

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

July 22, 2019 Session

MEMPHIS LIGHT GAS & WATER DIVISION v. JOHN PEARSON

**Appeal from the Chancery Court for Shelby County
No. CH-15-0578 JoeDae L. Jenkins, Chancellor**

**No. W2018-01511-SC-WCM-WC Mailed December 3, 2019;
Filed February 26, 2020**

The employee appeals from the trial court's denial of workers' compensation benefits. The employee asserted that a slip and fall suffered at work aggravated pre-existing degenerative conditions in his left shoulder and neck, causing injuries that are compensable under Tennessee's workers' compensation laws. After a trial, the trial court reviewed the testimony at length and held that the employee had failed to establish a compensable injury. The employee's appeal has been referred to this Special Workers' Compensation Appeals Panel for oral argument and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. Discerning no error, we affirm the judgment of the trial court.

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

HOLLY KIRBY, J., delivered the opinion of the court, in which WILLIAM B. ACREE, SR.J., and MARY L. WAGNER, J., joined.

Steve Taylor, Memphis, Tennessee, for the appellant(s), John Pearson

Sean Antone Hunt, Memphis, Tennessee, for the appellee(s), Memphis Light, Gas, & Water Division

**OPINION
FACTS AND PROCEDURAL BACKGROUND**

Defendant/Appellant John Pearson, age 59, is a resident of Memphis, Tennessee.

For twelve years, Mr. Pearson was employed by Plaintiff/Appellee Memphis Light, Gas & Water Division (“MLGW”), a division of the City of Memphis. During his employment with MLGW, Mr. Pearson worked as a utility worker and a bucket truck driver and operator.

On January 16, 2013, Mr. Pearson slipped and fell on ice as he walked from his vehicle to his place of employment, allegedly suffering an injury to his left shoulder and cervical spine. Mr. Pearson notified MLGW of the incident on the same day. However, he did not report it as a work-related injury at the time and would not do so for at least six months.

As an overview of his treatment, over the ensuing year, Mr. Pearson saw a number of physicians for treatment of his shoulder injury. On December 31, 2013, he underwent shoulder replacement surgery. During this same period, Mr. Pearson also saw several physicians for treatment of the injury to his cervical spine. Ultimately, on April 9, 2014, a neurosurgeon performed a spinal fusion on Mr. Pearson.

A detailed recounting of Mr. Pearson’s medical history is necessary for our analysis. In November 2010, Mr. Pearson saw Timothy Krahn, M.D., an orthopedist, for treatment of his left shoulder. At that time, Dr. Krahn determined that Mr. Pearson suffered from post-traumatic arthritis in his left shoulder.

On May 8, 2012, Mr. Pearson saw Michael Lynch, M.D., an orthopedic surgeon, who at the time was a partner in medical practice with Christopher Pokabla, M.D., also an orthopedic surgeon. Mr. Pearson sought treatment from Dr. Lynch for severe arthritis of the left shoulder, and presented with limitations in his range of motion as well as pain. The diagnostic studies performed on Mr. Pearson at that time indicated severe arthritis, specifically end-stage glenohumeral arthritis of the left shoulder. According to Dr. Pokabla,¹ this consisted of loss of joint space, cartilage thin from wear, bone spurs or osteophytes, and some loose bodies. Dr. Pokabla later explained that this condition typically took years to develop.

Following a referral from Dr. Lynch, Mr. Pearson saw Dr. Pokabla on May 10, 2012. At that time, Mr. Pearson reported to Dr. Pokabla that his condition had steadily deteriorated and that his symptoms had persisted for at least two years. Mr. Pearson’s complaints consisted of a limited range of motion, weakness, and mechanical symptoms,

¹ Dr. Pokabla utilized notes and records to discuss Mr. Pearson’s visit with Dr. Lynch, who is deceased.

all of which were worse at night. Dr. Pokabla's examination of Mr. Pearson confirmed the limited range of motion as well as crepitus, which Dr. Pokabla described as "popping and clicking noises [that occur] when you move your joint around." Dr. Pokabla noted that Mr. Pearson's rotator cuff at that time was intact with no tenderness, consistent with Mr. Pearson's x-rays. Dr. Pokabla agreed with Dr. Lynch's assessment of severe arthritis. Based on his x-rays and examination, Mr. Pearson was at that time a possible candidate for shoulder replacement surgery; such surgery would have been a reasonable course of treatment. Instead, however, Dr. Pokabla opted to start with a conservative treatment regimen that involved an intraarticular injection and physical therapy. During that visit, Dr. Pokabla performed the injection and then referred Mr. Pearson for physical therapy.

