ORAL ARGUMENT – 03/27/02
01-0358
EXCEL V. APODACA

COHAN: In this negligence case the CA affirmed judgment on the verdict for plaintiff even though no witness, expert or otherwise, testified that plaintiff's injury would not have occurred or probably would not have occurred but for Excel's negligent act or omissions.

Plaintiff, Jimmy Apodaca, had been employed at Excel for 17 years doing physically demanding work, including heavy lifting. The last three years of his employment at Excel, he had taken a different job operating a cryovac machine which he had bid for because of his seniority with the company. It was a job that required less heavy lifting. That job required him to grab a bag filled with meat, to slide the meat into a work area, place it on a plate where it would be sealed and the air eliminated from the bag and moved on. The weight of the bags varied from 3 to 20 pounds.

Excel is a nonsubscriber to the Texas Workers Comp system, which means that the plaintiff had the obligation here to show that Excel was negligent in order to recover. The plaintiff alleged that he suffered at least 3 distinct cumulative trauma disorders to his hand, to his neck, and to his back. In substance Apodaca contended that the cryovac operator's job required him to bend his body too much, to reach too far, and to process too many bags of product because the chain speed was too fast.

At trial there was conflicting medical testimony. Usually not a good thing for a petitioner coming to this court to say when arguing that there was no legally sufficient evidence. But the conflicting testimony was not about whether Excel's negligent act or omission was a proximate cause of plaintiff's injury. The conflicting medical testimony was whether the injuries were work related. And that's simply not enough.

There was no medical testimony, no other expert testimony and no lay testimony that the plaintiff's injuries were proximately caused by any negligent act or omission of Excel.

HANKINSON: Would a plaintiff in these circumstances with this type of injury, and the type of allegations of negligence that have been made, ever be able to show that the conduct of the employer or the failure to act by the employer in fact caused the injury?

COHAN: Yes. I think there are a number of ways that a plaintiff could make that showing in a case such as this. A plaintiff could produce medical evidence if in fact it were the case that reaches of a certain distance, stretch a certain part of the body too much could present medical evidence that a certain number of repetitions within a given time is not healthy, whereas a smaller number would be alright.

HANKINSON: There was testimony of that. That in fact there was testimony that had there been more frequent breaks, with the one minute for every ten minutes, or some sort of a mechanical eye that would allow the employee to control more of the case of the work and various other things. That there had been some government studies or whatever that indicated that those kinds of adaptations to the work place would have reduced the risk of this type of injury.

COHAN: I don't think there was any evidence of that. I think there was evidence, there was testimony that the employees would have liked to have had those things, would have liked more frequent breaks, would of liked to have had the electronic eye. But there was no evidence that any of those things would have reduced substantially the number of injuries so that one could say that but for those things this injury probably would not have happened.

HANKINSON: Would it be enough for the employee had there been such evidence that if these modifications had been made in the work environment by the employer, and there was some evidence that showed for a cumulative trauma disorder, that in fact that the incidents rates was lower, and the employee in fact exhibits and there is testimony that they have a cumulative trauma disorder, would that be sufficient evidence?

COHAN: I think it could be if the evidence reached that degree.

HANKINSON: The employee would not have to have testimony that in fact had they only had to reach 12 inches rather than 15 inches, or had they had a break every 10 minutes that they would not have had the particular injury that they claimed, that they wouldn't have to get that specific?

COHAN: I don't think it would have to be so specific that they actually could prove that this particular injury absolutely would not have happened. I think what the court has said is, would have to show that it probably would not have happened based on evidence.

HANKINSON: So I take it then that if that were the case, then the 5th circuit's decision in Gutierrez, the problem that you see with it is not the test that perhaps they set out, but the fact that they tied the injury to the work environment rather than the conduct of the employer?

COHAN: I think that's right.

HANKINSON: Otherwise you don't quibble with the way they analyzed the evidence?

COHAN: No I don't. I think that this is a case where there are several different types of evidence the plaintiff could put on, none of which were put on here. For example, Excel had some cryovac machines that did have an electronic eye. There was no attempt here to compare the injury rates on the machines with the electronic eye and those without the electronic eye. That would have been something that could have been done. These are the kinds of things that are susceptible to...

