IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE AUGUST 1999 SESSION

GEORGE CHAD BARRON	)	WASHINGTON CHANCERY
	)	
Plaintiff/Appellee	)	NO. 03S01-9807-CH-00143
	)	
v.	)	HON. JEAN A. STANLEY
	)	
DOGWOOD OIL COMPANY, INC.,	)	
	)	
Defendant/Appellant	)	

For the Appellant:

William T. Wray, Jr.
Edward J. Webb, Jr.
208 Sunset Drive, Ste. 500
Johnson City, TN 37604

For the Appellee:

Gene H. Tunnell
329 Commerce Street
Kingsport, TN 37660

MEMORANDUM OPINION

Members of Panel:

Chief Justice E. Riley Anderson
Senior Judge John K. Byers
Special Judge Roger E. Thayer

AFFIRMED **BYERS, Senior Judge**

_____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.

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).

At the time of trial, the plaintiff was 24 years of age. He had a high school diploma and some college hours. Prior to working for the defendant, the plaintiff worked as a salesperson in retail stores.

In May 1992, the plaintiff was diagnosed with a brain tumor in the area of the pituitary gland, the removal of which caused him to suffer various hormonal deficiencies. As part of the plaintiff's hormone deficiency treatment, he was prescribed and took Humatrope as replacement for lost growth hormones. The plaintiff did experience rapid bone growth stimulated by the medication.

The plaintiff was hired by the defendant in May 1993, at which time he was taking Humatrope. He was, however, suffering no apparent physical problems at the time he began his employment with the defendant.

The warning information supplied with Humatrope states that patients "may develop slipped capital femoral epiphysis more frequently." Slipped capital femoral epiphysis or SCFE is a fracture through the head and neck junction of the hip at the area of the growth line. The warning information also states that any patient with the onset of a limp during growth hormone therapy should be evaluated for SCFE.

On August 31, 1993, the plaintiff was experiencing pain in his left leg and hip, causing him to contact his endocrinologist, Dr. Lawrence Morris. Dr. Morris's nurse instructed the plaintiff to call his family doctor, Dr. Clay Renfro. Dr. Renfro ordered x-rays of the plaintiff on September 8 and told him to reduce his working hours. The x-rays showed partial SCFE on both the right and left sides; however, the results of the

x-rays were not revealed to the plaintiff until after he suffered complete SCFE.

On September 10, the plaintiff reported for his regular shift and presented the defendant with Dr. Renfro's instructions. While at work that same day, after working most of a regular shift, the plaintiff was stocking a cooler when he squatted to lift some cases of beer; while doing so, he felt a pop, experienced severe pain in his left hip and fell onto the floor of the cooler.

The plaintiff was taken to the hospital where he was diagnosed with a traumatic slipped capital epiphysis of the left hip, which required surgery to pin the hip. While in the hospital recovering from surgery, the plaintiff suffered a fall that caused the same injury to the right hip.

Eventually, the plaintiff was forced to undergo total hip replacement on the left side. Dr. Alex Williams, one of the plaintiff's treating physicians, gave the plaintiff a 15 percent impairment rating to the body as a whole and a 37 percent impairment rating to the lower left extremity. Restrictions given by Dr. Williams included no running, jumping or lifting more than five to ten pounds, avoidance of walking on uneven ground, no climbing on and off machinery, and avoidance of being knocked down or falling.

The trial judge awarded the plaintiff 25 percent permanent disability to the body as a whole plus past and future medical bills.

We affirm the judgment of the trial court.

The defendant says the plaintiff's injury was not an injury by accident nor was it work related; rather, it was due solely to the effects of the Humatrope.

An accidental injury is defined as an "unusual, fortuitous, or unexpected happening, causing an injury which was accidental in character." *Travelers Insurance Co. V. George,* 397 S.W.2d 368, 371 (Tenn. 1965).

To prove a "work-related" injury, a plaintiff must establish by a preponderance of the evidence that he or she sustained an injury "arising out of" the plaintiff's employment. TENN. CODE ANN. § 50-6-102(a)(5) (Supp. 1998). The phrase "arising out of" refers to cause or origin of the injury. The phrase "in the course of" refers to the time, place, and circumstances of the injury. *E.g., Jones v. Hartford Accident &*

Indem. Co., 811 S.W.2d 516, 519 (Tenn. 1991).

