IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

ROBERT KEEL	}	*MAURY CIRCUIT*
	}	*No. Below 6864*
Plaintiff/Appellee	}	
	}	*Hon. Jim T. Hamilton*
vs.	}	*Judge*
	}	
	}	*No. 01S01-9803-CV-00046*
SATURN CORPORATION	}	
	}	
Defendant/Appellant	}	*AFFIRMED AND REMANDED*

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 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 defendant/appellant, for which execution may issue if necessary.

IT IS SO ORDERED on December 3, 1998.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(December 11, 1998 Session)

ROBERT KEEL,	)	MAURY CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. Jim T. Hamilton,
	)	Judge.
v.	)	
	)	No.01S01-9803-CV-00046
SATURN CORPORATION,	)	
	)	
Defendant-Appellant.	)	

For Appellant:

Thomas H. Peebles, IV
Dana C. McLendon
Waller, Lansden, Dortch & Davis
Columbia, Tennessee

For Appellee:

J. Anthony Arena
Schulman, LeRoy & Bennett
Nashville, Tennessee

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

Members of Panel:

William M. Barker, Associate Justice
William H. Inman, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED AND REMANDED Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer, Saturn Corporation, insists (1) the evidence preponderates against a finding that the injury arose out of and in the course of the employment relationship, (2) the trial court's award of permanent partial disability benefits is excessive and (3) the evidence preponderates against the trial court's findings with respect to the employee's weekly compensation rate. The employee or claimant, Keel, insists the award should be modified to include temporary total disability benefits of $2,495.22. As discussed below, the panel has concluded the judgment should be affirmed as to the issues raised by the employer and remanded to the trial court for consideration of the issue raised by the employee.

The employee initiated this action to recover workers' compensation benefits for an injury which he avers occurred gradually as a result of repetitive use of his hands and arms at work. After a trial, the trial court awarded permanent partial disability benefits based on thirty percent to the body as a whole and found the employee's weekly compensation rate to be $415.87. Our review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2).

Unless admitted by the employer, the employee or claimant has the burden of proving, by competent evidence, every essential element of his claim. Oster v. Yates, 845 S.W.2d 215 (Tenn. 1992). The claimant must prove that he is an employee, that he suffered an injury by accident, and that such injury by accident arose out of and in the course of his employment by the employer.

In order to establish that an injury was one arising out of the employment, the cause of the injury must be proved. Hill v. Royal Ins. Co., 937 S.W.2d 873 (Tenn. 1996). An accidental injury arises out of one's employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, and occurs in the course of one's employment if it occurs while an employee is performing a duty he was employed to do. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). "Arising out of" refers to the origin of the injury in terms of causation and "in the course of" relates to time, place and circumstance. McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995). For an accidental injury to be compensable, both components are required. Chapman v. Aetna Casualty and Surety Co., 221 Tenn. 376, 426 S.W.2d 760 (1968). Where a condition develops gradually over a period of time resulting in a definite, work-connected, unexpected, fortuitous injury, it is compensable as an injury by accident. Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Thomas v. Aetna Life and Cas. Ins. Co., 812 S.W.2d 278 (1991).

The claimant began working at Saturn in July of 1990. His first assignment was with Trim Team Five, installing seat belts and the passive

restraint system, as well as the "wipe down job". Around July 26, 1994, he visited Saturn's Initial Care Facility (ICF) complaining of pain and swelling in his hands and wrists, following the use of his hands and palms to force panels into place on the frame of automobiles on the assembly line. At trial, he testified that he had been suffering for a period of time before he reported it. He also testified that he had quit bowling around the same time.

In august of 1994, he was restricted from gripping or pinching with the right hand. He returned to ICF around November 9th of the same year with complaints of numbness in his hands. He was referred to Dr. Tom Bartsokas, whom he first saw on November 23, 1994, a board certified family practitioner, who diagnosed a herniated disk at C 6-7. Dr. Bartsokas referred him to Dr. George Lien, a board certified neurosurgeon.

