

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT MEMPHIS
March 25, 2015 Session

DONNA CALLINS v. NSK STEERING SYSTEMS AMERICA, INC.

**Appeal from the Gibson County Chancery Court
No. 20670 George R. Ellis, Chancellor**

**No. W2014-01225-SC-WCM-WC – Mailed August 19, 2015;
Filed November 30, 2015**

Employee aggravated a pre-existing asymptomatic condition in her shoulder while working for Employer and failed to make a meaningful return to work. The trial court found employee to be 100 percent disabled and awarded permanent total disability benefits. Employer appealed,¹ arguing that the trial court erred in determining that employee sustained a compensable injury in the absence of anatomical change and in awarding employee permanent total disability benefits. After our review of the record, we affirm the trial court's judgment.

**Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right; Judgment of the Trial
Court Affirmed**

BEN H. CANTRELL, SR. J., delivered the opinion of the Court, in which HOLLY M. KIRBY, JUSTICE. and MARTHA B. BRASFIELD, CHANCELLOR, joined.

Jeffrey E. Nicoson, Ronald L. Harper (at trial and on appeal), and Brooks L. Yelverton (at trial) of Leitner, Williams, Dooley & Napolitan, PLLC, Memphis, Tennessee, for the appellant, NSK Steering Systems America, Inc.

Stephen F. Libby, Memphis, Tennessee, for the appellee, Donna Callins.

¹Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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.

OPINION

Factual and Procedural Background

Donna Callins was employed by NSK Steering Systems America, Inc. ("NSK") in Dyersburg, Tennessee. She began working at the plant in August 2010 through a staffing company and became a full-time NSK employee on November 15, 2010. In her position of "team tech," Ms. Callins rotated between different tasks involved in the production of steering columns.

In early March 2011, Ms. Callins began experiencing pain when she raised her arm. Ms. Callins had been working significant overtime and had been temporarily placed on a task that involved strength testing of a seventeen-pound part. Although Ms. Callins returned to her regular rotation after three days, her pain continued as she performed her overhead tasks.

On April 19, 2011, Ms. Callins saw Dr. Garth Wright, an orthopedic surgeon, who discovered severe arthritic changes in Ms. Callins' right shoulder. On June 20, 2011, Dr. Wright performed a total shoulder replacement. In the interim, Ms. Callins received compensation through NSK's short term disability policy. Dr. Wright released her back to work on December 5, 2011 with no restrictions. Ms. Callins worked three days before again being taken off work. By letter dated December 19, 2011, NSK terminated Ms. Callins' employment effective December 23, 2011.

Ms. Callins sought workers' compensation benefits. After an unsuccessful Benefit Review Conference, Ms. Callins filed her workers' compensation complaint on November 1, 2012. The trial was held on May 14, 2014, at which the trial court heard the live testimony of Ms. Callins and her husband Morris Callins. The trial court also reviewed the deposition testimony of Dr. Wright, the treating physician, and Drs. Michael Menz and James Varner, who performed independent medical examinations.

Morris Callins testified that he and Ms. Callins had been married more than thirty years. Mr. Callins explained that prior to working at NSK Ms. Callins was athletic, participating in karate, workouts at the gym, and "2K runs." Mr. Callins could not recall Ms. Callins having shoulder problems before she started at NSK. Some months later, however, she cried or complained almost every night about the pain in her shoulder. Mr. Callins said that Ms. Callins was eventually unable to shift her car to fifth gear and stopped doing the laundry. Mr. Callins noticed that after she had shoulder surgery Ms. Callins is unable to do any lifting and has difficulty with vacuuming and laundry. Further, Ms. Callins requires assistance when holding her small granddaughter.

On cross-examination, Mr. Callins acknowledged that Ms. Callins worked for NSK for five months. Mr. Callins was also aware that Dr. Wright returned Ms. Callins to work on December 5, 2011. However, he knew few details about Ms. Callins' diagnosis.

