

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 2000 Session

NPS ENERGY SERVICES, INC. v. ROBERT JERNIGAN

**Direct Appeal from the Circuit Court for Davidson County
No. 98C-2931 Carol Soloman, Judge**

**No. M2000-00229-WC-R3-CV - Mailed - July 9, 2001
Filed - October 4, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with *Tennessee Code Annotated* § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The plaintiff, NPS Energy Services, Inc. appeals the judgment of the trial court finding that the defendant, Mr. Robert Jernigan sustained an injury within the course and scope of his employment when he slipped and fell while at work aggravating a pre-existing hip condition resulting in hip replacement surgery. The trial court found Mr. Jernigan entitled to a vocational disability of 45% to the body as a whole representing three times the 15% anatomical impairment rating given by both physicians in this matter. For the reasons discussed in this opinion we find that the judgment of the trial court should be reversed and the cause dismissed.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court
Reversed and Dismissed**

CAROL CATALANO, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JAMES L. WEATHERFORD SR. J., joined.

Jade A. Rogers, Gallatin, Tennessee, for the appellant, NPS Energy Systems, Inc.

David Day, Cookeville, Tennessee, for the appellee, Robert Jernigan.

MEMORANDUM OPINION

Mr. Jernigan was 54 at the time of trial. He had completed high school and had two years of drafting courses in college. He went to trade school for four years and obtained his electrician's license to be an "electrical technician". He works through his Union for various companies in Tennessee and other states.

In 1966, Mr. Jernigan broke both his femurs in a car accident and had a metal pin surgically implanted in each leg to support the broken bones. The pin in his left leg was removed six to eight months after the accident due to discomfort, but the pin in his right leg was not removed.

In the early 1990's, Mr. Jernigan began to notice some "twinges" in his right hip. On December 18, 1992, he saw Dr. Carl Hollman, M.D., at Upper Cumberland Orthopedic Surgery. According to Dr. Hollman's notes, x-rays indicated "severe degenerative changes of the right hip joint." Dr. Hollman prescribed anti-inflammatories, discussed treatment options, and gave Mr. Jernigan information about a total hip replacement.

From 1992 to April of 1998, Mr. Jernigan did not see any more doctors concerning his right hip and was able to control occasional hip pain with pain medications. Mr. Jernigan stated that he was "happy as a lark" with this arrangement and did not see the need to consider hip replacement surgery during this time.

On April 14, 1998, he returned to the Upper Cumberland Orthopedic Group and saw Dr. Sam Barnes, M.D., who prescribed pain medication. Dr. Barnes noted that Mr. Jernigan's "posttraumatic arthritis of his hip has progressed a whole lot. He has external rotation contracture and he has hip flexion contracture and apparent shortening of the extremity. We discussed total hip replacement. I think he is a candidate now for total hip replacement as he has been for some time." Mr. Jernigan considered his hip pain still manageable and was able to perform his daily personal and work activities, and it was his plan to continue to work until retirement without hip replacement.

On September 13, 1998, he began working for NPS as an electrician at the TVA Cumberland City Fossil Fuel Plant making \$17.20 an hour. Mr. Jernigan and his co-workers were to remove and repair a 133 ton armature from a transformer on the job site. He knew that this job was a "short duration job".

On October 10, 1998, Mr. Jernigan and his co-workers began walking down a corridor with concrete floors that had been varnished recently and the whole area looked wet. Mr. Jernigan stepped into five inch wide ten inch long oblong puddle of water or oil. When he did so, both feet slipped out from under him and he landed hard directly on his right hip.

After the fall he was taken to the nurses' station on a stretcher where he received some pain medication and ice. The pain had localized in his right hip, felt "like a huge bruise" and it was "very hard walking". Hoping that he had suffered only a sprain, he returned to work approximately 45 minutes later, but had to leave after his first break because the pain was getting worse.

On October 11, 1998, the pain had not subsided and Mr. Jernigan went to the emergency room where he was referred for an appointment with Dr. Richard Williams M.D., an orthopedist at Upper Cumberland Orthopedic Surgery. On October 13, 1998, Dr. Williams reviewed x-rays taken after the fall that showed "severe hip degeneration [but] no obvious new bony deformity or fracture." Dr. Williams diagnosed "severe degenerative joint disease, right hip, with acute exacerbation of pain

secondary to fall.”

According to Dr. Williams records:

Mr. Jernigan says he really cannot deal with the pain at this point, and now he is ready to consider hip replacement. We discussed a little bit about the relationship to his most recent fall. Certainly, I think this fall has exacerbated his pain, and the fact that he is acutely having to be off of work and consider hip replacement surgery is likely tied to that fall. However, it is also clear that the degeneration of the hip is due to the accident many years ago, and the hip was going to need surgery at some point or another regardless. He understands this.

On October 28, 1998, NPS filed a complaint for declaratory judgment in the Circuit Court for Davidson County. On October 29, 1998, NPS filed a Notice of Controversy with the Department of Labor and terminated benefits.¹ On October 30, 1998, Dr. Williams performed total hip replacement surgery on Mr. Jernigan.

Dr. Williams compared the x-rays taken in 1992, April 1998 and October 1998 and stated: “I felt that there was interval change from 1992. I did not make specific note as to whether there was dramatic change from the films of 1998.” When asked if Mr. Jernigan had a specific new injury after the fall, Dr. Williams answered: “I did not see anything that I could clearly objectively state was an acute radiographic representation of change.” Dr. Williams concluded “My assessment was there was increase in discomfort as a primary new diagnosis.” He went on to state that “which part of his current impairment is due to having pre-existing degeneration in his hip, and which part is due to falling and presenting with acute pain, and I believe it’s impossible to separate those.”

. Regarding damage to osteophytes or bone spurs Dr. Williams stated: “I could not see an objective sign of that on the radiographs....I saw no evidence of obvious fracture of osteophyte or fracture of the bone or anything radiographically to suggest an acute precipitous representation of change, comparing with the x-rays from April of 1998.” During surgery Dr. Williams found that the hip joint was destroyed, and he “saw nothing at the time of surgery that would have led me to clearly objectively document there had been specific damage to these bone spurs.”

According to Dr. Williams, as a result of his fall on October 10, 1998: “there was a change in Mr. Jernigan’s condition specifically with respect to his level of discomfort or increase in pain stemming from the injury.” While before the fall Mr. Jernigan “was functional without daily pain complaints, was not taking narcotic pain medication...following the fall there was such a change as to seek emergency and orthopedic follow up care, and he voiced complaints of significant pain. ”

¹Mr. Jernigan’s Motion to Reinstate Benefits which was granted by the trial court included an affidavit from Dr. Williams stating that “Mr. Jernigan would not have had the hip replacement at this time but for the aggravation of his pre-existing hip condition resulting from the October 10, 1998 work injury.”

Dr. Williams agreed that when he referred to change he was referring to the pain.

Dr. Williams went on to explain: “I think you’re treading on thin ice when you’re characterizing pain and trying to correlate it to a specific anatomic finding....It’s difficult to pin down, and we have testified here again and again as to the nature of the pre-existing condition, the occurrence of a fall, the absence of hard radiographic visible change, or several weeks later at surgery, objective physical findings, but at the same time I will concede a clear change in the patient’s perception of the situation and expression of discomfort.”

When asked if it were possible that there was a change in Mr. Jernigan’s underlying anatomic condition, Dr. Williams replies: If there had been a dramatic change.. Like a fracture of the femoral neck, which I have seen in a similar set of circumstances, I would hope I would not have missed that on the radiographs. Any hard objective anatomic change was so subtle as to be eventually unappreciated. You can speculate there must have been something on a microscopic level.....You can speculate there must have been some change, but I can’t tell you specifically what it was. Dr. Williams concluded that to assume there was an anatomic change in this case “I would have to assume that something happened at a level that I could not clearly objectively appreciate, and we assume that is this mythical microscopic level.”

Dr. Williams assigned an impairment rating of 15% to the body as a whole and expected that Mr. Jernigan would continue to have a limp and some stiffness after hip replacement surgery. He advised Mr. Jernigan to avoid deep squatting and sitting in low chairs or stools; and to avoid extreme flexion, abduction, and internal rotation of the hip. He released him to return to work as of February 15, 1999, with the above restrictions which were normal for all hip replacement patients.

On July, 19, 1999, Dr. Paul Naylor, M.D., board certified orthopedic surgeon, performed an independent medical evaluation. When asked to apportion an impairment between his preexisting condition and the fall, Dr. Naylor found Mr. Jernigan “ had significant preexisting arthritis, he was ultimately going to need a total hip. So the fall exacerbated this or caused the timing to maybe increase some. So I gave him 85% of his impairment would have been due to this preexisting significant arthritis, and only 15% would be related to this fall.”