Mr. Pearson returned to see Dr. Pokabla on June 11, 2012. Mr. Pearson reported that the injection had helped, the pain had decreased, and he was able to sleep. Dr. Pokabla's notes at that time recommended against shoulder replacement surgery in light of Mr. Pearson's work as a manual laborer. Dr. Pokabla later explained that, although he thought Mr. Pearson would need the surgery in the future, Mr. Pearson's work would have had a negative impact on the result of the surgery, by causing the reconstructed shoulder joint to fail. Dr. Pokabla did not see Mr. Pearson again.

The incident that gives rise to this lawsuit occurred on January 16, 2013, seven months after Mr. Pearson last saw Dr. Pokabla. Mr. Pearson did not seek treatment immediately after the incident; he waited four months and finally saw his primary care physician, Reginique Green, M.D., on May 20, 2013. Dr. Green's notes state that Mr. Pearson "present[ed] with complaints of sudden onset constant episodes of moderate shoulder pain, non-radiating." The notes do not mention a work injury.² Dr. Green diagnosed Mr. Pearson as suffering from osteoarthritis of the shoulder. Mr. Pearson later testified that he went to his primary care physician because, at that time, he did not believe that the January 2013 fall was connected to his shoulder pain.

Two months later, on July 24, 2013, Mr. Pearson first sought treatment through MLGW for his January 2013 fall. An MLGW injury report from that day is the first indication in the record that Mr. Pearson believed that his shoulder pain resulted from the January 2013 incident. Two days later, on July 26, 2013, Mr. Pearson visited Lisa Mahan, M.D., at the Baptist Minor Medical Center. Dr. Mahan recorded what Mr. Pearson described in her notes:

John Pearson presents with complaints of gradual onset of constant

² However, Dr. Green's notes mention leg pain and a dragging of Mr. Pearson's right leg.

episodes of severe on the left, described as aching and throbbing, radiating to the left upper arm and left neck[.] On a scale of 1 to 10, the patient rates the pain as 7[.] The symptoms resulted from a fall onto the arm[.] The injury occurred at work[.] Episodes started about January 16, 2013[.] He is currently experience on the left[.] His symptoms are reportedly caused by the injury[.] . . . Symptoms are made worse by physical activity, shoulder motion, shoulder elevation, internal rotation, external rotation, lifting and throwing, but not by gripping[.] Symptoms are worsening[.] Pertinent Medical History[:] no pertinent past history (patient suffered fall at work on 1/16/2013 he fell back and caught himself with his left outstretched arm and hammed his left shoulder—he did not think much of this and has just been taking NSAIDS—he has noticed that the left arm has been getting worse over the past few months to the point that he has difficulty raising the left arm above his head—he is waking at night due to pain—and sometimes it hurts just to have the arm dangle at his side—he is scheduled to see orthopedics on August 5th but is in severe pain mainly at night)[.]

After Mr. Pearson reported the January 2013 fall as work-related, MLGW's workers' compensation carrier provided him with a list of three physicians. From this list, Mr. Pearson selected Randall Holcomb, M.D., an orthopedic surgeon.

Mr. Pearson saw Dr. Holcomb on August 5, 2013, two weeks after he saw Dr. Mahan at the Baptist Minor Medical Center. According to Dr. Holcomb, Mr. Pearson complained of a painful left shoulder that had previously been manageable but worsened after the January 2013 incident when Mr. Pearson tried to break his fall with his outstretched left arm. Mr. Pearson told Dr. Holcomb that he had been able to put up with his worsening symptoms for the two-to-three week period preceding his August 5, 2013 visit. Mr. Pearson described increasing pain and said he was unable to sleep.

Dr. Holcomb conducted a physical examination of Mr. Pearson. It revealed a "classic response of someone that has very little shoulder motion" and "joint contractures indicative of a degenerative joint disease." Dr. Holcomb diagnosed Mr. Pearson with osteoarthrosis³ of the left shoulder, consistent with the previous diagnoses by Drs. Lynch, Pokabla, and Green.

³ "Osteoarthrosis is a synonym for osteoarthritis." *Gonzales v. Comm'r of Social Sec. Admin.*, No. CV 14-0078-JPR, 2015 WL 685347, *5 n.11 (C.D. Cal. Feb. 18, 2015) (citing *Stedman's Medical Dictionary* 1283 (27th ed. 2000)).

However, Dr. Holcomb additionally concluded that Mr. Pearson's degenerative shoulder condition was "complicated by shoulder contusion and sprain chronic." In his later testimony, Dr. Holcomb recalled telling Mr. Pearson about the general ineffectiveness of conservative treatments for arthritis of the shoulder, compared to arthritis of the hip or knee, because the shoulder is "load bearing but not weight bearing" like those other joints. Dr. Holcomb gave Mr. Pearson an injection of Celestone Soluspan, which he described as "the only conservative treatment left for him at that time," and asked him to return in three weeks.

