

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

JOHN J. KOBUS v. COLONIAL MOVING COMPANY

**Circuit Court for Putnam County
No. 98N0009**

No. M1999-00034-WC-R3-CV - Decided - April 10, 2000

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 appears 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 appellant, Colonial Moving Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

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

JOHN J. KOBUS)	
Plaintiff/Appellee)	NO. M1999-00034-WC-R3-CV
)	
VS.)	PUTNAM COUNTY CIRCUIT
)	
COLONIAL MOVING COMPANY)	
Defendant/Appellant)	HONORABLE JOHN TURNBULL
)	

FOR THE APPELLANT:

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MEMORANDUM OPINION

Mailed - March 10, 2000

Decided - April 10, 2000

MEMBERS OF PANEL

Frank F. Drowota, III, Associate Justice
Samuel L. Lewis, Special Judge
Tom E. Gray, Special Judge

AFFIRMED

Tom E. Gray, Special Judge

MEMORANDUM OPINION

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

This case involves the second workers' compensation claim by John J. Kobus, employee, against Colonial Molding co., Inc., employer, arising out of injuries to both of the employee's knees. Employer contends in this appeal that the trial court erred in awarding workers' compensation benefits because the employee failed to prove that he suffered a new accident in the course and scope of his employment. Employer further contends that assuming argument that the employee suffered a compensable injury that the award of permanent partial disability benefits is excessive. As discussed below, the panel has concluded the judgment should be affirmed.

PREVIOUS WORKERS' COMPENSATION CASE

On the 13th day of December, 1996, John J. Kobus and his employer appeared in the Chancery Court for Putnam County, Tennessee at Cookeville upon joint petition for approval of a settlement under Tennessee Workers' Compensation Law.

John J. Kobus had sustained an injury arising out of and in the scope and course of his employment to his lower extremities on or about the 5th day of April, 1996. Bilateral arthroscopy with partial meniscectomy on the left had been performed on the knees of the injured worker on or about June 3, 1996. His treating physician, Dr. Carl M. Hollman, opined that according to the American Medical Association Guidelines to the Evaluation of Permanent Impairment, Fourth Edition that the injured worker suffered a five (5%) percent partial impairment to the right lower extremity and a seven (7%) percent partial impairment to the left lower extremity.

A settlement of a ten (10%) percent vocational disability to the employee's lower extremities with future medicals to remain open was accepted and approved by the Court.

WORKERS' COMPENSATION CASE ON APPEAL

On the 24th day of April, 1997, John J. Kobus, Randall Birdwell and Bobby Thompson,

employees of Colonial Molding Co., Inc., in the scope of their employment were moving a table made of hard maple and were in the process of picking up the table to flip it over when the tabletop came off knocking John J. Kobus backward and falling on his legs above the knees. Randall Birdwell in his testimony estimated the table to be about twelve (12) feet long by four (4) feet wide and weighing between three hundred (300) and four hundred (400) pounds.

An "Employee's First Report of Work Injury" completed on the 25th day of April, 1997, by John J. Kobus reads that the tabletop hit both knees. Randy Birdwell and Bobby Thompson signed as witnesses.

On May 13, 1997, John J. Kobus was seen by Dr. Carl M. Hollman, and Dr. Hollman's office notes reflect that the patient returns with a new problem with his left knee giving the history of the tabletop incident and the doctor stating that he, meaning Kobus, may have aggravated the left knee. John J. Kobus testified that he told Dr. Hollman that the table hit both knees. In his deposition taken the 1st day of October, 1998, Dr. Hollman stated that he could not refute that Mr. Kobus complained of both knees and that he relied upon his notes.

When John J. Kobus returned to see Dr. Hollman on the 6th day of June, 1997 the doctor dictated notes as follows:

Hist: Patient is a 52 year old who returns for follow up of painful knees. His knees are still rather sore for him. He has been taking the Aleve but he takes it in the morning and it causes him stomach upset. We will switch him to Naprolan, 50 mg. Per tablet, 2 tablets p o (sic) each day with food. We will see him back and see how he is doing. CMH/mr

The injured worker continued to see Dr. Hollman, and the doctor performed surgery on the 26th day of August, 1997 making a left total knee replacement. A right total knee replacement was performed on the 8th day of November, 1997.

Dr. Hollman released John J. Kobus to regular duty work on the 10th day of February, 1998 with permanent restrictions of no climbing or crawling. Using the AMA Guidelines to the Evaluation of Permanent Impairment, Fourth Edition, the doctor assigned a thirty-seven (37%) percent permanent partial impairment to the left knee and a thirty-seven (37%) percent permanent partial impairment to the right knee.

After hearing the testimony of the witnesses appearing in Court, reviewing the exhibits and reading the depositions of Carl M. Hollman, M.D., the trial judge found all witnesses to be credible. He found that the employee suffered an accident on the job in the course and scope of his

employment to both knees when the table top hit him and that from the medical proof and lay proof that the accident caused both an anatomical and a physiological change in the knees that caused John J. Kobus to require knee replacement surgery. The trial judge found that Dr. Hollman stated with a reasonable degree of medical certainty that the accident on April 23, 1997 did cause an anatomical and physiological change in the knees of the employee although Dr. Hollman was not able to state exactly what the nature of the anatomical changes in the knees were as a result of the injury.

