

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

September 28, 2000 Session

**SUSAN MASON v. OLD TIME POTTERY, INC., ET AL.**

**Direct Appeal from the Chancery Court for Rutherford County  
No. 98WC-643 Don R. Ash, Chancellor**

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**No. M2000-00226-WC-R3-CV - Mailed - June 26, 2001  
Filed - September 13, 2001**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with *Tennessee Code Annotated* § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The plaintiff, Ms. Susan Mason, appeals the judgment of the trial court dismissing the case at the conclusion of trial after finding that Ms. Mason did not sustain a compensable workers' compensation injury because did not carry her burden of proof that the fall she had while working for the defendant, Old Time Pottery, aggravated her pre-existing condition and/or caused her to have back surgery. The trial court also ruled that had it found that this had been a work-related injury it would have awarded Ms. Mason a 35% permanent partial disability to the body as a whole. For the reasons set out in this opinion, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2000); Judgment of the Chancery Court Affirmed**

CAROL CATALANO, SP.J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JAMES WEATHERFORD, SR. J., joined.

Luther E. Cantrell, Jr., Nashville, Tennessee, for the appellant, Susan Mason.

Robert R. Davies, Nashville, Tennessee, for the appellee, Old Time Pottery.

E. Blaine Sprouse, Assistant Attorney General, Nashville, Tennessee, for the appellee, James Farmer, Director of the Division of Workers' Compensation, Tennessee Department of Labor, Second Injury Fund.

**OPINION**

Ms. Mason was 39 years old at the time of her slip and fall accident, which occurred on November 11, 1997, while working for the defendant, Old Time Pottery, Inc.

Ms. Mason has an eleventh (11<sup>th</sup>) grade education. In the past, she has owned and operated an antique business; and worked as a cake decorator and floral designer. She had lived in Virginia all her life until moving to Murfreesboro, Tennessee, in June of 1997.

Ms. Mason suffered from depression and had attempted suicide three different times before moving to Tennessee. She also had a 17 year history of back pain and right hip and leg pain. While in Virginia, she was under the treatment of an orthopedic surgeon and had applied for Social Security Disability benefits in November of 1996.

On June 30, 1997, Ms. Mason went to work for the defendant as a floral designer. She also worked part time at another flower shop.

On September 16, 1997, she saw orthopedic surgeon, Dr. Thomas O'Brien, where she reported a long history of ineffective treatments for back pain. She reported taking Lortab and Motrin for back and leg pain, and Prozac and Xanax for depression and anxiety.

On September 23, 1997, Dr. O'Brien, after reviewing Ms. Mason's MRI, diagnosed "decreased disc signal consistent with degenerative disc disease at L4-5 and L5-S1 with bulges that were present at both levels." According to Dr. O'Brien's records on that date:

I had a lengthy discussion with Ms. Mason regarding her treatment options and the fact that she had exhausted non-operative treatment measures. She has had symptoms now for 16 years and they have steadily been more progressive since she moved to Tennessee from Virginia. In the past she has been treated with physical therapy, multiple injections, and narcotic medications.

Ms. Mason's treatment options would involve a decompression posterior lumbar interbody fusion with BAK or Ray cages. Because she just started a job three months ago, we will plan on doing this at the end of the year.

Dr. O'Brien scheduled a follow-up appointment in two months at which time the surgery would be scheduled. Ms. Mason maintained that in her discussions with Dr. O'Brien there was not anything definite done as far as making plans for future surgery or any in depth discussions regarding the type of procedure to be performed.

Ms. Mason also sought treatment for depression at The Guidance Center in Murfreesboro which was under the direction of Dr. Libby McCauley, a psychiatrist. On September 29, 1997, she met with therapist Mr. Bart Andrews whose report indicates that Ms. Mason "report[ed] chronic back pain that is making going to work on a daily basis quite difficult and is due to have major surgery as soon as her probation period is complete at her job." Ms. Mason testified that she may have discussed this with her therapist but did not tell him that she had back surgery scheduled and did not know why her therapist had charted this in her history.

On October 20, 1997, she reported to Mr. Andrews that her “back was constantly in pain.” On November 10, 1997, Ms. Mason complained of depression, marked sleep disturbance, anhedonia (lack of interest), sadness and occasional suicidal ideation.

On November 11, 1997, Ms. Mason fell while working for the defendant. According to Ms. Mason, “[I] came around the corner and it was a box there and I didn’t see it and I fell on it, over it. I mean I ended up on my left side half in and half out of the box.” Ms. Mason maintained that she fell onto and hit the concrete floor and that the box was empty. On cross-examination and in her deposition Ms. Mason acknowledged that there may have been one or two Christmas wreaths in the box.

