

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 25, 2013 Session

**MICHAEL ANTHONY BRIM v. LIBERTY MUTUAL INSURANCE
COMPANY ET AL.**

**Appeal from the Chancery Court for Sumner County
No. 2011CV318 Tom E. Gray, Chancellor**

**No. M2012-01565-WC-R3-WC - Mailed September 20, 2013
FILED October 23, 2013**

In this workers' compensation case, the employee alleged that he injured his right shoulder and left hip when he fell while entering a vehicle. His employer accepted the shoulder injury as compensable, but denied the hip claim. The employee had surgery on both the shoulder and hip and eventually returned to his pre-injury job. The trial court found that the hip injury was compensable and awarded permanent disability benefits for both injuries. The employer has appealed, contending that the evidence preponderates against the trial court's finding regarding the hip injury. 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 of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery
Court Affirmed**

BEN H. CANTRELL, SR. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J., and DONALD P. HARRIS, SP. J., joined.

David T. Hooper, Brentwood, Tennessee, for the appellants, Liberty Mutual Insurance Company and United Parcel Service, Inc.

William Joseph Butler, Lafayette, Tennessee, for the appellee, Michael Anthony Brim.

OPINION

Factual and Procedural Background

Michael Anthony Brim (“Employee”) was fifty-two years old when the trial occurred. He is a high school graduate, but has no additional education. He had worked for United Parcel Service (“Employer”) for thirty-six years. His job consisted of moving trailers on the premises of Employer’s White’s Creek Pike facility. He used a vehicle known as a “Yardbird” to perform this task. Employee entered the vehicle from the rear by climbing a series of steps on its right side. The steps are built into a battery box cover. On the morning of February 2, 2010, the battery cover was not properly closed. It came loose as Employee stepped on it, causing him to fall. His right arm struck a handrail, his legs went down and he landed flat on his feet, straddling the steps. He reported the incident to his supervisor, but declined an offer of medical treatment at that time. An OSHA incident report completed by Employer’s Health and Safety Manager on February 2, 2010 sets out the manner in which the incident occurred and describes the injury as: “[p]ain in right elbow and arm. Also complaining of pain/burning in left pelvic/ab area.”

Employee’s right shoulder pain increased, and he was referred to a local medical clinic by Employer. Needing specialized treatment, he selected Dr. Blake Garside, an orthopaedic surgeon, from a list provided by Employer. Employee first saw Dr. Garside on March 2, 2010. Employee testified that he did not mention his hip injury to Dr. Garside at that time

because the shoulder injury was more painful. Dr. Garside determined that Employee had a torn rotator cuff and torn biceps tendon and recommended surgery. After the surgery on March 22, 2010, employee recovered well from the procedure. On May 17, 2010, during a routine post-surgical visit, Employee mentioned his hip pain to Dr. Garside, stating that he had injured it initially in February 2009 and had re-injured it at the time of his fall. Dr. Garside stated that he would treat the hip if he received approval from his workers' compensation insurer. Employee consulted with Employer, and Dr. Garside was authorized to treat the hip injury. X-rays of Employee's left hip showed arthritis. In July 2010, Dr. Garside ordered an MRI, which showed moderate to severe arthritis in the left hip and mild arthritis in the right hip. He ordered a steroid injection, but that provided relief for only a short time. In December 2010, Dr. Garside was asked by the Tennessee Division of Workers' Compensation if Employee's left hip injury arose from the February 2, 2010 incident. He replied that it did not. Employer thereafter declined to provide further medical care for the hip. Dr. Garside continued to treat Employee's shoulder until September 15, 2010. At that time, he released Employee to return to work without restrictions. He subsequently determined that Employee retained a 4% impairment to the body as a whole due to the shoulder injury and surgery.

Employee was referred to another orthopaedic surgeon, Dr. Robert Landsberg, by his primary care physician in February 2011. Like Dr. Garside, Dr. Landsberg concluded that

Employee had osteoarthritis of the left hip. He recommended a total hip replacement surgery which was carried out on March 14, 2011. Employee's post-operative course was uneventful and he reached maximum medical improvement on September 8, 2011. The doctor restricted Employee from running, jumping or jumping from heights. Dr. Landsberg testified that Employee retained a 21% impairment to the left lower extremity as a result of the hip replacement procedure.¹ Dr. Landsberg testified as follows concerning causation:

Based on the history, he had been doing very well until his first injury that he described back in February of 2009. He made a recovery after that and was doing quite well until his next injury when he further twisted or damaged the hip when he fell.

And having those injuries and with the second injury causing him to have increasing pain in the left hip, had it not been for that injury, his arthritis might not have progressed to the point where he would need the surgery.

During cross-examination, Dr. Landsberg agreed that Employee had "wear-and-tear

¹Dr. Landsberg did not convert the impairment rating to the body as a whole. However, pursuant to Table 16-10 of the Sixth Edition of the AMA Guides, 21% to the lower extremity equals 8% to the body as a whole. The trial court used the latter figure in its findings.

type arthritis” in his hip. He testified that the MRI scans did not contain evidence of an acute injury. He agreed with Dr. Garside’s statement, contained in a December 26, 2010 letter to the Department of Labor, that the arthritis was not caused by the February 2010 incident. On redirect examination, he elaborated:

Again, arthritis was obviously there before the fall of February 2010. It takes months to years to develop. Arthritis was probably there a little bit before the injury in the year before where he first did the splits and first had problems. That’s the first time he said he ever had problems with his hips.