Mr. Pearson returned to see Dr. Holcomb on August 26, 2013, and told Dr. Holcomb that the injection had given him no lasting relief. Elaborating, Mr. Pearson said that, before the January 2013 fall, "he had some difficulty with his shoulder but nothing of the intensity he was experiencing at that time." Dr. Holcomb changed Mr. Pearson's oral medications and asked him to come back in three to four weeks.

Mr. Pearson next saw Dr. Holcomb on September 9, 2013. In that visit, Mr. Pearson reported "no response with the medication." Dr. Holcomb told Mr. Pearson that they had "sort of run through all the arrows in the quiver, so to speak; I had nothing magical to offer him short of replacement of the shoulder." Dr. Holcomb opined that Mr. Pearson suffered from

a preexisting degenerative arthritis that was activated by the trauma. The cartilage that has become osteoarthritic produces chemicals, and those chemicals further break down the bonds that are in the cartilage.

And so a shoulder that is having a slow osteoarthritic deterioration can accelerate because of a burst of energy placed—or injury placed into the shoulder.

....

The injury in the fall—the fall in January—and the fall in January activated the condition to a point where was not able to get back to work.

Due to the aggravation of the injury caused by Mr. Pearson's fall, Dr. Holcomb, as the physician authorized by MLGW's workers' compensation carrier, recommended shoulder replacement surgery.

MLGW, however, denied Mr. Pearson's claim for workers' compensation benefits.

MLGW submitted Dr. Holcomb's recommendation of a left shoulder replacement for Mr. Pearson through utilization review, and it was examined by Dr. James Talmage. Dr. Talmage agreed that shoulder replacement was medically appropriate but concluded that it was not a work-related condition. In his assessment, Dr. Talmage noted that Mr. Pearson's record

contains many facts that show the osteoarthritis pre-existed what appears to have been a minor fall in January 201[3],⁴ and there is *no documentation that he is objectively worse for having had the minor fall.*

The shoulder replacement was "inevitable" in 2012. The surgery is indicated, but not a work related injury.

Based on Dr. Talmage's conclusion, MLGW denied approval for the surgery.

On September 23, 2013, Mr. Pearson filled out a request for assistance from the Department of Labor. To resolve the dispute, Mr. Pearson and MLGW agreed that Mr. Pearson would be "evaluated by a second opinion physician as selected by [Mr. Pearson] from the original panel." The second opinion physician would "be provided with the diagnostic tests and medical records of both Dr. . . . Holcomb and . . . Dr. Talmage, so he can give his opinion as to whether [Mr. Pearson]'s condition is a new work-related injury or a pre-existing not work-related condition and what treatment he might recommend for any work-related injury."

Mr. Pearson selected Jeffrey Dlabach, M.D., an orthopedic surgeon. Dr. Dlabach evaluated Mr. Pearson on October 25, 2013, and concluded:

Mr. Pearson has a documented history of advanced glenohumeral arthritis of his left shoulder dating back to November 3, 2010. X-rays at that time were consistent with advanced glenohumeral arthritis with posterior subluxation and erosions. X-ray studies and CT scan since that time have been consistent. He has been evaluated by Dr. Krahn, Dr. Lynch, Dr. Pokabla, as well as Dr. Holcomb.

Radiographically, Mr. Pearson met criteria for a shoulder arthroplasty dating back to 2010. There has been no real change in his imaging over the past two years.

⁴ We assume—as the context of the letter makes clear—Dr. Talmage's reference to a "fall in January 2012" is a typographical error.

There is no doubt that the treatment recommendation for Mr. Pearson is a shoulder arthroplasty. The question to be answered is causation. There is no documentation of evaluation after a fall in January 2013 until he was evaluated by Dr. Holcomb in August 2013. The progression to shoulder arthroplasty can be seen as inevitable dating back to 2010. The glenohumeral arthritis is pre-existing with no supporting documentation or change in imaging from a fall in January that led to advancement.

Shoulder arthroplasty is indicated for Mr. Pearson's advanced glenohumeral arthritis, but it is not a work-related injury.

In his later deposition testimony, Dr. Dlabach noted that, in 2012, Mr. Pearson was documented as having a long history of shoulder pain and x-rays that revealed "advanced arthritis." He said the term "advanced" means "that terminal stage of arthritis where it really couldn't get much worse in appearance on an x-ray." Dr. Dlabach commented that it would not be typical to wait four months after an aggravating incident such as the January 2013 fall before seeing or seeking any medical treatment. He explained that if it were "an acute aggravation," he would expect the patient to be seen by a physician "within a couple of weeks." In evaluating causation, Dr. Dlabach said, he would not generally relate a condition such as Mr. Pearson's "to something specific if it is four months out."