HANKINSON: And that would be sufficient proof?

COHAN: If the differences were statistically significant enough and if there were competent testimony that that's what happened, I think that could be sufficient proof.

We think that this case is in fact controlled by the court's decision in Leitch, and by the court's decision more than 30 years ago in Linger vs. Physicians General Hospital. In Leitch, which was just over 5 years ago, the employee suffered a back injury from lifting heavy cable reel, and was not supplied with a lift belt or other lifting equipment by the employer. The court assumed that the injury was work related. Assumed that the employer had a duty to provide the employee with proper lifting equipment. But held that there was not sufficient evidence of proximate cause because there was no evidence that the injury would not have occurred or probably would not have occurred but for the proper lifting equipment. The Leitch court relied on Linger v. Physicians General Hospital, which was the case where the nurse had failed to follow the doctor's orders and had given solid food to the patient, the patient's sutures ruptured. Held again no legally sufficient evidence of proximate cause because there was not testimony that said that the sutures would not have ruptured in the absence of the solid food or could make a sufficient tie between the alleged negligent act and the injury.

The court in both cases said that these are simply not areas where the jury may determine by general knowledge and common experience of what the result would be. We think that's at least as much the case in a situation like this. The argument here was that the chain speed in which the cattle came down the line should have been reduced from 240 per hour to 200 per hour. But there was no evidence whatsoever that that would have made a difference, that you wouldn't have had just as many injuries at a speed of 200 per hour as you would at 240 per hour. And that's simply not the kind of determination that a jury is expected to be capable of making from common knowledge.

JEFFERSON: The juror that voted in your favor replaced the juror that you say should have been disqualified? How can you show harm under the court's failure or refusal to disqualify him?

COHAN: Yes. Under this court's standard in the Hallett case, harm is established at the time that the objecting party does two things prior to submitting its peremptory strikes to the court. First, the court has asked that a juror be excused because that was done here; second, the objecting party informs the court that having to use all of its peremptory challenges it would be left with an objectionable juror. In this case, the objectionable juror who would remain was Joe Brown. The argument and the rationale of the CA in affirming here was that there would not have been any harm because Joe Brown was one of 2 jurors who did not vote for liability for the plaintiff. We think it would be unwise for this court to depart from that standard simply on the basis of the way in which the juror voted. There are any number of reasons why a party does not want a particular juror on the panel that may go beyond which way the party thinks that the juror is going to vote.

We don't have evidence here of what deliberations took place in the jury room

other than the affidavits saying which way the jurors voted. We think it would be unwise for this court to go to that next step and say, well we're going to make an exception and not find harmful error in the circumstance where the juror's vote happened to be for the party that objected. It would encourage in future cases parties to try to inquire into the deliberative process within the jury room to go beyond what the actual vote was. This court has a bright line standard in Hallett that we think is an appropriate standard and should be complied with.

BAKER: Does Hallett just really talk about how to preserve that error rather than whether there is harm or not? Does Hallett go as far as Justice Jefferson's question asked you?

COHAN: I think Hallett probably does not go that far. I think we're maybe somewhat in between the distance that Hallett goes and...

BAKER: What is the bottom line basis of the claim that I was required or forced to take an objectionable juror? What is your argument? That that then caused the rendition of an improper judgment? What is the rationale of why that should be error?

COHAN: Well this court has said that error is established at the time that the party...

BAKER: But you said that Hallett doesn't say that. It just says here's how you preserver this error.

COHAN: Hallett does not explicitly say that because the situation so far as we know wasn't there in Hallett.

BAKER: Well why shouldn't there be a harm analysis?

COHAN: The harm is simply presumed to occur if you have established and one establishes...

BAKER: What is the harm presumed?

COHAN: Is that there was an improper verdict.

BAKER: So was I correct in saying that if you get a bad juror the harm presumed is that it would result in an improper verdict/judgment?

COHAN: Yes.

BAKER: So your view is, you don't have to show that harm, or if the evidence shows that the juror that you got didn't harm you it still doesn't make any difference?