Donna Callins testified that she was fifty-two-years old at the time of trial. Ms. Callins did not graduate from high school but received her GED in 1994. In 2008, Ms. Callins briefly pursued a paramedic/EMT program at Jackson College and in 2009 studied at Newbern Tech School to become a legal administrative assistant. Ms. Callins, however, never held a job in either field.

In 1980 Ms. Callins worked on an assembly line at Brown Shoe in Dyersburg, Tennessee, where she "hand taped" shoes under time constraints and was paid for the number of bundles she completed. She took maternity leave or quit in early 1984. Next, Ms. Callins worked at Brian Custom Plastic (which became Plastex) where she held various labor positions. She worked at Plastex for twenty-four years until the plant closed in June 2008. Subsequently, Ms. Callins participated in a program that paid her to attend school.

Ms. Callins said that when Plastex closed down, she took karate to stay "skinny" and to be an active person. She also recalled a "quiz bowl" during which she was required to do 30 pushups and a 5k run. Prior to the pain in her shoulder, Ms. Callins swam, cleaned the house, painted the ceilings, played ball with her grandchildren, and exercised at a gym.

On August 16, 2010, Ms. Callins was hired by Manpower staffing company to work at NSK in Dyersburg, Tennessee. She became a full-time employee of NSK on November 15, 2010. Ms. Callins explained that she was required to undergo a physical examination prior to her employment. She began on the first shift and was later moved to the second shift, which began at 4:00 p.m. and frequently ended at 2:30 a.m. due to overtime. Ms. Callins explained that she made steering columns but added that NSK rotated the employees to prevent carpal tunnel syndrome. She described each of her jobs and the "grabbing" and "overhead reaching" involved over the course of her shift. According to Ms. Callins, she was timed on each task and was expected to move quickly. She said that she had no problem doing the job from August 2010 to February 2011, and experienced no pain during that period.

Ms. Callins testified that her shoulder pain began around the first of March 2011. She recalled performing a difficult job and raising her arm and feeling pain. She told an associate about her arm and asked the supervisor to apply some Biofreeze, however, the

pain did not stop. Ms. Callins spoke with her supervisor, Debbie Rook, who told her not to worry about doing that job the next day because she was "not going to put women on [the job] . . . because . . . it is hard on you-all." Subsequently, every time Ms. Callins reached for a screwdriver or the press her arm would start hurting. Ms. Callins said that when the pain continued to worsen, she told Arlene Brown in Human Resources that her arm was hurting and that her thumb was "locking up." Ms. Brown suggested that Ms. Callins had cysts on her arms and offered her Tylenol. She also suggested that Ms. Callins see a doctor on her own since her insurance had "kicked in."

On April 19, 2011, Ms. Callins saw Dr. Wright who informed her that the problem stemmed from her shoulder rather than from her arm. By this time, she described the pain as "unbearable" and said it prevented her from doing her normal activities. Although Dr. Wright recommended shoulder replacement surgery, Ms. Callins was reluctant to have surgery. Because the pain was getting worse, however, Ms. Callins finally agreed to the surgery. She recalled that Dr. Wright performed the surgery on June 20, 2011 and that she was off work for five months.

Ms. Callins went to physical therapy three times per week. She temporarily received payments from NSK's short-term disability policy but she received no workers' compensation payments during that time. She returned to work on December 5, 2011 and worked for three days. Based on the problems with her shoulder and her restrictions, Ms. Callins was unable to perform the duties of her job. She explained that "you can't work down there with restrictions." When the policy limitation period expired, Ms. Callins was terminated from her employment. She was unable to have the shoulder manipulation surgery recommended by Dr. Wright because her insurance lapsed and she could not afford COBRA.

When asked further about her restrictions, Ms. Callins was unaware of any job at NSK that did not require overhead work. She said that even if the Plaster plant was still open her shoulder would prevent her from returning to her previous job. Ms. Callins said that her shoulder continues to bother her and that she has difficulty with vacuuming and hanging out clothes.

