experiencing some popping and clicking but no true catching in her left knee and her condition had otherwise improved. He returned Employee to full-duty work. Dr. Giel next saw Employee on June 29, 2015, at which time he noted her knee was improving with just some mild tenderness and Employee was able to work without much difficulty.

On July 15, 2015, Dr. Giel again saw Employee. At that time, Employee presented on crutches and complained of an exacerbation of her left knee pain following an incident at home in which she had experienced a popping in her knee while getting up from her couch. This, in turn, was followed by an increase in pain. Dr. Giel's assessment at that time was left knee pain, early degenerative changes with recent exacerbation. He prescribed an aspiration of the left knee and a cortisone injection and placed Employee on limited duty.

Dr. Giel saw Employee on July 22, 2015, at which time she presented with a history of no relief from the cortisone injection and inability to ambulate and use crutches for weight bearing. On examination, Dr. Giel found Employee's condition to be a little worse, with some pain and swelling. He found Employee's pain, however, to be out of proportion to her physical findings. Dr. Giel's impression was early degenerative changes with an exacerbation while getting up from the couch. Dr. Giel was uncertain how this current condition related to Employee's work. Dr. Giel ordered an MRI.

Dr. Giel last saw Employee on August 10, 2015. At that time, Employee presented with left knee pain and reiterated to Dr. Giel that she had been injured at work, had been improving, but had then re-injured her knee while getting off of her couch. Employee's examination was similar to that on her prior visit. A review of Employee's recent MRI indicated a medial meniscus tear, full thickness cartilage loss, and large osteophytes on the medial femoral condyle. Dr. Giel's diagnosis was left knee pain with varus knee and degenerative changes with a degenerative meniscus tear in the left knee. Dr. Giel continued to recommend against arthroscopic knee surgery and for viscosupplementation injections. Employee was opposed to the injections, which left only surgical options, including a total knee arthroplasty.

As a result, Dr. Giel referred Employee to Dr. Timothy Krahn, an orthopedic surgeon who had previously performed a right knee replacement on Employee. On October 29, 2015, Dr. Krahn performed a total left knee replacement on Employee. Dr. Krahn released Employee to return to work on December 23, 2015, and she returned to full duty. Employee continues to work for Employer as a cashier earning the same or higher wage that she earned prior to her alleged injury.

In July 2016, Dr. Giel completed a medical questionnaire in which he indicated Employee had reached Maximum Medical Improvement (MMI); she had no permanent impairment as a result of her April 8, 2015, work-related incident; she had no permanent restrictions as a result of her April 8, 2015, work-related incident; Employee's MRI findings were not causally related to her April 8, 2015, work-related incident; her referral to Dr. Krahn for knee replacement surgery was not causally related to her April 8, 2015, work-related incident; and Employee's left knee replacement surgery was not necessitated by her April 8, 2015, work-related incident. In his April 17, 2017, deposition, Dr. Giel testified as follows with respect to causation:

Q. Okay. And do you have an opinion, within a reasonable degree of medical certainty, as to whether the April 8, 2015, work incident caused or contributed more than 50 percent in the knee for her having a left knee replacement?

A. My opinion would be that -- that her April 8th injury was less likely than not the cause of her knee replacement; that the osteoarthritis that was already present was more likely the largest contributing factor to her need for a total knee replacement.

Dr. Giel further testified with respect to the consequences of that April 8, 2015, incident:

Q. Okay. As to the April 8, 2015, work incident, does Ms. Hayes have any permanent impairment that would be related to that April 2015 work incident?

A. I did not give her any permanent impairment rating.

Q. Okay. Does she have any restrictions you would recommend that would be solely related to that April 8, 2015, work incident?

A. I would not expect her to have any permanent or long-lasting restrictions, based on that injury.

On cross-examination, Dr. Giel testified that he could not determine when the meniscus tear identified on the MRI had occurred. He explained, however:

She had some other findings on the -- on the MRI that sort of are concerning for chronicity, which is that she had an extruded meniscus, which is something that's sometimes hard to understand. So the knee, you've got the space for the femur and the space for the tibia. And as those compress against each other, the meniscus will oftentimes get pushed outside, where it's actually sitting right outside the space. Where it should be between the two bones, it's pushed outside of that. So that's something that we expect to take a while or take, you know, time to develop. But the tear itself, we won't see a date on it as far as when it may have occurred. We won't get that information.