COHAN: I think that the harm is presumed and that the harm is not conclusively reputed

by showing that that juror voted in your favor. Because you do not know what the deliberations were in the jury room, what arguments were made, whether that juror's conduct or arguments caused other jurors to react in a way that caused them to vote another way.

RODRIGUEZ: But if you were successful in getting Mr. Bryarly struck, Ms. Brown would have still been in that jury room. Correct?

COHAN: No. If we would have been successful in getting juror Bryarly struck for causes, we would have had an additional peremptory challenge that could have been used to strike juror Brown.

BAKER: Then you would have gotten off the jury only one of two jurors that voted for you?

COHAN: We would have gotten off the jury one of two jurors who had voted for us. We would have gotten on the jury someone else...

BAKER: Who may have voted the other way.

COHAN: Who may have voted the other way. May have voted for us and persuaded other jurors to vote in our favor. I think our position on the harm point is simply that that's not a point the court should reach, because the court should not be in a position of trying to inquire behind the jury verdict as to who voted which way and why.

PHILLIPS: So you are saying if there is ever an improper juror put on the panel, that there's automatically a new trial for the _____?

COHAN: If the proper objection was made. If there was a showing of bias. If there was a request.

PHILLIPS: Is there authority in Texas law _____?

COHAN: I think not explicitly. But I think that's the implicit rule of Hallett.

O'NEILL: If a felon had been seated on the jury, you presume harm at the beginning of the trial. Correct? What if the felon then votes in your favor?

COHAN: I think there's a distinction there. And you've got the Palmer Well Service case which is similar to that. There you had a juror unbeknownst to the parties and unbeknownst to the court who was under indictment at the time seated. And it was discovered after the trial that that juror was under a technical disqualification, that that juror was under indictment and there was an examination - the court while it was not part of the holding did note that that particular juror was one of the ten in the majority and, therefore, that the juror's vote was necessary to the rendition of a

verdict in that case and, therefore, reversed and sent the case back. I think had that juror not been in the majority in that case, I would draw a distinction there and say that that would not have necessarily at least have required reversal because no party had objected to that juror. There was no claim that that juror would adversely affect the result. And so there would be a reason and could be a reason to look behind how that juror voted when there was a juror who was not claimed to be objectionable by either side.

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RESPONDENT

GLASHEEN: I think Leitch is instructive on the issue of causation for what it tells us and what it doesn't tell us. In Leitch the court correctly held that there was no evidence that could cause a jury through its common experience conclude that a lifting belt would have prevented Mr. Hornsby's back injury if he had been wearing a lifting belt. And it's not within a jury's common understanding to decide that lifting belts have some mechanical, physiological benefit that prevent back injuries. And that was a correct holding.

However, I think Justice Abbott's concurring opinion is also very important because it does spell out very clearly the standard of review and a no evidence review on this causation question. And as Judge Abbott stated, that when determining a no evidence point of error, the court must consider only the evidence and the inferences that support the verdict ____ most favorably in support of the finding and disregarding all contrary evidence in inferences.

HANKINSON: Do you agree with Mr. Cohan's statement that what we are to be evaluating is whether or not there was evidence that the employer's conduct proximately caused your client's injury as opposed to the work environment or the mere fact that it was job related since this is a non-subscriber case?

GLASHEEN: I don't think it's enough to show that it's just work related or caused by the work environment. I think we do have to show a causal link between the negligence and to show that it was the negligence that probably caused the injury as opposed to just the general ordinary normal hard work conditions that are found in many jobs.

HANKINSON: Which would put us in a position of having to evaluate the employer's conduct or failure to act.

GLASHEEN: Not really, because the question of the employer's conduct and failure to act in their negligence is not even being reviewed here.

HANKINSON: Seeing if there is evidence of the causal link, we are trying to see if there is a link between the negligence that there evidentially is some evidence of at trial because there is no complaint here about the legal sufficiency of that, and the injury. Do you agree that that's what we're trying to link?

GLASHEEN: Yes. We are trying to see whether or not Mr. Apodaca would have just as likely have been hurt anyway without the negligence. And to put it in context of the standard of review, we're looking to see whether there's any evidence in the record from which a reasonable jury could infer a causal...