The trial judge noted that the employee had no further complaints of any knee problems after the arthroscopic surgery in 1996 until the accident with the tabletop. It was also noted by the trial judge that with the degenerative disease in both knees that it was inevitable that knee replacement surgery would occur in the future unless there was some development of new medication.

Considering the restrictions, the additional things that the worker cannot do after knee replacement that he could do prior, the skills of the worker, the job market, and the percentage of permanent partial impairment to both lower extremities assigned by the doctor according to AMA Guidelines the trial court found a vocational disability of sixty (60%) percent to both legs which is a sixty (60%) percent vocational disability to the body as a whole.

In addition to the award for vocational disability, the trial judge awarded temporary total disability benefits from August 26, 1997, to February 10, 1998.

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); Krick v. City of Lawrenceburg 945 S.W. 2d 709, 712 (Tenn. 1997).

Appellant argues that the claim of John J. Kobus is barred because the right and left knee replacement surgeries were inevitable as a result of his degenerative knee condition and not caused by the 1997 tabletop incident. Also asserted by appellant is that the claim is barred because the worker did not suffer an anatomical change caused by his employment at Colonial Molding.

The injured worker has the burden of proof of establishing both causation and permanency by a preponderance of the evidence using expert medical testimony which is considered in conjunction with lay testimony on how the injury occurred and the subsequent condition. Thomas v. Aetna Life and Casualty Co. 812 S.W. 2d 278, 183 (Tenn. 1991). This Court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies.

In making the determination great deference is given to the trial court's assessment of oral testimony of witnesses at trial, but this Court makes its own assessment of the credibility and weight to be given to deposition testimony of medical experts. Townsend v. State 826 S.W.2d 434,437 (Tenn. 1992) Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993).

According to the expert medical testimony of Dr. Hollman, it was inevitable that John J. Kobus would at some point in the future need total knee replacements, but the tabletop incident advanced the severity of his knee condition causing an actual progression in the arthritis and accelerated the timing for the need for the replacement surgery on the knees. That the table hitting the worker's legs caused an actual progression of his underlying arthritis was made by Dr. Hollman with a reasonable degree of medical certainty.

Medical testimony was that it would have been reasonable that but for the accident with the table that future treatment of the worker's knees would have been at some unknown place in the future. The tabletop incident caused more than merely an increase in pain, but the pain was with a reasonable degree of medical certainty produced by damage to the knees.

On cross examination by counsel for the employer in answer to a question that asked what aggravation or advancement of Mr. Kobus' knee condition occurred, Dr. Hollman testified:

Answer: In his particular situation, there is no way that I could really measure it. For example, would x-rays show a break in bones? We really had nothing to suggest that. Will it show tearing of the muscles, or tendons, or cartilage? No, not unless it was just a tremendous injury, and yet something went on, because like in every injury we have, such as in a bruise, there is injury and except for the discoloration, there is not much to measure that.

Counsel for appellant argues that the trial court erred in granting the employee additional workers' compensation benefits when the worker failed to prove a new accident or injury in the course and scope of his employment. In support appellant relied upon Smith v. Zurich Insurance Co., No. 03501-9701-CV-0004 (Tenn. Dec. 15, 1997) and Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587 (Tenn. 1989) and Pride v. Baptist Memorial Hospital 1994 WL 902800 (Tenn. 1994). Appellant also contends that the employee's claim is barred because he did not suffer an anatomical change when the table fell on him.

In the Smith v. Zurich case, plaintiff suffered a fall at work. Medical testimony failed to prove causation and the nexus between the fall and any permanent impairment.

In Talley, the worker was engaged in her employment when the rollers on a chair in which

she was sitting malfunctioned causing her to fall to the floor on or about the 3rd day of January, 1987. This worker had experienced back problems since 1978 when she fell from a porch at her home. She had two (2) prior laminectomies, one in early 1979, and the second in 1984. Three physicians testified by deposition. Dr. William G. Jennings treated Ms. Talley, and he was acquainted with her two (2) prior back operations, and he testified that she had spondylolisthesis and that the fall aggravated a pre-existing condition by pain and he recommended surgery of fusion and bars. He had been trying to get Ms. Talley off of previous medications and into surgery before the fall in the chair.

Dr. Nicholas A. Ransom, who performed the surgical procedure for Ms. Talley testified that he could not really state with any certainty how more unstable Ms. Talley's spine was rendered by her fall.

Dr. Michael Cobb, an orthopedic surgeon, was employed by the defendant to make an examination and evaluation of Ms. Talley. He testified that the fall did not contribute to any further slippage as the x-rays did not show any significant increase and that the fall was not the precipitating cause of the spinal fusion surgery.