On cross-examination, Ms. Callins agreed that Dr. Wright sent her back to work at NSK in December 2011 with no restrictions on her shoulder. After working for three days, another doctor at the clinic took her off work for her back and shoulder. She said she did not recall Dr. Wright telling her that she had arthritis. According to her, Dr. Wright told her that she had "bone rubbing or spurs." Ms. Callins recalled seeing Dr. Menz on one occasion in August 2013 but she was unaware of his diagnosis. Similarly, she was unaware of Dr. Varner's diagnosis. Ms. Callins knew that she had knee problems and had been told that she had "disk degenerating disease" in her back. Ms.

Callins said that she had not been employed since NSK and agreed that no doctor had told her she could not work.

Dr. Wright, a board certified orthopedic surgeon, testified that he first saw Ms. Callins in 2011. At that time Ms. Callins had restricted or decreased motion in her shoulder and severe arthritic changes in the shoulder itself. Dr. Wright testified that arthritis means that the joint is inflamed. He explained that if you were looking at the shoulder on an MRI, you would see inflammatory changes in the soft tissues. In contrast, he said you would use regular x-rays or CT scan to see bony changes and the anatomical considerations.

Dr. Wright said there could be a number of causes of arthritis but because Ms. Wright is relatively young, her arthritis may have a genetic component. In his opinion, Ms. Callins' arthritic condition was not caused by her work and was likely caused by either a genetic condition or an inflammatory condition. Dr. Wright explained that there are two kinds of trauma can cause or exacerbate or accelerate an arthritic condition in a joint -- a single acute event such as a motor vehicle accident or repetitive activity. He added that "in the face of an underlying arthritic condition whether it's an inflammatory or genetic condition . . . that repetitive, over time activity might lend itself to arthritis. In Ms. Callins' case, he said that the repetitive tasks described by her would be consistent with the kind of activity that could accelerate the process or aggravate her condition. Her work would "probably have increased her symptoms of pain, and it may have made her range of motion more difficult too." "More likely than not . . . [her] work exacerbated it." Dr. Wright could not say to a reasonable degree of medical certainty that there had been an anatomical change.

Dr. Wright performed a total shoulder arthroscopy or complete replacement of the humeral head. He said that the surgery went extremely well but that Ms. Callins had some post-operative scar tissue restricting her motion. Dr. Wright originally planned to return Ms. Callins to work on January 2, 2012. Because of the scar tissue, he wanted to perform a shoulder manipulation prior to her return to work. Ms. Callins explained to him, however, that her short term disability payments through NSK were ending and that she would be terminated and lose her health insurance if she did not return to work in December. Dr. Wright therefore released her to work on December 5, 2011, with no restrictions. Ms. Callins worked for three days and returned to Dr. Wright's office on December 7, 2011. By letter dated December 9, 2011, Dr. Wright took her off work until January 30, 2012, due to her back pains.

During cross-examination, Dr. Wright reviewed the results of Ms. Callins' pre-employment physical conducted before she was hired by NSK, and he noted that the report indicated that Ms. Callins' shoulders were within normal limits. Dr. Wright said

he had no information that Ms. Callins had a problem with her shoulder prior to April 2011. He recalled that when he saw Ms. Callins in April 2011, her shoulder was not within normal limits. Dr. Wright agreed that Ms. Callins was complaining of disabling pain in her shoulder. He stated that the repetitive pressing down, pulling, and reaching tasks performed by Ms. Callins in her job would have made any kind of existing arthritis more painful. Dr. Wright further opined that, based on the history Ms. Callins gave him, her work was a "significant contributor" to the disabling pain she was experiencing and more likely than not exacerbated it. He said that her work activity as described by Ms. Callins "probably did expedite the need for surgery."

Dr. Wright assigned Ms. Callins an impairment rating of 28 percent to the upper extremity or 17 percent to the whole person. He recommended a lifting restriction of forty pounds and an overhead lifting restriction of twenty pounds.