I think at that point, he had something that aggravated and advanced his osteoarthritis with the first injury. Then with the second injury, based on what he told me, he further injured the hip. And following that, it wasn't a gradual change.

When he hurt his hip the first time and finally got back to work, he had problems. His hip was not normal. He would limp and ache.

But then he told me that after he fell the second time and injured the right shoulder in February of 2010, it wasn’t like a slow, gradual increase in the left hip problem. It got worse.

And his left hip was a lot worse after that to the point where he couldn't work up until that point, and he felt that he couldn't work after that because of further aggravation of his pre-existing condition in the left hip.

After being released by Dr. Landsberg, Employee returned to work in the same job he held prior to the injury. He testified that he was able to perform all aspects of the job. He had some difficulty walking on inclines. "Squatting, lifting, trying to pull on dollies, or standing up after I've been bent over," caused pain. His shoulder limited his ability to work overhead, operate a weed eater or use a pruner. He had lifted weights for exercise prior to his injury and continued to do so after his recovery.

The trial court took the case under advisement and issued its findings as a written memorandum. The court found that the February 2009 incident had "aggravated and advanced his osteoarthritis and that the second [February 2010] injury injured the hip." Therefore the court found that the Employee was entitled to workers' compensation benefits for the hip injury. The court found that the employee had suffered a 12% impairment to the body as a whole for the combined effect of the shoulder and hip injuries. It was undisputed that Employee's recovery was limited to one and one-half times the impairment pursuant to Tenn. Code Ann. § 50-6-241(d)(1)(A) (2008 & Supp. 2012). The court therefore

awarded the employee the benefits based on an 18% permanent partial disability. Employer has appealed, asserting that the trial court erred by finding that Employee sustained a compensable hip injury as a result of the February 2010 incident.² We affirm the judgment.

Standard of Review

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007) (citing *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991)). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2012) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . 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." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*,

²Employer does not contest the award of benefits for Employee's shoulder injury.

184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009); *Goodman v. HBD Indus., Inc.*, 208 S.W.3d 373, 376 (Tenn. 2006).

Analysis

The gist of Employer's argument is that Employee did not suffer a compensable injury to his left hip as a result of the February 2010 incident. It proposes that his hip replacement surgery was to treat osteoarthritis, a pre-existing condition that was neither caused nor aggravated by that incident. According to Employer, the only potentially compensable injury to Employee's left hip occurred in February 2009, but Employee did not allege such an injury in his complaint, nor pursue such a theory at trial. Employee responds that his sole theory is that the February 2010 incident advanced his pre-existing arthritis in his hip, that the lay and medical evidence supports that theory and that the trial court correctly found that the injury was compensable.

The circumstances under which a work injury causes a pre-existing condition to be compensable under the workers' compensation law is a frequent subject of appellate review. In *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598 (Tenn. 2008), our Supreme Court addressed the issue as follows:

We reiterate that the employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain. However, if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable.

273 S.W.3d at 607; *see also Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 645 (Tenn. 2008); *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 488 (Tenn.1997).

Employee testified that he missed approximately three days of work after the 2009 incident. He did not seek medical attention for his injury. He was able to return to work without incident until February 2010. Employer's internal documents confirm that he complained of pain in his pelvic area after the latter event. Employee testified that he did not discuss those symptoms with his doctors at that time because his shoulder problems were more painful. Dr. Landsberg testified that Employee's description of his symptoms after February 2010 was consistent with an advancement of the pre-existing arthritis at that time. All reasonable doubt as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. *Phillips v. A & H Constr. Co.*, 134

S.W.3d 145, 150 (Tenn. 2004) (citing *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992)). Further, a trial court may properly award benefits based upon medical testimony that the employment “could or might have been the cause” of the employee's injury when there is also lay testimony supporting a reasonable inference of causation. *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005) (quoting *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004)).

The trial court in this case was presented with lay testimony that Employee's symptoms changed at the time of the 2010 injury, and it implicitly accredited that testimony. In addition, there was expert medical testimony from a treating physician that the 2010 injury was consistent with an advancement of the underlying arthritic condition. Based on that evidence, the trial court found that Employee sustained a compensable injury to his hip at that time. That finding is entitled by statute to a presumption of correctness. Viewing the record as a whole, we are unable to conclude that the evidence preponderates against the trial court's finding. The judgment is therefore affirmed.

Conclusion

The judgment is affirmed. Costs are taxed to Liberty Mutual Insurance Company and United Parcel Service, Inc. and their surety, for which execution may issue if necessary.

BEN H. CANTRELL, SENIOR JUDGE

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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 Liberty Mutual Insurance Company and United Parcel Service, Inc. and their surety, for which execution may issue if necessary.

PER CURIAM