HANKINSON: Then I take it you do have some disagreement with the 5th circuit's decision in Gutierrez since that decision focused on whether or not the work environment caused the injury as opposed to the negligence?

GLASHEEN: I don't disagree with Gutierrez's reasoning at all.

HANKINSON: How do you square then the fact that you say the causal link is between the negligence and the injury?

GLASHEEN: Because the employer was negligent in failing to control the work environment. There was evidence that they were negligent in failing to implement the recommended one minute break out of every ten minutes of work as was recommended by their own ergonomic expert. There was negligence in failing to implement OSHA's recommendations for an electric eye that would enable the worker to get some relief from the work.

HANKINSON: But we're not evaluating whether there is any evidence of the negligence. We're evaluating whether or not there is any evidence to connect up that alleged negligence with the injury.

GLASHEEN: Correct. And I think that when you look at both Leitch and Gutierrez and see what they were dealing with that that's helpful. Because in Leitch the court stated, that in cases like this one where there is no medical evidence linking the alleged negligence to the injury, the claimant must provide objective evidence through expert testimony connecting the injury to the negligence. And went on to say, that whether proper lifting equipment would have prevented the injury in that case is not a question that can be answered by general experience. So Leitch is saying that whether lifting _____ work requires expert evidence. Now Gutierrez in contrast, the 5th circuit was actually reviewing three separate plans, and two of them are of interest. One was the de la Cruz case. And what had happened was de la Cruz and Ponce both received plaintiffs verdicts in the TC which were jnov. Now the 5th circuit affirmed de la Cruz, the jnov, because de la Cruz's wrist injury was never diagnosed as a cumulative trauma disorder in the court below. And there is no evidence that it was in fact a cumulate trauma disorder caused by excessive repetitions. However, the court in Gutierrez reversed the DC's jnov on Ponce because it found that Ponce's operated shoulder for a rotator cuff tear was a cumulative trauma disorder that was related to the repetitive motions which were again directly connected to the negligent failure to control those excessive repetitions.

HANKINSON: Where was the evidence though in Gutierrez that the injury, cumulative trauma disorder, was caused by the failure to control the number of repetitions in someway as opposed to evidence just that he did have this work related cumulative trauma disorder?

GLASHEEN: And that's a good question. And in fact, in Gutierrez and in this case, there was no witness that came forward and said, I am going to connect each one of these chains of evidence together for you as a jury and give you my opinion on the ultimate conclusion of but for causation. No one said that. And no one testified in that manner. However, the question is now whether there's any evidence from which a jury could rationally infer from certain evidentiary premises that the injury more likely than not would not have occurred but for Excel's failure to control the work.

HANKINSON: But it seems to me there has to be at least some evidence some place that had they made these changes in the work environment, things that we've been talking about, that in fact he would have had fewer repetitions and therefore would not have had the cumulative trauma disorder. But where is the evidence in the record that provides that causative link that a change in the work environment would have affected his condition in a way that he would not have had this disorder? That's what we're looking for isn't it?

GLASHEEN: Exactly. And that's exactly what I would like to address by doing what Leitch and the standards instruct us to do, which is examine the testimony of the witnesses in the case. But I think Mr. Cohan pointed out that if you could show that there is a statistically significant difference between this job and other jobs, that that would help support the conclusion that it was the negligence in this job that led to the higher injury rates. And in fact, there's evidence that the meat packing industry as a whole has an 8% injury rate. And this job had a 40% injury rate. The only two explanations in the record for these cumulative trauma disorders are 1) the ordinary nature of having hard typical repetitive work, which would account for the 8% injury rate. Well the only evidence to explain the 40% injury rate and having a 5 times normal injury rate is the negligence that has been found, and it can't be controverted at this stage of review. And so if the jury had evidence that Excel was negligent, that repetitions caused these kinds of disorders, and when Dr. Scioli testified that it was the excessive repetitions that caused these particular injuries...

HANKINSON: He didn't say it was the excessive repetitions. He just said it was the repetitions didn't he? He didn't give any kind of a quantitative analysis that had there been fewer repetitions he would not have been injured.