Dr. Lien saw the claimant first on May 11, 1995 and ordered a myelogram, which confirmed Dr. Bartsokas's diagnosis and on July 25, 1995 performed corrective surgery. The claimant also saw Dr. David Gaw for an evaluation.

As to causation, Dr. Bartsokas testified the herniation resulted from numerous factors, including genetic predisposition, smoking, poor posture and occupational exposure. Dr. Lien expressed no opinion as to causation. Dr. Gaw testified the herniation was consistent with a work-related injury but could have been caused by something else.

The employer contends the proof of causation was too speculative. In a workers' compensation case, a trial judge may properly predicate an award on medical testimony to the effect that a given incident "could be" the cause of a claimant's injury, when, from other evidence, it may reasonably be inferred that the incident was in fact the cause of the injury, McCaleb v. Saturn Corp., 910 S.W.2d 412 (Tenn. 1995), but an award may not be based on conjecture or speculation. Collins v. Liberty Mut. Ins. Co., 561 S.W.2d 456 (Tenn. 1978). Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award, for expert opinion must always be more or less uncertain and speculative; Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996); and, where equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn under the case law. Jackson v. Greyhound Lines, Inc., 734 S.W.2d 617 (Tenn. 1987).

From a consideration of those principles and an examination of the record, particularly including the testimony of the claimant, which the trial judge accredited, we cannot say the evidence preponderates against the finding that the injury was one arising out of and in the course of the employment. The first issue is resolved in favor of the employee.

The employer next contends the evidence preponderates against the trial court's finding of thirty percent permanent partial disability. For injuries arising after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer

returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment, the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment, or, in cases where an impairment rating by any appropriate method is used and accepted by the medical community. Tenn. Code Ann. section 50-6-241(a)(1). In making determinations, the courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Id. The claimant has returned to work at a wage which brings him within the above rule.

Drs. Bartsokas and Lien assessed the claimant's medical impairment at nine percent to the whole body, Dr. Gaw fifteen percent. The trial court's award is more than two and one-half times nine percent, but less than two and one-half times fifteen percent. It thus appears the trial judge gave due consideration to all the medical opinions. From our examination of the record, we cannot say the evidence preponderates against the finding of the trial court. The second issue is also resolved in favor of the employee.

Finally, the employer contends the evidence preponderates against a weekly compensation rate of $415.87 and in favor of a weekly compensation rate of $382.79. The weekly compensation rate for an injured employee's permanent partial disability is an amount equal to sixty-six and two thirds percent of the employee's average weekly wage for the fifty-two weeks immediately preceding the injury. Tenn. Code Ann. section 50-6-207(3)(A).

The dispute in this case is whether the injury occurred before or after July 1, 1995. If it occurred before that date, the compensation rate is $382.79. If it occurred on or after that date, but before July 1, 1996, the rate is $415.87, as the trial court found. The date of injury for a gradual injury is the date on which the claimant was forced to quit work because of severe pain. Lawson v. Lear Seating Corp., 944 S.W.2d 340 (Tenn. 1997). In the present case, the employee continued working through July 23, 1995, just two days before his corrective surgery. Thus, the evidence fails to preponderate against the finding of the trial judge, and the third issue is resolved in favor of the employee.

The trial court's judgment is silent as to the question of temporary total disability benefits. Thus, it appears the appeal was premature. Nevertheless, we have reviewed those issues upon which the trial court made a finding. This court, however, lacks any original jurisdiction and must, therefore, remand the case the trial court for an award of temporary total disability benefits, if appropriate.

As to the issues properly before this tribunal, the judgment of the trial court is affirmed; and the case is remanded to the Circuit Court for Maury County. Costs on appeal are taxed to the defendant-appellant.

_____

Joe C. Loser, Jr., Special Judge

CONCUR:

_____

William M. Barker, Associate Justice

_____

William H. Inman, Senior Judge