Ultimately, Dr. Dlabach opined that Mr. Pearson's shoulder pain stemmed from "a chronic issue that was preexisting, [and] that the arthritis was not caused by a fall in 2013." This opinion was based on the fact that Mr. Pearson "had documented x-rays for up to three years prior to that event that revealed advanced arthritis," and "he was a candidate for shoulder replacement before" the January 2013 fall. Dr. Dlabach acknowledged that the January 2013 slip and fall incident could have aggravated Mr. Pearson's problems, but felt that any aggravation would have been merely an "[i]ncrease in symptoms," i.e., "[i]t hurts more."⁵

Mr. Pearson next sought treatment from Apurva Dalal, M.D., an orthopedic surgeon whom Mr. Pearson had previously consulted on an unrelated knee issue.⁶ Dr. Dalal referred Mr. Pearson to Thomas Throckmorton, M.D., the surgeon who ultimately

⁵ Dr. Dlabach also testified that Mr. Pearson did not complain to him of any neck problems when Dr. Dlabach saw him in October 2013.

⁶ Dr. Dalal testified that Mr. Pearson complained of an injury to "his neck and left shoulder" from the January 2013 fall.

performed the shoulder replacement surgery.

In his later deposition testimony, Dr. Throckmorton said that, when Mr. Pearson first came to see him on November 20, 2013, he did not report any type of work injury. Mr. Pearson told Dr. Throckmorton that he had experienced shoulder problems for many years. After reviewing Mr. Pearson's history and performing a physical examination, Dr. Throckmorton echoed prior assessments by opining that Mr. Pearson suffered from left shoulder osteoarthritis. They agreed that shoulder replacement surgery was the best option. Dr. Throckmorton performed the surgery on December 31, 2013.

Even though Mr. Pearson had not initially reported a work injury to him, Dr. Throckmorton testified that Mr. Pearson's January 2013 fall at work aggravated or accelerated his pre-existing shoulder problem by 60% to 65%. He clarified, however, that he was referring to an increase in pain, not a physical change in Mr. Pearson's condition. Dr. Throckmorton explained that shoulder replacement surgery is based on pain relief; he said that Mr. Pearson's surgery was not for pain alone, but it was "predominantly for pain."

Dr. Throckmorton released Mr. Pearson from his care on April 1, 2014, "to activities as tolerated." He assigned Mr. Pearson a permanent partial impairment rating of 20% to the left upper extremity or 12% to the body as a whole.

While he was in the process of obtaining shoulder replacement surgery, Mr. Pearson also sought to address another symptom, the dragging of his right leg. Mr. Pearson had noted that symptom to his primary care physician, Dr. Green, when he visited Dr. Green on May 20, 2013, and Dr. Green ordered an EMG. The results of that test were normal. Mr. Pearson returned to Dr. Green on November 12, 2013 with the same complaint. Dr. Green ordered an MRI for Mr. Pearson's lumbar spine and referred him to a neurologist, Gregory Condon, M.D.

Mr. Pearson visited Dr. Condon on December 16, 2013. The initial assessment suggested a problem in Mr. Pearson's cervical spine. Mr. Pearson saw Dr. Condon again on February 21, 2014, to review the results of the spinal MRI. During this visit, Mr. Pearson informed Dr. Condon of his January 2013 fall and said that he began developing weakness in the legs after the fall. Dr. Condon thought Mr. Pearson might be suffering from cervical myelopathy and referred Mr. Pearson to Glenn Crosby, M.D., a neurosurgeon.

Dr. Crosby saw Mr. Pearson on March 24, 2014. Dr. Crosby reviewed Mr. Pearson's MRI and performed a physical examination, which revealed a degenerative disk

“between C4 and C5, which is in the neck, with spinal cord compression.” Dr. Crosby recommended a cervical fusion operation “to stop the process of the myelopathy and keep the spinal cord injury from worsening.”

Dr. Crosby performed the operation on April 9, 2014. Dr. Crosby’s operative report indicates that the disc space was “very sclerotic and spondylotic,” that “[v]ery little soft disc was present,” and noted a “very large spondylotic spur.” By his May 19, 2014 follow-up visit with Dr. Crosby, Mr. Pearson had a complete resolution of his symptoms.

On October 7, 2014, counsel for Mr. Pearson requested Dr. Crosby’s opinion on whether the January 2013 fall caused, accelerated, or aggravated the pre-existing cervical problems that led to his cervical fusion surgery. Dr. Crosby responded by letter dated November 21, 2014. Dr. Crosby said that, assuming the facts as provided by Mr. Pearson’s counsel and as verified by Mr. Pearson’s medical records to be true, the January 2013 fall aggravated or accelerated Mr. Pearson’s pre-existing cervical problems which in turn made the fusion surgery necessary. Subsequently, Dr. Crosby testified that the January 2013 fall at work was 75% of the cause of Mr. Pearson’s cervical problems because it aggravated the underlying issue that made the cervical surgery medically necessary. He assigned Mr. Pearson a permanent partial impairment rating of 8% to the body as a whole with respect to his cervical spine. Dr. Crosby recognized that the spinal cord compression resulted from wear and tear, and the bruise or lesion in the spinal cord was due to the degenerative disk; it was a degenerative, progressive process that took years to develop. He acknowledged that the condition “is caused essentially or most of the time by age.” He noted that Mr. Pearson also had a bone spur pressing on his spinal cord, and said that “an injury did not cause that spur to form.” Dr. Crosby conceded that he did not know when Mr. Pearson became symptomatic relative to the January 2013 fall and that it was possible that Mr. Pearson’s problems were simply degenerative, with no precipitating event. He admitted that he had no way to know whether, absent the fall, Mr. Pearson would have had the same problems requiring the same surgery.

Dr. Holcomb also gave deposition testimony about his treatment of Mr. Pearson. Dr. Holcomb acknowledged that Mr. Pearson’s left shoulder was symptomatic at least six to seven months before the January 2013 fall. He conceded that Mr. Pearson had pre-existing severe left shoulder osteoarthritis and the only way to fix such a condition is shoulder replacement surgery. Dr. Holcomb said that the fall did not cause Mr. Pearson’s condition but may have increased his pain. Dr. Holcomb agreed that what he saw on his August 2013 x-ray of Mr. Pearson’s shoulder was the same thing that Drs. Krahn and

Lynch found when they examined Mr. Pearson in 2010 and 2012 respectively.⁷ Dr. Holcomb essentially agreed with the findings of the second opinion physician, Dr. Dlabach, but disagreed with Dr. Dlabach's ultimate conclusion that the January 2013 fall did not aggravate Mr. Pearson's arthritis.

He agreed with Dr. Dlabach that "the progression to shoulder arthroplasty can be seen as inevitable dating back to 2010," when Mr. Pearson saw Dr. Krahn, and that the "x-rays at that time were consistent with advanced glenohumeral arthritis with posterior subluxations and erosions." Dr. Holcomb agreed the "glenohumeral arthritis is preexisting with no supporting documentation or change in imaging from . . . a fall in January that led to an advancement." Dr. Holcomb recognized that Mr. Pearson's shoulder condition in August 2013 most likely resulted from a combination of genetics, high school football injuries, and the January 2013 fall, and was unable to say that one factor was more important than the others. Despite this acknowledgment, Dr. Holcomb also testified that Mr. Pearson's work-related January 2013 fall was 55% of the cause of his need for shoulder replacement surgery.

Mr. Pearson's counsel referred him to Dr. Dalal for an independent medical examination, which was performed on January 21, 2015. Dr. Dalal took a medical history that included the January 2013 fall and his subsequent treatment for the left shoulder and cervical spine. Mr. Pearson reported to Dr. Dalal that, although both surgeries helped, he still had some problems lifting weights or performing overhead work, due to pain, mild weakness, some tingling and numbness in his arms, and decreased motion in his neck. Dr. Dalal also reviewed Mr. Pearson's medical records with respect to his shoulder and cervical spine, both before and after the January 2013 fall, and examined Mr. Pearson as well. Dr. Dalal opined that Mr. Pearson's injuries were 80% (shoulder) and 75% (cervical spine) due to the fall at work, which aggravated or accelerated his pre-existing shoulder and cervical problems and in turn made the cervical and shoulder surgeries medically necessary. Dr. Dalal assigned an overall impairment rating of 22% to the body as a whole.

Dr. Dalal acknowledged that Mr. Pearson already had arthritis in his shoulder and symptoms prior to the January 2013 fall and that this condition would have led to shoulder replacement surgery. He conceded that orthopedic surgery such as Mr. Pearson's shoulder surgery is based the patient's reported symptoms, not the patient's x-rays. He acknowledged the only thing that could have resulted from the January 2013 fall was an

⁷ Prior to his deposition testimony, the only prior treatment of Mr. Pearson of which Dr. Holcomb was aware was that of Dr. Holcomb's partner, Dr. Krahn.

increase in Mr. Pearson's symptoms, and, in particular, his pain. Dr. Dalal viewed the increase in Mr. Pearson's shoulder pain following his fall as a progression or advancement of his pre-existing arthritic condition.

With respect to Mr. Pearson's cervical spine, Dr. Dalal acknowledged that Mr. Pearson did not complain about or seek treatment for his spine until approximately March 2014, over a year after the January 2013 fall.

On April 28, 2015, MLGW filed a complaint for determination of workers' compensation benefits against Mr. Pearson in the Chancery Court of Shelby County. The matter was tried on July 2, 2018.

The trial court issued its findings of fact and conclusions of law on July 31, 2018, ruling in favor of MLGW. After hearing Mr. Pearson's testimony and reviewing the deposition testimony of the physicians, the trial court concluded that Mr. Pearson had failed to establish by a preponderance of the evidence that he suffered a compensable, work-related injury. The trial court noted that, under Tennessee law, an increase in pain or other symptoms does not alone constitute a compensable aggravation of a pre-existing injury. It commented that it was "at best . . . conjectural to decide that any increase in pain or increase in symptoms suffered by Mr. Pearson was the result of the slip and fall accident, rather than the result of the natural aging progression of Mr. Pearson's pre-existing arthritic condition." Noting the conflicting testimony on whether Mr. Pearson's shoulder injury was work related, the trial court said that it found the testimony of Dr. Talmage and Dr. Dlabach to be the most persuasive. On that basis, the trial court concluded that Mr. Pearson had failed to carry the burden on whether the shoulder injury was work-related. As to Mr. Pearson's claim for compensation benefits based on his cervical spine injury, the trial court found that the claim was barred by statutory notice provisions and the statute of limitations because Mr. Pearson did not provide MLGW notice of the injury within thirty days and did not request the required benefit review conference within one year of the injury.

Mr. Pearson now seeks review from this Panel on the following issues:

- 1) Did Mr. Pearson's fall at work aggravate or accelerate his pre-existing condition to the point that the neck and shoulder surgeries were warranted under the law?
- 2) Did the Defendant/Appellant, Mr. Pearson give timely notice of his cervical injury to his employer and file within the applicable statute of limitations?

- 3) Is Mr. Pearson's degree of permanent anatomical impairment 22% to the body as a whole due to his injuries in this cause?
- 4) Does the law allow Mr. Pearson to recover 1½ times the appropriate impairment rating?

STANDARD OF REVIEW

In a workers' compensation action, the applicable standard of review is governed by statute: "Review of the trial court's findings of fact shall be 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) (2008) (applicable to injuries occurring on or before January 1, 2014). When the trial judge has had the opportunity to observe a witness's demeanor and to hear in-court testimony, considerable deference is given to the trial court's factual findings. *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009). However, when the record contains expert medical testimony presented by deposition, as is the case here, the reviewing court may draw its own conclusions with respect to the weight and credibility of the evidence. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). The trial court's conclusions of law are reviewed de novo without a presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

ANALYSIS

We note at the outset that Mr. Pearson's injury occurred in January 2013. Accordingly, this case is governed by the "old" workers' compensation statutes. *Cf. Coleman vs. Armstrong Hardwood Flooring Co.*, No. W2017-02498-SC-R3-WC, 2019 WL 1578706, at *4 (Tenn. Workers Comp. Panel Apr. 12, 2019). It involves the claimed aggravation of a pre-existing condition; it is undisputed that Mr. Pearson suffered from pre-existing arthritis in his left shoulder and cervical issues, including spondylosis and sclerosis, prior to his fall in January 2013. In this context we look at whether Mr. Pearson suffered a compensable injury, as defined by the statute, as a result of the slip and fall at work.

Under both the old and new workers' compensation regimes, "[e]very employer and employee subject to this chapter, shall, respectively, pay and accept compensation for personal injury or death by accident arising out of and in the course of employment without regard to fault as a cause of the injury or death" Tenn. Code Ann. § 50-6-103(a) (2014) (applicable to injuries occurring prior to July 1, 2014); Tenn. Code Ann. § 50-6-

103(a) (2014) (applicable to injuries occurring on and after July 1, 2014) (stating the same). In order to be compensable, the injury must have “aris[en] out of and in the course of employment.” Tenn. Code Ann. § 50-6-102(12)(A) (2014) (applicable to injuries occurring prior to July 1, 2014); *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008) (stating the same); *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001) (same).

As noted by the trial court below, the statutory terms “arise out of” and “in the course of” are not synonymous. *See, e.g., Foreman*, 272 S.W.3d at 571 (citing *Glisson v. Mohon Int’l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006); *Houser*, 36 S.W.3d at 71 (citing *Sandlin v. Gentry*, S.W.2d 897, 901 (Tenn. 1957)). The term “‘arising out of’ employment refers to causation.” *Clark v. Nashville Machine Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004) (citing *Hill v. Eagle Bend Mfg. Inc.*, 942 S.W.2d 483, 487 (Tenn. 1997); *Reeser v. Yellow Freight Sys., Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997)). “An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.” *Clark*, 129 S.W.3d at 47 (citing *Fink v. Caudle*, 856 S.W.2d 952, 958 (Tenn. 1993)). Thus, “an injury purely coincidental, or contemporaneous, or collateral, with the employment, . . . will not cause the injury . . . to be considered as arising out of the employment.” *Foreman*, 272 S.W.3d at 572 (quoting *Jackson v. Clark & Fay, Inc.*, 270 S.W.2d 389, 390 (1954)). In contrast, the term “in the course of employment” requirement “focuses on the time, place, and circumstances of the injury.” *Clark*, 129 S.W.3d at 47 (citing *Hill*, 942 S.W.2d at 487). An employee suffers an injury “in the course of employment” if the injury takes place “while the employee is performing a duty he or she is employed to perform.” *Id.* (citing *Fink*, 856 S.W.2d at 958).

In a workers’ compensation suit, the employee bears the burden of proving every element of his claim by a preponderance of the evidence. *Foreman*, 272 S.W.3d at 572; *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 543–44 (Tenn. 1992). To prove causation, the employee must show that the “injury has a rational, causal connection to the work.” *Braden v. Sears, Roebuck & Co.*, 833 S.W.2d 496, 498 (Tenn. 1992). “Although absolute certainty is not required for proof of causation, medical proof that the injury was caused in the course of the employee's work must not be speculative or so uncertain regarding the cause of the injury that attributing it to the [employee’s] employment would be an arbitrary determination or a mere possibility.” *Tindall v. Waring Park Ass’n*, 725 S.W.2d 935, 937 (Tenn. 1987) (citations omitted); *Clark*, 129 S.W.3d at 47. “If, upon undisputed proof, it is conjectural whether disability resulted from a cause operating within [the employee’s] employment, or a cause operating without [her] employment, there can be no award.” *Tibbals Flooring Co. v. Stanfill*, 410 S.W.2d 892, 897 (1967); *Foreman*, 272 S.W.3d at

In this case, it is undisputed that Mr. Pearson's January 2013 slip and fall arose out of and in the course of his employment. The question is whether his shoulder and spinal troubles are sufficiently related to that fall. There is considerable caselaw on whether an injury constitutes a compensable aggravation of a pre-existing condition. *See, e.g., Hill*, 942 S.W.2d at 488 (finding an employee's pre-existing back condition that was permanently worsened by work related injury was compensable); *Fink*, 856 S.W.2d at 959 (ruling a work injury advanced the severity of employee's pre-existing condition); *Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992) (finding an employee's injury was not compensable because employee's knee condition was independently progressive and his employment did not advance the severity of his condition or cause a disabling condition); *Cunningham v. Goodyear Tire & Rubber Co.*, 811 S.W.2d 888, 891 (Tenn. 1991) (finding no compensable injury where employee's work aggravated his pre-existing condition by making the pain worse but it did not otherwise injure or advance the severity of his osteoarthritis).

"[A]n injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability, if a work connected accident can be fairly said to be a contributing cause of such injury." *Fink*, 856 S.W.2d at 958. Nonetheless, the injury is "not compensable if it results only in increased pain or other symptoms caused by the underlying condition." *Sweat v. Superior Indus., Inc.*, 966 S.W.2d 31, 32 (Tenn. 1998); *Boling v. Raytheon Co.*, 448 S.W.2d 405, 408 (Tenn. 1969). In 2008, our Supreme Court reaffirmed this point of law:

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.

Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 607 (Tenn. 2008). Thus, if an injury does not cause an actual progression or aggravation of the underlying, pre-existing condition, the claim is not compensable. *See Cunningham*, 811 S.W.2d at 890. Specifically, if the injury results only in an increase in pain with no corresponding permanent anatomical change, then there is no new compensable injury. *Barnett v. Milan Seating Sys.*, 215 S.W.3d 828, 835 (Tenn. 2007).

Here, Mr. Pearson asserts that the trial court erred in concluding that the aggravation of the pre-existing conditions in his neck and shoulder did not constitute compensable injuries. MLGW maintains that the trial court should be affirmed because any aggravation in these conditions constituted no more than an increase in pain and would therefore not be compensable.

The trial court below was presented with contradictory medical testimony. Overall, we agree with the trial court's assessment of the testimony.