GLASHEEN: He didn't do a quantitative analysis but there was a huge volume of material because meat packing has the highest rate of cumulative trauma disorders of any industry in the country. And it's a well known problem and phenomenon. OSHA has written ergonomic guidelines for meat packing plants and Excel's own consultant, Dan McCloud, had written extensive training materials and had written an ergonomic's program. Dr. Scioli had review all of those things, which referred to the excessive repetitions causing these cumulative trauma disorders, and said, Mr. Apodaca, you could put his picture in the manual, and that is him. That's what caused his injury.

HANKINSON: Well I understand that. I don't think that anyone's claiming that there's not sufficient evidence to support the fact that the man had a work related injury, or that there's any question about what the conditions were in the plant or that he dealt with on his job. But it seems

to me the evidence of causation we're looking for is that it was the negligence, the failure to do these various things you've been talking about caused the injury as opposed to just the fact that he was doing the job. And I didn't see in the doctor's testimony that there was that. So I need for you to direct me to that kind of evidence.

GLASHEEN: I think the question is whether or not there's evidence from which a jury could make those links and those logical conclusions and stack those premises of evidence to reach the inference that more likely than not the injury would not have occurred.

HANKINSON: Where are we going to find that in the record?

GLASHEEN: We find it in the fact that it is work related from Dr. Scioli. We find in the record that it was a predicted injury. This injury has been predicted by OSHA, who did a study 6 months before the injury in Jan of 1995, and said that in studying the two years of injuries from 1993 to 1995 on this specific job "a significant number of cumulative trauma disorders have been caused by exposure to stressers(?) on this job.

RODRIGUEZ: Is this the same study that was withdrawn or is this a different study? Wasn't there an OSHA study that was withdrawn?

GLASHEEN: This is in the record, and it's part of the record.

RODRIGUEZ: Petitioner made a claim in their brief that an OSHA study had been withdrawn. I'm trying to figure out which study had been withdrawn.

GLASHEEN: The study was never withdrawn. I think they may have argued that one of their recommendations was withdrawn. There was no evidence of that at trial to show that OSHA had actually withdrawn their recommendation. Maybe one of their witnesses had said that their recommendation had been ultimately dropped. Certainly the jury is free to disregard that as it was a statement from Excel. There's no direct evidence that OSHA withdrew anything. In fact, OSHA had said in that same study, which the study itself was not withdrawn, that this job had highly repetitive extended reaches, there was repeated exertion of force with the wrist in an awkward position, and that it is "likely to cause cumulate trauma disorders to the hand, shoulders and back"...

OWEN: Let's suppose we have a professional football player on the line, and he gets a knee injury. We know it's work related. I suspect there are studies that say this is predictable, there's a high rate of knee injuries for professional football players who are linemen. But what negligence do you have in the record or evidence that you say that there was negligence that but for this this injury would not have happened?

GLASHEEN: Let me take your analogy and make it fit this case. In the way that I see it is that football players have a certain incident of head injury as well. And I think that if you took a group of football players and had them play without helmets, that you'd probably find that they had

maybe 5 times the incident of head injury as football players with helmets. And, therefore, a jury could reasonably conclude that if a person suffered a head injury in a helmetless football game, that it was the lack of helmet that more likely than not caused that head injury. And that he probably wouldn't have suffered it had he been wearing a helmet...

OWEN: Where is your evidence that's comparable to that?

GLASHEEN: The main point on that is that if you look for any explanation as to why this job had 5 times the industry average injury rate, the only explanation in the record is the excessive repititions. And that's well understood by medicine, by science, by Excel's own expert, by OSHA to the point that we could predict this injury.

PHILLIPS: Does your evidence show that most meat packers follow either OSHA guidelines or some ergonomic guidelines, and, therefore, had 8% injury rate?

GLASHEEN: No. But I think it's reasonable for a jury to infer that if the average is 8% and this job has 5 times that rate, that there's something wrong with this job. Now the average life expectancy is 2-1/2 years before you get a permanent disabling injury. That's not right.

HANKINSON: Were those statistics tied to running the cryovac machine, or just generally in the meat packing industry?

GLASHEEN: That was the cryovac machine that had the 40% injury rate.

HANKINSON: But is it 8% for other cryovac machine operators, or is that generally in the meat packing industry?