Next, Dr. Michael J. Menz, a board certified orthopedic surgeon, performed an independent medical examination of Ms. Callins on August 31, 2013, at the request of Ms. Callins' counsel. Dr. Menz testified that Ms. Callins reported that she worked at a plant where she performed a lot of "heavier work" and started having right shoulder pain. He recalled that Dr. Wright diagnosed Ms. Callins with severe shoulder arthritis and performed a total shoulder replacement. He noted that after treatment, Ms. Callins still had restriction of motion and persistent pain and was unable to perform the heavy work she had been doing prior to surgery.

Dr. Menz said that prior to her complaint of shoulder pain, Ms. Callins did not have any limitations and was an active person, participating in sports such as karate. He noted that Ms. Callins' assembled steering columns and was required to pull down hard with her arm. Further, she had to lift up, grab parts above her head, put the parts together, and operate a press with her right arm. Dr. Menz said he reviewed Ms. Callins' MRI taken on April 22, 2011. The MRI showed "some rotator cuff tendinitis and severe arthritis of the glenohumeral joint, or the shoulder joint." Dr. Menz said that Ms. Callins' shoulder had "severe osteoarthritis with spurs and thinning of the cartilage of the joint."

Although the condition would have been present for some time, Dr. Menz noted that Ms. Callins had been doing well prior to her complaints at NSK and that the "repetitive work aggravated the arthritis that was already there." He added that Ms. Callins had been asymptomatic with the shoulder problems and that the repetitive work brought out her symptoms. When asked whether, in his opinion, the surgery performed on Ms. Callins was necessitated by the work injury, Dr. Menz testified that the pain presumably came in part from her repetitive work. He added that, other than shoulder replacement surgery, nothing else can really be done.

Dr. Menz's physical examination of Ms. Callins revealed some limitation of motion but he said she had good strength to the rotator cuff with a well-healed scar with the sensation and muscles intact. He noted that Ms. Callins had been previously active and that her work aggravated the previously existing condition that had been asymptomatic. "More probably than not" the work activities primarily caused the onset of pain. He said he determined that she is at maximum medical improvement when he saw her (on August 31, 2013).

He restricted Ms. Callins' lifting to ten pounds and directed that she perform no work above shoulder height. He said that the AMA Guidelines called for a 20 percent impairment rating for a shoulder replacement. With Ms. Callins' limitation of motion and persistent ache, he modified the impairment up to 24 percent upper extremity impairment. All of his opinions were to reasonable degree or medical certainty. Dr. Menz reviewed the records from physical therapy, Jackson Madison County General Hospital, Sports Orthopedics and Spine, Dr. Wright's notes along with others. He opined that Ms. Callins' treatment arose out of her work injury and was necessary and appropriate.

On cross-examination, Dr. Menz said that Ms. Callins' arthritis did not change because of the work injury but that her pain was aggravated. He explained that during his IME he tested her external rotation and an internal rotation. Dr. Menz said he did not believe that Ms. Callins could return to work in the job she held unless they modified the job within her restrictions.

On redirect examination, Dr. Menz said that if Ms. Callins' pre-employment physical at NSK showed no history or present problems with her shoulder, it would confirm that her work activities "aggravated something that was present but not bothering her." Dr. Menz reviewed the AMA Guidelines and confirmed that 24 percent to the upper extremity converts to 14 percent to the body as a whole.

Finally, Dr. James C. Varner, a board certified orthopedic surgeon licensed to practice in Mississippi, examined Ms. Collins on April 23, 2014, at the request of employer's counsel. He performed an IME and reviewed the deposition transcripts of Ms. Callins, Dr. Wright, and Dr. Menz. Ms. Callins described to him an initial onset of right shoulder symptoms in March 2011 while employed at NSK. He noted that she held different jobs at NSK that required repetitive use of her right shoulder as well as lifting and overhead use of her right upper extremity. Dr. Varner was aware that Ms. Callins initially saw Dr. Wright, who eventually performed a right total shoulder arthroplasty on June 20, 2011.

Dr. Varner stated that the x-ray of Ms. Callins' right shoulder revealed a well-positioned total shoulder replacement and that the x-ray of the left shoulder demonstrated "moderate to severe degenerative arthritis of the glenohumeral joint." During the physical examination, he determined that her range of motion was not within normal limits. His diagnosis at that time was "status post right total shoulder arthroplasty or replacement with residual symptoms or discomfort and restriction of motion." He gave an opinion that the degenerative arthritis predated her employment at NSK. Although he said that exacerbation of irritation of underlying degenerative changes was reasonable or possible, he could not identify any specific anatomical change that he could attribute to her work activities. He saw no evidence in either Dr. Wright's deposition or Dr. Menz's deposition that either described an anatomical change. In his opinion, the total shoulder arthroplasty was the result of degenerative arthritis and not specifically her work responsibilities.

Dr. Varner testified that a total shoulder arthroplasty equates to 24% partial permanent impairment or 14% whole person impairment. He recommended that Ms. Callins not engage in work activities that require active use or lifting at or above shoulder level.

On cross-examination, Dr. Varner listed the other records he reviewed prior to preparing his IME report. He specifically identified records from Sideline Physical Therapy, Jackson-Madison County General Hospital, Dr. Wright, Sports Orthopedic and Spine, and the lab. Dr. Varner said Ms. Callins told him that her right shoulder was fully functional prior to her employment at NSK. Dr. Varner reviewed the NSK pre-employment physical and noted that Ms. Callins was reported to have a normal range of motion. He said that he had no record of pain or functional limitation at the time she began work in August 2010 other than Dr. Wright's notation that Ms. Callins had suffered pain for approximately one year. He agreed that Ms. Callins had a case of "asymptomatic preexisting glenohumeral arthritis" of the right shoulder.

Dr. Varner agreed that it was possible that the work activities could have aggravated her preexisting arthritic condition. He added, however, that he could not be sure that the exacerbation or symptoms were related to the arthritis. He described exacerbation as a temporary effect while aggravation is an anatomical change. Dr. Varner believed that Ms. Callins' work activities "did result in her symptoms."

The trial court made its findings on the record and subsequently released a written order of judgment on June 13, 2014. The trial court accredited Ms. Callins' testimony regarding causation and concluded that Ms. Callins' work-related injury aggravated her pre-existing, though asymptomatic, condition. The court concluded that prior to March 2011, Ms. Callins was able to fulfill her full job duty and that her work activities caused

her to suffer disabling pain. Recognizing that an employer takes an employee "as is," the trial court found that Ms. Callins suffered a compensable injury within the Tennessee Workers' Compensation Act. Next, the trial court found that Ms. Callins failed to make a meaningful return to work. Accordingly, the trial found Ms. Callins 100 percent disabled and awarded her permanent total disability benefits. NSK appealed.

Standard of Review

The standard of review of issues of fact in a workers' compensation case is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Madden v. Holland Group of Tenn.*, 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

In this appeal, NSK contends the trial court erred in determining that Ms. Callins suffered a compensable injury and in finding Ms. Callins permanently and totally disabled. For the reasons discussed below, we disagree.

Aggravation of Pre-existing Condition

In its initial argument, NSK raises two claims of error relating to the trial court's finding of a compensable injury. First, NSK insists that the trial court relied on a compensability standard that has been rejected by the Tennessee Supreme Court. Second, NSK maintains that Ms. Callins failed to carry of her burden of demonstrating that she sustained a compensable injury. These closely-related issues will be addressed together.

It is well settled that an employee seeking workers' compensation benefits must prove every element of her claim by a preponderance of the evidence. *Vandall v. Aurora Healthcare, LLC*, 401 S.W.3d 28, 32 (Tenn. 2013). For an injury to be compensable, the employee must prove that the injury arose out of the work and that it occurred in the

course of employment. *Padilla v. Twin City Fire Ins. Co.*, 324 S.W.3d 507, 511 (Tenn. 2010). Thus, the employee must prove that the injury has a causal connection with the work. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 572 (Tenn. 2008).