At the request of her attorney, Employee was seen for an Independent Medical Examination by Dr. Apurva Dalal, an orthopedic surgeon, on May 25, 2016. Employee provided a history of having injured her left knee in April of 2015 while lifting some boxes at work and twisting her knee on a pallet, which resulted in pain in that knee. Employee reported a left knee replacement by Dr. Krahn in October 2015. Employee further reported that, despite her knee replacement surgeries on both knees, her knee swells and hurts all the time; both knees give out, do not bend normally, and cause difficulty walking for any length of time. On physical examination, Dr. Dalal found well-healed surgical scars, mild swelling in both knees, no clinical evidence of infection, full extension bilaterally, significantly decreased flexion bilaterally, and moderate anterior and posterior instability bilaterally. Dr. Dalal performed x-rays which revealed bilateral total knee replacements. Dr. Dalal's diagnosis was "post bilateral total knee replacement with range of motion loss and moderate instability bilaterally." With respect to causation, Dr. Dalal testified by deposition as follows:

Q. Doctor, do you have an opinion to a reasonable degree of medical certainty as the causation of the injuries to the knees for Ms. Hayes?

A. Well, the work-related injury Ms. Hayes sustained on both her knees caused her to have knee replacement.

Dr. Dalal further testified that Employee retained a permanent impairment of seven percent (7%) to her left lower extremity. Dr. Dalal testified that Employee had no specific limitations other than not lifting in excess of twenty (20) pounds and avoiding running and squatting. Dr. Dalal opined that trauma caused an aggravation of Employee's arthritis and an acceleration of her need for knee replacement. Dr. Dalal was not specific as to which knee he was referring in this testimony, and his immediate subsequent testimony indicates that he was referring to Employee's right knee and not to her left knee. On cross-examination, however, Dr. Dalal testified that Employee's original injury to her left knee on April 8, 2015 made that knee weak and susceptible to the subsequent injury when Employee was getting up from her couch. According to Dr. Dalal, had it not been for the original injury, Employee would not have required knee replacement surgery.

At trial, Employee testified that she returned to work at full duty after Dr. Krahn released her in December 2015. According to Employee, she experiences some swelling in her knee if she engages in lifting. In addition, there are some limitations on the tasks she can perform, but Employer accommodates her. Employee further testified she now has some difficulty with stairs, getting up from the floor, walking around her neighborhood, and certain household chores such as vacuuming. She testified she continues to experience some pain and swelling for which she applies ice and takes ibuprofen.

The Court of Workers' Compensation Claims held that Employee had failed to establish by a preponderance of the evidence a compensable injury or aggravation arising primarily out of and in the course and scope of her employment with Employer. In so holding, the court concluded that Dr. Dalal's testimony fell short of satisfying the standard for establishing a compensable injury or aggravation in that it was insufficient to prove that Employee's work-related incident contributed more than fifty percent (50%) to causing her disablement or her need for medical treatment. The court further concluded

that even had Dr. Dalal's testimony been sufficient to meet the applicable standards, it failed to overcome the presumption afforded the testimony of Dr. Giel as Employee's treating physician.

Analysis

Standard of Review

“Review of the workers’ compensation court’s findings of fact shall be de novo upon the record of the workers’ compensation court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. Code Ann. § 50-6-225(a)(2) (2014) (applicable to injuries occurring on or after July 1, 2014). When the workers’ compensation court has seen and heard the witnesses, considerable deference must be afforded the court’s credibility and factual determinations. *See Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court’s findings based on medical testimony presented by deposition. *Id.* Questions of law are reviewed de novo with no presumption of correctness. *Id.*

Causation

Pursuant to the Workers’ Compensation Law, Tenn. Code Ann. § 50-6-239(c)(6) (2014) (applicable to injuries occurring on or after July 1, 2014), “[u]nless the statute provides for a different standard of proof, at a hearing the employee shall bear the burden of proving each and every element of the claim by a preponderance of the evidence.” The applicable statutory definition of “injury” under the Workers’ Compensation Law provides:

(13) “Injury” and “personal injury” mean an injury by accident, a mental injury, occupational disease including diseases of the heart, lung and hypertension, or cumulative trauma conditions including hearing loss, carpal tunnel syndrome or any other repetitive motion conditions, arising primarily out of and in the course and scope of employment, that causes death, disablement or the need for medical treatment of the employee; provided, that:

(A) An injury is “accidental” only if the injury is caused by a specific incident, or set of incidents, arising primarily out of and in the course and scope of employment, and is identifiable by time and place of occurrence, and shall not

include the aggravation of a preexisting disease, condition or ailment unless it can be shown to a reasonable degree of medical certainty that the aggravation arose primarily out of and in the course and scope of employment;

(B) An injury “arises primarily out of and in the course and scope of employment” only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes;

(C) An injury causes death, disablement or the need for medical treatment only if it has been shown to a reasonable degree of medical certainty that it contributed more than fifty percent (50%) in causing the death, disablement or need for medical treatment, considering all causes;

(D) “Shown to a reasonable degree of medical certainty” means that, in the opinion of the physician, it is more likely than not considering all causes, as opposed to speculation or possibility;

(E) The opinion of the treating physician, selected by the employee from the employer’s designated panel of physicians pursuant to § 50-6-204(a)(3), shall be presumed correct on the issue of causation but this presumption shall be rebuttable by a preponderance of the evidence.