Dr. Naylor stated that Mr. Jernigan did not sustain a new injury because of the fall and “this was just an exacerbation of this bad arthritis he had.” Dr. Naylor concluded that: “He did not sustain a new injury. He just irritated this bad hip. It caused him more pain.”

Dr. Naylor also stated: “I think with a reasonable degree of medical certainty Mr. Jernigan was going to undergo a total hip arthroplasty, and it was just, it was inevitable. So the timing was going to just be dependent on his pain level. And in this case, the fall just made his timing a little quicker than it might otherwise have been, but any fall could have done it.”

Dr. Naylor opined that Mr. Jernigan had a 15% impairment rating to the body as a whole

under the AMA Guides based on a total hip replacement. He stressed that this rating was due to the surgical procedure itself and not due to the October 10, 1998 fall

After months of physical therapy, Mr. Jernigan was released on February 15, 1999, to return to work with some restrictions. At the time of trial, he worked for J & F Electric, Inc. in Edwardsville, Illinois, a higher paying job than that at NPS. He can still do full duty work but needs to follow the precautions given to all hip replacement patients.

The trial court found: 1) that Mr. Jernigan's condition was aggravated by the fall and therefore compensable; and 2) that he had a 15% disability to the body as a whole resulting in a 45% vocational disability. The trial court awarded a \$92,700 judgment for disability benefits; a \$39,146.53 judgment for medical bills and expenses; and a \$1,854.00 judgment for unpaid temporary total benefits.

ANALYSIS

Review of findings of fact by the trial court shall be *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. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

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. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

NPS first raises the following issue:

Whether Mr. Jernigan proved by a preponderance of the evidence that he experienced a permanent injury or a permanent aggravation of his pre-existing condition as a result of the incident of October 10, 1998.

The employee has the burden of proving every essential element of his claim. *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992).

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(12).

If a work injury aggravates a pre-existing condition merely by increasing pain, but does not otherwise "injure or advance the severity" of the employee's condition the claimant did not sustain an injury by accident within the meaning of the Workers' Compensation Act and is not entitled to compensation. *Cunningham v. Goodyear Tire and Rubber Co.*, 811 S.W.2d 888, 891 (Tenn. 1991). 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. *Sweat v. Superior Industries Inc.*, 966 S.W.2d 31, 33 (Tenn. 1998).

Except in the most obvious and routine cases, the claimant in a workers' compensation action must establish causation by expert medical evidence. *Orman v. Williams Sonoma, Inc.* 803 S.W.2d 672, 676 (Tenn. 1991). Although absolute certainty is not required for proof of causation, it cannot be based upon medical proof that is so speculative or remote that attributing an injury to the employment would be an arbitrary determination or a mere possibility. *Tindall v. Waring Park Association*, 725 S.W.2d 935, 937 (Tenn. 1987).

Dr. Williams was asked repeatedly if Mr. Jernigan's slip and fall accident on 10/10/98 aggravated or changed his pre-existing hip condition. Dr. Williams never says that in his opinion based upon reasonable medical certainty there was any aggravation or change in his preexisting condition other than an increase in his pain. In Dr. Williams opinion, finding an anatomical change in this case would require speculation that something occurred at the "mythical " microscopic level. Dr. Williams was questioned at length on this issue and agreed that he was very careful with his words: "I like to be very particular about what I say. I recognize the importance of my testimony, and I believe I need to be truthful and accurate."

While Dr. Naylor attributes 15% of Mr. Jernigan's impairment to the fall, he too relates the exacerbation or aggravation of his condition specifically to pain.

After thoroughly reviewing the medical testimony in this case, we find that the evidence preponderates against the finding of the trial court that Mr. Jernigan sustained an accidental injury within the course and scope of his employment. Accordingly, the other issues raised by NPS are now moot and therefore pretermitted.

CONCLUSION

The judgment of the trial court is reversed and the cause dismissed. Costs are taxed to Mr. Jernigan.

CAROL CATALANO, SP.J.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

NPS ENERGY SERVICES, INC. v. ROBERT JERNIGAN

No. M2000-00229-SC-WCM-CV - Filed - October 4, 2001

JUDGMENT

This case is before the Court upon Robert Jernigan's 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 will be paid by Robert Jernigan, for which execution may issue if necessary.

IT IS SO ORDERED.

BIRCH, J., NOT PARTICIPATING