Except in the most obvious circumstances, causation must be established by expert medical evidence. *Arias v. Duro Standard Prods, Co.*, 303 S.W.3d 256, 264 (Tenn. 2010). This expert evidence may be supported by relevant lay testimony. *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 274 (Tenn. 2009). Although causation cannot rest on speculative or conjectural evidence, absolute medical certainty is not required. *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004).

Upon review, the courts should resolve all reasonable doubts regarding the weight of the causation evidence in favor of the employee. *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008). When the medical causation testimony is presented by deposition, the reviewing court may independently assess the evidence to determine where the preponderance of the evidence lies. *Williamson v. Baptist Hosp. of Cocke Cnty, Inc.*, 361 S.W.3d 483, 487 (Tenn. 2012).

In this case, Ms. Callins does not contend that her employment at FSK caused her arthritic condition. Instead, she maintains that her work-related injury aggravated or advanced her pre-existing asymptomatic condition. The standard for determining the compensability of an aggravation to an employee's pre-existing condition was clarified by the Tennessee Supreme Court in *Trosper v. Armstrong Wood Products, Inc.*, 273 S.W.3d 598 (Tenn. 2008).

Based on the proof, Ms. Callins had not experienced pain in her right shoulder prior to her employment with NSK. The testimony indicated that she was an active person, participating in karate classes and marathons. NSK conducted a pre-employment physical examination of Ms. Callins and concluded that her shoulder strength and range of motion were normal. Ms. Callins performed various jobs tasks at NSK without pain until early March 2011. According to Ms. Callins' testimony, she was working overtime on a regular basis. She explained that she was placed on a task that required extensive overhead lifting and pressure testing of parts. After a few days on this task, she noted a considerable change in her strength and level of pain. Ms. Callins said that her supervisor took her off the job and informed her that only men would perform the task in the future. Ms. Callins' pain, however, did not subside. At Ms. Callins' request, her supervisor provided a product called Biofreeze which offered no relief. When the pain increased and became "unbearable," Ms. Callins spoke with NSK's human resources director. The HR director offered ibuprofen and suggested that Ms. Callins see a doctor "since her insurance had kicked in." Ms. Callins went to Dr. Wright.

As summarized above, Dr. Wright diagnosed Ms. Callins with osteoarthritis and eventually performed a total shoulder replacement. Drs. Menz and Varner later conducted independent medical examinations. All three physicians agreed that Ms. Callins' arthritic condition was not caused by a work-related injury at NSK. None of the physicians had evidence that Ms. Callins had complained of shoulder pain prior to her employment at NSK. Further, they were each made aware of the pre-employment physical conducted by NSK. Each physician, however, gave slightly different descriptions of the effects of the work-related injury on Ms. Callins' pre-existing condition.

Drs. Wright, Menz, and Varner acknowledged Ms. Callins' complaints of disabling or unbearable pain. Dr. Wright testified that Ms. Callins' work activities could have been a significant contributor to her disabling pain and that these activities aggravated her arthritic condition. He further indicated that the activities could have accelerated Ms. Callins' need for the shoulder replacement surgery. Dr. Wright added that the overhead lifting described by Ms. Callins loaded her shoulder excessively. He said that the repetitive motion and stress would cause an inflammatory condition in her shoulder.

Dr. Menz opined that Ms. Callins' work activities made her previously asymptomatic arthritic condition become symptomatic and that her shoulder surgery was necessitated by her work injury and activities. He explained that shoulder replacement surgery is not typically performed until a person is "pretty disabled by their pain." Dr. Menz testified that more likely than not Ms. Callins' work activities caused her condition. Dr. Varner also agreed that Ms. Callins' work activities could have caused her arthritic condition to become symptomatic. He did not believe that the injury resulted in an anatomical change.

The trial court made the following findings:

[I]t is sufficient for compensability if an asymptomatic condition becomes symptomatic because of a work[-]related injury or if a previously asymptomatic condition produces disabling pain.

Pursuant to Tennessee Workers' Compensation law, the Employers takes an Employee "as is" and assumes responsibility of said Employee having a pre-existing condition aggravated by a work-related injury which might not affect an otherwise healthy person.

The Court finds that the Plaintiff[']s work activities caused her to suffer disabling pain . . .

NSK maintains that the trial court applied an erroneous standard and therefore erred in concluding that Ms. Callins had proven a compensable injury. NSK's argument is premised on its assertion that the *Trosper* court adopted the line of cases that require an anatomical change to demonstrate the advancement of the severity of the pre-existing condition. Because the physicians could not identify an anatomical change, NSK maintains that the trial court erred in awarding benefits.

Indeed, the *Trosper* court discussed the diverging line of cases and the confusion that has arisen in cases involving the aggravation of pre-existing arthritic conditions. *Trosper*, 273 S.W.3d at 605. However, the plain language of the *Trosper* standard does not include the requirement of an anatomical change. The Court's specific holding is 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.

Id. at 607. We therefore consider the evidence and the trial court's determinations in light of this standard.

Under that standard, the work injury must advance the severity of the pre-existing condition, or the employee must suffer a new, distinct injury other than increased pain before the injury is compensable. *Id.*

In this case, NSK took Ms. Callins as they found her and required her to undergo a pre-employment physical. The record contains no evidence that Ms. Callins complained of shoulder pain prior to March 2011. On the contrary, she was described as an active person. The testimony regarding the strenuous tasks assigned to her at NSK supports her claim that the pain resulted from her work assignments. The pain increased to such a degree that Ms. Callins described it as "unbearable" and "disabling." According to the testimony, Ms. Callins often cried due to the pain she was suffering and lost her ability to perform many daily tasks, including shifting gears in her vehicle. The record clearly establishes that the work injury caused more than a mere "increase in pain." Instead, it became disabling to such a degree that surgery was required to alleviate the pain. From our independent review of the record, we are unable to conclude that the evidence preponderates against the trial court's findings.

Permanent and Total Disability

NSK next claims that the trial court erred in finding Ms. Callins permanently and totally disabled. Ms. Callins responds that the evidence does not preponderate against the trial court's findings. Although a close question, we agree with Ms. Callins.

Tennessee Code Annotated, section 50-6-207(4)(B) provides that an employee is considered totally disabled "[w]hen an injury not otherwise specifically provided for in this chapter totally incapacitates the employee from working at an occupation that brings the employee an income. . . ." Our supreme court has indicated that any award of permanent total disability must comply with this statutory section. *Hubble v. Dyer Nursing Home*, 188 S.W.3d 525, 535-36 (Tenn. 2006). In *Hubble*, the Court explained that:

The determination of permanent total disability is to be based on a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court. Such factors include the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability. Though this assessment is most often made and presented at trial by a vocational expert, it is well settled that despite the existence or absence of expert testimony, an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment, is competent testimony that should be considered.

Id. (citations and internal quotations omitted).

As noted, Ms. Callins failed to make a meaningful return to work and was terminated from her employment with NSK. She testified that she was unaware of any other job she could perform at NSK based on her restrictions. Ms. Callins' also indicated that due to her injury she could not return to her former jobs even if they were available to her. She testified that her shoulder still bothers her and that she "can't do any lifting with [her shoulder]." Ms. Callins testified that she is unable to engage in her normal daily activities such as holding her granddaughter, hanging clothes, and vacuuming.

Indeed, Drs. Wright, Menz, and Varner assigned impairment ratings of 28%, 24%, and 24%, respectively to the upper extremity translating into a 14% to 17% impairment to

the body as a whole. Dr. Wright restricted Ms. Callins to twenty pounds for overhead lifting and Dr. Menz restricted her to ten pounds for lifting, pushing, or pulling. Dr. Varner said that Ms. Callins should not lift more than twenty pounds or perform repetitive lifting more than ten pounds. Notably, Dr. Varner testified that she should not engage in any future work that required use or lifting at or above shoulder level. Without question, these limitations played a substantial role in her termination from NSK and severely restricted Ms. Callins' future employment possibilities.

Further, Ms. Callins has a limited education. She attended school through the tenth grade and eventually received her GED some years later. Ms. Callins testified that she attended an emergency medical technician class (EMT) but found the work to be "too stressful." She did not indicate whether she completed a course of study or received a certification as an EMT. Additionally, she studied to be a legal assistant but never received her degree and never worked in the legal field.

Ms. Callins' work history reveals that she has essentially been employed in manual labor factory positions her entire life. She testified that from 1980 through 1984 she was employed on the production line at Brown Shoe. In 1984, she was hired as a laborer at Bryan Custom Plastic (which became Plastex) and remained with the company until it closed in June 2008. Ms. Callins was unemployed from June 2008 to August 2010, at which time she worked for Manpower at the NSK plant. Subsequently, Ms. Callins received unemployment benefits.

NSK maintains that in receiving unemployment benefits, Ms. Callins "certified that she is ready, willing, and able to work" and furthermore "has shown a strong inclination towards expanding her job skills and seeking other lines of work." Certainly, Ms. Callins candidly testified that in accepting unemployment benefits, she was required to make herself available for employment. She added that she would try to do any job she was asked to perform. Ms. Callins testified, however, that no prospective employer ever contacted her. Citing *Williamson v. A.O. Smith Corp.*, No. 2004-00843-SC-WCM-CV, 2005 WL 990578, *4 (Tenn. Workers Comp. Panel Apr. 28, 2005), Ms. Callins admits that "[t]he earnestness of a disabled employee" may be a factor in evaluating the employability of an employee in disabled condition but it is "not a prohibition to a finding of total and permanent disability in the face of substantial evidence to the contrary." NSK also cites *Williamson* in conceding that an employee's "[w]illingness to work in a seriously disabled condition does not make a person employable." *Id.*

Finally, NSK argues that the trial court failed to make adequate findings to support its award of permanent total disability benefits. In its order of judgment, the trial court made specific findings about Ms. Callins' age, educational background, and employment

history. The trial court also detailed the course of Ms. Callins' complaints of pain. In doing so, the court specifically recognized that Ms. Callins was asymptomatic when she passed NSK's pre-employment physical but experienced "unbearable" or "disabling" pain following periods of significant overtime during which she performed tasks later assigned only to men. Upon finding that Ms. Callins suffered a compensable injury, the trial court also found that she failed to make a meaningful return to work. The trial court concluded that "[a]s a result of the subject injury . . . [Ms. Callins] is 100% disabled."

Without question, detailed findings by the trial court aid the reviewing court. Although the trial court could have included additional findings in this case, the trial court was not required to use legal terms of art in finding Ms. Callins totally disabled. The trial court's findings were adequate to convey that Ms. Callins was certainly limited in her employment options based on her age, education, employment history, locale, and residual effects of her injury. No one disputes that she failed to make a meaningful return to work. As NSK recognizes, our review requires us to determine whether the evidence presented at trial preponderates against the trial court's award. Having examined the entire record in light of Tennessee Code Annotated section 50-6-207(4)(B) and the *Hubble* factors cite above, we conclude that the evidence does not preponderate against the trial court's finding that Ms. Callins is permanently and totally disabled.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to NSK Steering Systems America, Inc. and its surety, for which execution may issue if necessary.

BEN H. CANTRELL, SR. JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

DONNA CALLINS v. NSK STEERING SYSTEMS AMERICA, INC.

**Chancery Court for Gibson County
No. 20670**

No. W2014-01225-SC-WCM-WC – Filed November 30, 2015

Judgment Order

This case is before the Court upon the motion for review filed by NSK Steering Systems America, Inc. pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to NSK Steering Systems America, Inc., and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

HOLLY KIRBY, J., not participating