Tenn. Code Ann. § 50-6-102(13) (2014) (applicable to injuries occurring on or after July 1, 2014). Consequently, Employee was required to prove by a preponderance of the evidence that her total left knee replacement and the subsequent alleged permanent impairment to her left knee arose primarily out of and in the course of her employment with Employer. In other words, she was required to prove by a preponderance of the evidence that her employment with Employer contributed more than fifty percent (50%) in causing her need for a total left knee replacement and the alleged permanent impairment to her left knee. Moreover, meeting this burden required Employee to overcome the statutory presumption afforded the causation opinion of her treating physician, Dr. Giel.

Employee contends on appeal that the Court of Workers’ Compensation Claims erred in concluding that she failed to meet her burden on the issue of causation. She first contends that the testimony of Dr. Dalal was sufficient to satisfy the statutory standard.

However, Employee's only specific reference to Dr. Dalal's testimony is itself vague. Employee simply refers to what she characterizes as Dr. Dalal's testimony that "the original injury set forth the issues leading to the knee replacement." Problematically, Dr. Dalal's testimony never expressly or implicitly establishes that Employee's April 8, 2015, work-related incident involving her left knee contributed more than fifty percent (50%) in causing her disablement or her need for the total left knee replacement. Dr. Dalal simply states, "[T]he work-related injury Ms. Hayes sustained on both her knees caused her to have [a] knee replacement."

Next, Employee alleges the injury she sustained while getting off of the couch was a direct and natural consequence of her work injury. In general, a subsequent injury or an aggravation of an injury may be used to meet the causation standard if it is a direct and natural consequence of a compensable injury. *See Davis v. Wabash Screen Door Co.*, 204 S.W.2d 87, 88 (Tenn. 1947); *see also McAlister v. Methodist Hosp. of Memphis*, 550 S.W.2d 240, 242 (Tenn. 1977)(citing *International Harvester Co. v. Scott*, 43 S.W.2d 1065, 1065 (Tenn. 1932))(stating an injured worker may recover for a new injury or an aggravation of a compensable injury resulting directly and without intervening cause from medical or surgical treatment of a compensable injury). Employee's support for this proposition is scant. She again points to Dr. Dalal's testimony that "the original injury set forth the issues leading to the knee replacement."¹ The record reflects that Dr. Dalal also testified that the original injury made Employee's knee weak which caused an injury when she was getting off the couch.

Contrary to Employee's argument, this is not a case wherein the direct and natural consequence rule is applicable. Here, we do not have a case in which the employee's disability arose from medical treatment necessitated by a compensable injury as in the cases cited by Employee. Moreover, Employee's contention is dependent upon Dr. Giel's initial assessment that Employee's symptoms in May 2015 were caused by the twisting incident at work on April 8, 2015. However, as the Court of Workers' Compensation Claims noted, after his subsequent treatment of Employee, his review of Employee's MRI, and after Employee's surgery by Dr. Krahn, Dr. Giel expressly opined that the April 8, 2015, work-related incident did not contribute more than fifty percent (50%) to her disability or her need for total knee replacement surgery and did not result in any permanent impairment or permanent restrictions. He further testified that "the April 8, 2015, injury was less likely than not the cause of her knee replacement; that the osteoarthritis that was already present was more likely the largest contributing factor to her knee for a total knee replacement." This opinion superseded Dr. Giel's original assessment made after only one visit and applicable only to Employee's then existing

¹ Employee also points to her own testimony that "she was still having problems prior to getting off the couch."

symptoms and condition.

Finally, Employee contends that Dr. Dalal's testimony was sufficient to rebut the statutory presumption afforded the opinions of Dr. Giel. Employee's contention in this regard is premised on the same assertions as is her contention regarding her first issue. It is likewise subject to the same analysis and fails for the same reasons.²

Conclusion

Based on the foregoing analysis, the judgment of the Court of Workers' Compensation Claims is affirmed. Costs are taxed to Tina E. Hayes, for which execution may issue if necessary.

William B. Acree, Senior Judge

² Employee additionally contends that she is entitled to receive temporary total and permanent partial disability benefits. These issues were not reached by the Court of Workers' Compensation Claims based on its disposition of the issues related to causation, and they need not be reached by this Panel in light of our holding with respect to causation.

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

**TINA E. HAYES v. COSTCO AND LIBERTY MUTUAL INSURANCE
COMPANY**

**Court of Workers' Compensation Claims
No. 2016-08-0500**

No. W2017-02130-SC-R3-WC – Filed February 12, 2019

JUDGMENT ORDER

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 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 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 are assessed to Tina E. Hayes, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM