IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 18, 2004 Session

# WILLIAM SEALE v. CHURCH OF GOD d/b/a PATHWAY PRESS

**Direct Appeal from the Chancery Court for Bradley County**
**No. 00422 Jerri S. Bryant, Chancellor**

**Filed August 31, 2004**

**No. E2003-01559-WC-R3-CV - Mailed May 24, 2004**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found the claim was compensable and ordered the employer to provide medical treatment of total knee surgery. The employer contends the employee's condition was the result of pre-existing condition of arthritis and did not result from the accident. Judgment of the trial court is affirmed.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed**

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and H. DAVID CATE, SP. J., joined.

C. J. Barnett and Barrett M. Estep, Memphis, Tennessee, for Appellant, Church of God d/b/a/ Pathway Press.

Harry F. Burnette and Kent T. Jones, Chattanooga, Tennessee, for Appellee, William Seale.

## MEMORANDUM OPINION

This appeal has resulted from the entry of an order finding the accident in question was the cause of the employee's injury and condition and finding the employer was liable for providing immediate medical treatment of total knee surgery. The trial court certified, pursuant to Rule 54.02, Tenn. R. Civ. P., that the order was final and there was no just reason or cause for delay. Such certification created a final judgment appealable as of right under Rule 3, Tenn. R. App. P. *See* ***Fox v. Fox***, 657 S.W.2d 747 (Tenn. 1983).

## Limited Facts

The employee, William Seale, was injured on December 17, 1999, while employed as a warehouse manager at defendant's bookstore, Pathway Press. The accident happened when he was moving a one thousand-pound skid with a manual pallet jack. He testified that when he stopped the skid and was pushing it back where he was planning on putting it, his knee popped. He was immediately seen by Dr. Gary J. Voytik who operated on his knee during January 2000. He returned to light duty work in March 2000 and resigned from employment due to personal family reasons in April of the same year. The doctor released him for full duty work during May 2000.

On September 19, 2000, he was seen by Dr. H. Barrett Heywood III and he recommended that he should undergo total knee arthroplasty.

Prior to the accident, Mr. Seale had problems with the same knee and had surgery performed during the early 1980's and again in 1997. He testified he had healed well after these operations and could do almost anything that needed to be done at work or at his home and that before the December 17 incident, he was not having any problems with the knee.

Mari Anne Seale, the employee's wife, testified her husband was not experiencing any problems with his knee before the accident and that at the time of the trial during April 2003, he could not use his knee as he did in the past.

After leaving employment with Pathway Press, Seale worked at some part-time jobs and at the time of the trial, he was employed as a cashier with Christian Book Liquidators. He also testified he had not been involved in an accident or incident injuring his knee anytime after December 17, 1999.

## Medical Evidence

Dr. Gary J. Voytik, an orthopedic surgeon, testified by deposition and stated he first prescribed a knee brace and administered cortisone injections; that the employee continued in a great deal of pain and he performed arthroscopic surgery on January 14, 2000; that surgery indicated there was a vertical tear of the cartilage or the brake pad of the left knee and there was a tremendous amount of arthritis on the inside of the knee and about the kneecap mechanism. At another point in his testimony, he stated the shinbone and thigh bone were just about bare bones; and that the meniscus injury was apparently caused by the accident but the arthritis was a pre-existing condition.

After surgery Dr. Voytik prescribed a physical therapy program which Mr. Seale enrolled in and appeared to go through the program without intervening problems. The doctor also said he had suffered postoperative gout and that trauma can trigger this problem if conditions are right. The doctor opined his medical impairment was 10 percent to the left leg or 4 percent to the whole body. He stated the employee would eventually need total knee arthroplasty.

Dr. H. Barrett Heywood III, also an orthopedic surgeon, saw the employee on September 19, 2000 and testified by deposition. He stated Seale walked with a limp and that x-rays indicated the femoral side of the knee joint had shifted medially on the tibia and it was merely bone to bone. He said he had osteoarthritis of the left knee and the accident and physical injury had significantly aggravated this condition. The doctor recommended immediate surgery to perform a total knee arthroplasty and said this had not been accomplished because the workers' compensation carrier would not approve it. In his present condition, he gave a medical impairment of 50 percent to the left leg or 20 percent to the body as a whole.

## Standard of Review

Our review of the case is *de novo* accompanied by a presumption that the findings of the trial court are correct unless we find the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings. ***Richards v. Liberty Mut. Ins. Co.***, 70 S.W.3d 729 (Tenn. 2002). However, on appeal the reviewing court may draw its own conclusions about the weight and credibility of expert testimony when the medical proof is presented by deposition since we are in the same position as the trial court to evaluate such testimony. ***Houser v. Bi-Lo Inc.***, 36 S.W.3d 68 (Tenn. 2001).

## Analysis

The employer acknowledges that former employee Seale has a valid claim for his physical injury but insists that his pre-existing arthritis condition was the cause of his need for total knee surgery and that his physical injury would not warrant surgery of that nature. We have closely examined the record and disagree with this contention.

An employer is responsible for workers' compensation benefits, even though the claimant may have been suffering from a serious pre-existing condition or disability, if employment causes an actual progression or aggravation of the prior disabling condition or disease which produces increased pain that is disabling. Thus, an employer takes an employee as he or she is and assumes the responsibility of having a pre-existing condition aggravated by a work-related injury which might not affect a normal person. ***Hill v. Eagle Bend Mfg., Inc.***, 942 S.W.2d 483 (Tenn. 1997); ***Fink v. Caudle***, 856 S.W.2d 952, 958 (Tenn. 1993).

The evidence indicates that prior to the work-related injury of December 1999, the employee was able to do heavy labor and was not suffering from his pre-existing arthritic condition. Dr. Heywood testified the accident significantly aggravated his prior conditions and this seems to be evident by all of the problems he was having even after undergoing surgery during January 2000. It is argued that he must have had another accident or injury after being released by Dr. Voytik and before seeing Dr. Heywood. The employee denies any incident of this nature and Pathway Press has not offered any evidence to support this assertion. The trial court resolved these contentions in favor

of the employee and the evidence does not preponderate against this finding.

The employer places a great deal of reliance on an answer of Dr. Heywood to a hypothetical question which was propounded to the witness as follows:

> A. You want me to assume that he returned to work in May?
>
> Q. He was able to at least physically able to return to work in May with a 10 percent impairment to the left lower extremity, able to do even leg presses or weights of 65 pounds 30 times without symptoms or increase in symptoms. Hypothetically if he was in that condition in May 2000 what would have had to have occurred to lead to the condition he was in in September?
>
> A. Something catastrophic.

We find the question was not properly framed as the question was not an accurate assumption of the facts in evidence. It was also misleading in that the employee resigned from employment in April 2000 and did not ever return to work at his regular job and heavy work duties. He did work at some part-time jobs after leaving employment with Pathway Press and some of this work was not physically demanding. For these reasons, we do not give the answer to this question any weight.

## Conclusion

Since the evidence does not preponderate against the findings of the trial court, the final judgment on this issue is affirmed, and the case is remanded for the purpose of enforcement of this order and the determination of all other issues. Costs of the appeal are taxed to the employer.

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ROGER E. THAYER, SPECIAL JUDGE

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## JUDGMENT ORDER

This case is before the Court upon the motion for review filed by the appellant, Church of God d/b/a Pathway Press, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

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.

The appellee, William Seale, has also filed a motion for frivolous appeal, which the Court has considered and finds to be without merit. Accordingly, the motion is denied.

Costs are assessed to the appellant, Church of God d/b/a Pathway Press, and its sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Barker, J., not participating