GLASHEEN: That's generally in the meat packing industry, but also the OSHA guidelines and their own ergonomic expert said that you look at injury rates job by job and do a job analysis to identify problem jobs that have excess risks for cumulative trauma disorder. And the way you do it is by studying injury rate for trends.

ENOCH: That's one of the difficulties I see. Conceding that this job produces this higher rate of injury is not the same thing as saying that as comparing this job to this job under some other circumstance produces a different rate of injury. The question is, where in the record is there any indication that this job done under a different work environment produced a different rate of injury?

GLASHEEN: I think that it is a reasonable inference to draw from OSHA's statement that there were a significant number of CTDs caused by exposure to stressers on this job, and that the problems with the job are likely to cause more injuries in future.

OWEN: What were the problems? Don't you have to identify something that caused -

what was different about this that they could have changed?

GLASHEEN: Here is the problem with the job. Mr. Apodaca had to lift 10 lbs to 40 lbs of meat. He had to pick up 25 bags a minute, one every 2.4 seconds across a conveyor belt and twist and place it on the cryovac machine which would then suck the air out of the bag and seal it. He had a 15 minute break in the morning and a 30 minute lunch break and no control over that conveyor. If he took a 15 second break to stretch his hands, he would have 6 bags of meat piling up and falling on the floor. Over 200 lbs of meat in 15 seconds. So this is a situation that even common understanding says it's too much. But beyond that OSHA said it was too much. Mr. Apodaca's supervisor, Mr. Garza, testified that he thought it was too hard and too fast and somebody was going to get hurt. The union steward said it was too dangerous and reported it to the safety committee. And OSHA made specific recommendations. Nothing was done. And their own expert, Dan McCloud, their own consultant said you've got to give these guys one minute out of ten to let go.

HANKINSON: But if these workers are exposed to the - even under the most ____ circumstances these workers are going to be exposed to the risk factors that lead to cumulative trauma disorders?

GLASHEEN: Correct.

HANKINSON: So even if everything was as OSHA said it should be, then doesn't there have to be evidence that those changes - the failure to do those things are what caused his injury as opposed to the fact that he was doing a job that was high risk for these kind of conditions?

GLASHEEN: I don't think you can ever forget our burden of proof is to show more likely than not probability.

HANKINSON: The problem that I'm having is, this is a nonsubscriber case in which your burden is to prove negligence. If this were a case involving a subscriber and the burden was only to show a work related injury, then we would have a different situation. And I'm having a hard time understanding under what you're saying is the proof differentiates this case. It seems to me your turning it into a subscriber case. Does that make sense?

GLASHEEN: I understand what you're saying. And certainly it's undisputed that the - or it can't be disputed now that these injuries were work related. That they were associated with the stressers(?) on the job. That's established. We have to take it as true. Dr. Scioli said it. The only question is, was this jury within their realm of rational potential thinking to conclude that this injury was much more likely than not to occur under these dangerous circumstances than it would be likely to occur under normal work circumstances and environments where an employer was following the rules and their own expert's safety recommendations.

HANKINSON: The problem is that what cuts against you is the fact that it is a high risk job in the first place, which is most unfortunate.

GLASHEEN: That's correct. And a lot of people get hurt on those jobs and develop the same kind of injuries where the employer has done nothing wrong and has not created an unreasonably dangerous situation. In this case, the jury decided that it was an unreasonably high risk of injury. And we believe that that was a rational inference from the evidence when viewed under the standards required by Leitch.

HANKINSON: Is there anything else that you say we should look to to determine that there is some evidence? It was work related. It was predictable. The OSHA report. What else?

GLASHEEN: Employees won't often come forward and report injuries. They are afraid of retaliation. And certainly after the Mexican Railway decision, these employees have no protection from retaliation if they report an injury. And OSHA has recognized that. Gutierrez makes reference in the 5th circuit opinion to the workers fear of reporting injuries. And so OSHA recommends that you go out and talk to the employees and ask them if they have any symptoms. This was recommended by Excel's own experts. It was done in 1991. It wasn't done in 1992, 1993, 1994 or 1995 until after Mr. Apodaca was injured even though it should have been done. And there is evidence that Mr. Apodaca was complaining to Ken _____ of soreness and pain as early as late 1994, and was seeing the nurse in April 1995, a month before Excel even reported his injury.