The Supreme Court of Tennessee in Talley at page 592 wrote:

...under the evidence in the record, we cannot find that Ms. Talley's surgery and disability were causally connected to the injury she sustained on 3 January, 1987. She is the unfortunate victim of a disability which existed long before that date. According to Dr. Jennings she was only able to work prior to 3 January, 1987 through administration of pain-relieving medication. The surgical procedures performed on her back were the result of that pre-existing disability and not the consequence of the fall she sustained.

The dispositive issue in Pride was whether the plaintiff's progressive, degenerative arthritis was a gradual injury within the ambit of the workers' compensation law. The panel found from the medical evidence that the "appellee's idiopathic condition (1) is not an occupational disease, (2) did not arise out of her employment, (3) was not caused by accident."

No disagreement is made with appellant's statement that "Tennessee law holds that when a workers' compensation plaintiff suffers a pre-existing condition, the plaintiff cannot recover workers' compensation benefits when the employment merely aggravates the condition by increasing the amount of pain, but otherwise does not advance the severity of the condition" see Cunningham v. Goodyear 811 S.W.2d 888, 890 (Tenn. 1991); Smith v. Smith's Transfer corp. 735 S.W.2d 221,225-226 (Tenn. 1987); Boling v. Raytheon Co. 223 Tenn. 528, 448 S.W.2d 405, 408 (1969); Conner v. Rite Aid, 1995 W.L. 274486, 1995 LEXIS 220 (W.Com. Appeals Panel).

In cases when there is objective medical evidence of an aggravation of a pre-existing condition the Supreme Court has generally allowed recovery. See Brown Shoe Co. v. Reed 209 Tenn. 106 350 S.W.2d 65(1961); Crossno v. Publix Shirt Factory 814 S.W.2d 730(Tenn. 1991); White v. Western Industries 824 S.W.2d 158 (Tenn. 1992); Sweat v. Superior Industries, Inc. 966 S.W.2d 31 (Tenn. 1998).

In Smith v. Zurich the only medical evidence in the case was the deposition of Dr. John H. Bell who testified there was no anatomic evidence that the disc disease was aggravated by the injury, and that the fall caused the pre-existing condition to become painful. Causation was not proven by expert medical testimony.

In Cunningham, Smith v. Smith Transfer and Talley the only aggravation of the pre-existing condition was limited to pain (arthritis in Cunningham; thoracic outlet syndrome in Smith v. Smith Transfer; spondylolisthesis in Talley).

By contrast in the case at bar Dr. Hollman testified that the tabletop hitting the legs of John J. Kobus advanced and caused an actual progression in his arthritis.

Dr. Hollman also testified that the table hitting the legs produced more than merely increased pain.

When Dr. Hollman was asked by defense counsel to tell the Court specifically what aggravation or advancement of Mr. Kobus' knee condition occurred, the doctor stated that there was no way to measure it but something went on. This testimony related to the tabletop falling on the legs.

Dr. Hollman was asked if it would be speculative to articulate exactly what went on, the doctor said it would be less than speculative.

Dr. Hollman's testimony as to anatomical change is not so different than the testimony offered by Dr. G. William Davis in White v. Western Industries, supra 824 S.W.2d 158 (Tenn. 1992). There Dr. Davis could not express a medical opinion as to increased anatomical injury because there was no documented tests comparing plaintiff's pre and post fall conditions.

Absolute medical certainty is not required to establish causation. Chapman v. Employer's Insurance Co. 627 S.W.2d 122, 123 (Tenn. 1981) Foster v. ESIS Inc. 563 S.W. 2d 180, 183 (Tenn. 1978). Kellerman V. Food Lion, Inc. 929 S.W.2d 333 (Tenn. 1996). Clinard v. Lumberman Mut. Cas. Co. LEXIS 114 (Supreme Court 1998). Causation cannot be based upon speculative or

conjectural proof. Smith v. Empire Pencil Co. 781 S.W. 2d 833, 835 (Tenn. 1989) Simpson v. H.D.Le Co. 793 S.W.2d 929, 931 (Tenn. 1990).

Dr. Hollman said that it was not complete speculation on his part to say something went on with the knees when the accident with the table top happened to John J. Kobus.

The burden of proof on the issue of causation as with every essential element of the claim lies within the employee. Roath v. Liberty Mutual Insurance Co. 793 S.W.2d 932, 934 (Tenn. 1990).

The trial judge relied upon the testimony of Dr. Hollman, the plaintiff and plaintiffs's witness, Randall Birdwell. We find this testimony is sufficient to support a causal connection between the on-the-job accident and the disability of John J. Kobus. The evidence does not preponderate against the finding of the trial court in this regard.

We cannot say that the evidence preponderates against the vocational disability awarded by the trial court. In making the award the trial judge considered many factors including the employee's job skills, the capacity to work at difference types of employment in the employee's disabled condition, restrictions given by the treating physician and the anatomical impairment testified to by the medical expert.

The award of temporary total disability benefits from the August 26, 1997 to February 10, 1998 is affirmed.

The judgment of the trial court is affirmed. Costs are assessed to the appellant.

Tom E. Gray, Special Judge

Concur:

Frank F. Drowota, III, Associate Justice
Samuel L. Lewis, Special Judge, Retired