In most cases, a plaintiff must establish the causation element by expert medical evidence. *E.g., Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991). Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required, and reasonable doubt must be extended in favor of an employee based on medical evidence that an incident "could be" the cause of the injury, where the trial judge has also heard lay testimony from which it reasonably inferred that the incident was in fact the cause of the injury. *Id.*

The medical evidence of the plaintiff's treating physicians in this case is not contradictory. Dr. Lawrence Morris, who treated the plaintiff for his brain tumor and arranged for him to use Humatrope, testified that SCFE is one the many side effects of the growth hormone, but that such a condition is a "possibility" that is "not inevitable" and "not a necessary thing that's going to happen." Dr. Morris explained that his opinion that SCFE is something that "can happen" from the use of Humatrope is consistent with the drug package insert warning that the condition "may develop."

Dr. G. Alex Williams II, the plaintiff's treating orthopedic surgeon, first saw the plaintiff immediately after the accident on September 10, 1993. He testified those x-rays on that day showed "a traumatic [SCFE] of the left hip" and a "chronic slip" of the right hip. Regarding the plaintiff's x-rays of September 8, 1993, he agreed they showed partial SCFE on the right and left sides. Dr. Williams believed the plaintiff's acute fracture occurred just as he related it. Dr. Williams stated the plaintiff was having some chronic slip which does not always advance to an acute slip. In his first deposition, Dr. Williams indicated that due to bending and lifting, the plaintiff's condition became acute.

Dr. Frank Gray, another of the plaintiff's treating orthopedic surgeons, agreed that based on Dr. Williams's records the injury occurred "at work" based on an acute episode of pain occurring there. He also stated it was more probable than not that the chronic slip would progress to an acute incident.

Dr. John A. Fox, a pediatric orthopedic specialist, testified as an expert for the

defendant. He stated that the plaintiff's x-rays both before and after the accident showed SCFE on the right and left sides. Dr. Fox also testified he would have hospitalized the plaintiff immediately upon seeing the September 8th x-rays and pinned the hip at that time. He stated further slippage at that point was expected and would have occurred over a period of time. In his second deposition, Dr. Williams agreed with Dr. Fox's assessment.

The plaintiff's treating physicians testified the injury suffered by the plaintiff was traumatic and was due to his position at the time. The defendant's expert testified that a partial SCFE would inevitably become SCFE, and that would have occurred over a period of time. The fact that the injury occurred suddenly while the plaintiff was in a squatting position and exerting some effort to move cases of drinks indicates the injury was more than a mere progression, which would have occurred over a period of time.

The general rule is that aggravation of a pre-existing condition may be compensable unless it results only in increased pain or other symptoms caused by the underlying condition. *See Cunningham v. Goodyear*, 811 S.W.2d 888, 890 (Tenn. 1991). To be compensable, the pre-existing condition must be advanced or there must be an anatomical change in the pre-existing condition, or the employment must cause "an actual progression . . . of the underlying disease." *Id.* at 890. This Court has repeatedly held that "[a[n employer takes the employee as he is, that is with his defects and pre-existing afflictions." *Rogers v. Shaw*, 813 S.W.2d 397, 399 (Tenn. 1991) (citing *Flowers v. South Central Bell Telephone Co.*, 672 S.W.2d 769, 770 (Tenn. 1984)); *see also Parks v. Tennessee Municipal League Risk Management* 974 S.W.2d 677 (Tenn. 1998).

Undoubtedly, this plaintiff was especially susceptible to the type of injury that he suffered, but he was asymptomatic prior to working for the defendant. He was taking the Humatrope and suffered a side effect; however, there is simply no way to measure the exact effect his work had on his condition. Given the uncertainty, the law requires the employer to bear the burden. *Sweat v. Superior Indus.*, 966 S.W.2d 31 (Tenn. 1998).

The trial court's holding is supported by the law and the evidence. We affirm the holding of the trial court.

The cost of the appeal is taxed to the defendant.

_____
John K. Byers, Senior Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
Roger E. Thayer, Special Judge

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

FILED

January 10, 2000

Cecil Crowson, Jr.
Appellate Court
Clerk

GEORGE CHAD BARRON,	)	Washington County Chancery
	)	No. 31,321
Plaintiff/Appellee,	)	
	)	S. Ct. No. 03-S-01-9807-CH-00143
v.	)	
	)	Hon. Jean A. Stanley, Chancellor
DOGWOOD OIL COMPANY, INC.,	)	
	)	Affirmed
Defendant/Appellant.	)	

JUDGMENT ORDER

This case is before the Court upon defendants' 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 defendant/appellant, for which execution may issue if necessary.

PER CURIAM

Anderson, C.J., not participating