After reviewing the medical testimony, the trial court observed that, while the "medical professionals disagree on whether or not the slip and fall injury aggravated Mr. Pearson's preexisting arthritic condition in his left shoulder, they all seem to agree on one thing: if there was an aggravation it was simply an increase in pain." It also noted several undisputed facts in this case: Mr. Pearson (1) suffered from a pre-existing arthritic condition of his left shoulder; (2) saw multiple physicians prior to his slip and fall in January 2013, at least one of whom said shoulder replacement surgery would be necessary at some point in the future; and (3) was not asymptomatic at the time of his slip and fall injury in January 2013. It is also undisputed that Mr. Pearson did not seek medical treatment for his left shoulder injury for at least four months after the January 2013, slip and fall incident. With this array of facts, the trial court concluded that it was "at best . . . conjectural to decide that any increase in pain or increase in symptoms suffered by Mr. Pearson was the result of the slip and fall accident, rather than the result of the natural aging progression of Mr. Pearson's pre-existing arthritic condition."

Looking first at the testimony related to Mr. Pearson's shoulder, the trial court noted that "Dr. Dalal, Dr. Holcomb and Dr. Throckmorton have all testified on behalf of Mr. Pearson that his shoulder injury and his need for shoulder surgery resulted from his slip and fall injury on January 16, 2013." On the other hand, Dr. Talmage's report and Dr. Dlabach's testimony indicated "affirmatively that Mr. Pearson's shoulder condition pre-existed and was not work related." The trial court correctly observed:

Both Dr. Holcomb and Dr. Dlabach are physicians chosen by the employee from the panel of physicians required by Tennessee Code Annotated § 50-6-204 and are, therefore, both entitled to the presumption provided by Tennessee Code Annotated § 50-6-102(12)(A)(ii) which provides "[t]he opinion of the physician, selected by the employee from the employer's designated panel of physicians pursuant to §§ 50-6-204(a)(4)(A) or (a)(4)(B), shall be presumed correct on the issue of causation but said presumption shall be rebutted by a preponderance of the evidence." Tenn. Code Ann. § 50-6-

102 (Effective: July 1, 2012 to June 30, 2014).

In resolving these conflicting opinions, it is important to note, as the trial court observed, that only Drs. Talmage and Dlabach were “privy to all of the pertinent medical records and all of the history of Mr. Pearson’s shoulder condition prior to formulating their opinions.” With that knowledge, “Dr. Dlabach testified that Mr. Pearson’s shoulder surgery was ‘inevitable’ dating back to 2010 and was not related to his January 16, 2013 slip and fall incident at work.” Dr. Dlabach’s testimony was supported by Dr. Talmage’s report, opining that Mr. Pearson’s shoulder condition was pre-existing and the shoulder surgery was “inevitable.” Given that Dr. Dlabach’s opinion was entitled to the same statutory presumption of correctness as that of Dr. Holcomb, and considering the fact that only Drs. Talmage and Dlabach were fully privy to Mr. Pearson’s history when they formulated their opinions, we agree with the trial court that the opinions of Dr. Talmage and Dr. Dlabach are most persuasive.

Regarding the cervical spine injury alleged by Mr. Pearson, the trial court found that it had the same flaw as the shoulder injury. “Mr. Pearson did not seek any medical treatment until December 2013 for the alleged neck injury. Plus, Dr. Crosby indicates that Mr. Pearson never mentioned that he suffered an injury at work during his treatment with Dr. Crosby.” In addition, Dr. Crosby acknowledged that Mr. Pearson’s neck condition is “caused essentially or most of the time by age.” We agree with the trial court that it would be conjectural “to conclude that Mr. Pearson’s neck injury, which did not provide symptomatology until nearly a year later, was the result of the slip and fall incident on January 16, 2013, rather than the result of aging.”

After a careful review of the record, we cannot say that the evidence preponderates against the trial court’s findings, nor can we disagree with its conclusions of law. Accordingly, we affirm the trial court’s holding that Mr. Pearson failed to prove that the injuries to his left shoulder and cervical spine were caused by the January 2013 fall at his workplace, and therefore failed to prove causation.

This holding pretermits the other issues raised on appeal.

CONCLUSION

Discerning no error, the judgment of the trial court is affirmed. Costs on appeal are taxed against Appellant John Pearson and his surety, for which execution may issue if necessary.

HOLLY KIRBY, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

MEMPHIS LIGHT GAS & WATER DIVISION v. JOHN PEARSON

**Chancery Court for Shelby County
No. CH-15-0578**

No. W2018-01511-SC-WCM-WC – Filed February 26, 2020

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by John Pearson 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 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 John Pearson, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

HOLLY KIRBY, J., not participating