That taking with Mr. Rudd, the ergonomic expert's testimony that 100% of these injuries are reversible with early intervention lends support to the jury's conclusion that if Excel had done the symptom surveys as recommended, the injury would have been discovered, it was early enough to have done an intervention and reversed the symptoms and prevent it from becoming a permanent injury. And I think that's a black and white point on which the jury verdict could be granted.

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REBUTTAL

O'NEILL: Mr. Cohan, what about the argument that if these symptom surveys had been done, this injury would have been 100% preventable? Isn't that some evidence of but for causation?

COHAN: No. I think it's not. Because I think here the respondent has confused what symptom surveys were. And I would note that this was something that the respondent didn't plead and it was not relied upon by the CA, and I think for good reason.

What the respondent would have to show here is that if they had done symptom surveys Apodaca would have reported his symptoms, that those symptoms would have indicated a need for medical treatment for Apodaca, and that he would receive that medical treatment and it would probably have reversed the injury.

But the symptom surveys that he says that Excel did not undertake were these OSHA symptom surveys, which are not designed to identify problems in individual employees.

Those symptom surveys are designed to determine what problems are being had on which jobs. And in fact, OSHA specifically says, and this is in plaintiff's ex. 26 at page 10, that those symptom surveys should be done anonymously so that employees will participate, and that there should be no personal identifiers in the survey information.

So doing the symptom surveys would not have been designed to get at Mr. Apodaca's individual problem. Rather Excel had a different kind of survey. Excel did medical management surveys. And there is no evidence here that Excel failed to perform its medical management surveys, which would have identified the problem if Mr. Apodaca had had one. In fact, in that same exhibit what OSHA says is the primary way to identify these injuries early is to encourage reporting. And there is no evidence whatsoever that Excel didn't do that. Rather Mr. Apodaca only made a statement of injury a few days before he left work in April 1995. And there is no evidence that any kind of survey would have uncovered that injury earlier.

O'NEILL: I'm not sure I understand your statement. You say that the purpose of the OSHA symptom surveys is to identify problems such as this? Maybe not in an individual but inherent in whatever operation they are looking at.

COHAN: Problems inherent in specific jobs. But Excel's medical management surveys do both. They identify problems within jobs and individual employee problems. And the evidence of that would not in anyway show that Mr. Apodaca's problem would have been identified sooner, which is what respondent urged in its brief to this court. And no evidence that that problem would have been solved in anyway.

HANKINSON: Would you respond to the argument that there is evidence that the work environment, the actions of the employer created the work environment in which there were excessive numbers of repetition, and that that is some evidence of causation. We know it's a high risk job and high risk work environment, but the fact that there were excessive repetitions that could have been eliminated by the employer is some evidence of causation.

COHAN: Well I think what is not shown here at all is that the number of repetitions was excessive verses something else. It was simply an argument that for out of the blue that maybe if it were reduced from 240 per hour to 200 per hour, but there's no evidence that at 200 per hour the same number of problems would exist.

PHILLIPS: In Havener we indicated that you could show after taking a medicine that the disease occurs more than twice as often as it does in the natural population that that's some evidence of causation. How come 40% v 8%...

COHAN: Because it's not apples to apples. First of all, the 40% was not a rate of cumulative trauma disorders. The 41.6% was five reports of pain, and it happened to all be to the wrist, not a single one of those was to the lower back or to the neck, which are two of the injuries that plaintiff alleges here. But 5 reports of pain among 12 operators. There was no attempt to

compare that with cryovac operator injury rates in any other company. So we don't know what that relates to. We also don't know which machine they were looking at. These 5 reports of pain for cryovac operators. Some Excel cryovac machines have electronic eyes, but the employee was dealing with heavier product than they were here. So there was plenty of opportunity here to make comparisons. But the plaintiff simply did not avail himself of the opportunity to do that. Likely because doing that would not have helped prove his point. But we don't know, because there is simply no evidence in the record to show the significance of that.