Ms. Beverly Bull, a supervisor, witnessed the accident, and stated that Ms. Mason “just kind of fell back into the box, and was sitting in the box” Ms. Bull testified that after Ms. Mason fell she was sitting completely in the box which contained Christmas wreaths and that she did not hit the concrete floor.

Another employee Mrs. Carolyn Smoot also testified that she was walking right in front of Ms. Mason when the accident occurred. When she turn around Ms. Mason “was kind of just sitting down in the box.” Mrs. Smoot stated that the box had Christmas wreaths in it and she didn’t think Ms. Mason “ever touched the concrete”.

On November 13, 1997, Ms. Mason saw Dr. O’Brien stating that she had fallen at work and had an increase in pain. He found tenderness on both sides of her back with some muscle spasm. A straight leg raise caused pain on the right side but not on left side. She returned on November 25, 1997, complaining of increased back pain and bilateral leg pain.

On December 17, 1997, Dr. O’Brien performed surgery, which involved the removal of two discs and a two level fusion with a bone graft. While she had some initial relief from symptoms, at his examination on October 13, 1998, Dr. O’Brien found that she was essentially no better than she was pre-operatively and she was complaining of persistent back pain. At that time he concluded given her current level of symptoms he did not foresee her returning to work in the near future and referred her to a pain clinic. In his deposition, Dr. O’Brien did state that he felt that she could do some light work where she could limit her lifting and alternate standing and sitting.

Dr. O’Brien found that she had a 10% to 15% permanent partial impairment to the body as a whole before the fall, and did not think the fall increased her impairment rating. When asked if the fall caused an anatomical increase in her pre-existing degenerative disc disease, Dr. O’Brien stated: “I don’t think it caused it, you know, if you want to think of it as a discreet new injury because she had a flare-up of her symptoms after that, but in terms of ...an injury or breakage, no, anatomically, structurally, no.” He also said she would have had to have surgery absent the fall.

On October 6, 1999, Dr. David Gaw, orthopedic surgeon, performed an independent medical evaluation in which Ms. Mason related that her injury occurred “when she fell over a box hitting the

concrete floor.” Dr. Gaw found Ms. Mason’s impairment rating prior to the fall to be a minimum of 7% to the body as a whole based on non-operated degenerative disease with pain. After the fall, he assigned a 20% impairment rating to body as a whole based on the surgical procedure and loss of movement. He also felt that Ms. Mason suffered from chronic pain syndrome.

Dr. Gaw stated that “I think based upon her history that it [the fall] did aggravate her condition” and found that the impairment that she now has was causally related to her fall in November of 1997. Dr. Gaw testified as follows:

Q: You can’t say then with a reasonable degree of medical certainty that the slip and fall actually increased the severity of her anatomical injury as result of the slip and fall?

A: If her history is true I think I can. It would be based on the fact if she had no pain in the left leg before and then afterwards she did, something anatomically happened to cause nerve root compression.

Dr. Gaw agreed that the history, including the severity of impact, in this accident played an important role in formulating his opinion that Ms. Mason aggravated her pre-existing condition. Dr. Gaw acknowledged that Ms. Mason was a surgical candidate in September, 1997, before her slip and fall accident in November. He assigned restrictions of lifting 20 to 25 pounds occasionally, 10 pounds frequently, and limiting bending, twisting and long static positions.

Dr. McCauley, who first saw Ms. Mason in December 1997, testified Ms. Mason’s depression increased after the fall and therefore made it more difficult to treat her condition since she had not responded to therapy or medication. She did not think Ms. Mason was capable of full employment. Ms. Patsy Bramlett, vocational rehabilitation counselor, found that with Dr. Gaw’s restrictions Ms. Mason had a 67% loss of job access or opportunities.

Ms. Mason testified that she is completely disabled because of the medication she takes to relieve pain and has not been able to work since the accident. She is very limited in driving and has times when she is walking where her legs “give out” on her and she falls.

The trial court found that Ms. Mason had not carried her burden of proof and dismissed the case ruling “that the cause of Plaintiff’s surgery and resulting disability was not due to the incident of November 11, 1997, as alleged in the Complaint and, therefore, finds that the Plaintiff did not sustain a compensable workers’ compensation injury.” The trial court also found that if she had suffered a compensable work-related injury, Ms. Mason would have been entitled to 35% permanent partial disability benefits.

#### ANALYSIS

Review of findings of fact by the trial court 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). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

Ms. Mason had presented three issues on appeal:

I. Whether the evidence preponderates against the finding of the trial court that the plaintiff did not sustain a compensable work related injury on November 11, 1997, arising out of and in the course of her employment.

II. Does the evidence preponderate against the finding of the trial court that the plaintiff did not sustain an accident arising out of and in the course of her employment and therefore sustained no work related injury.

III. Whether the trial court erred in its conclusions that the plaintiff sustained a thirty-five percent (35%) permanent impairment to the body as a whole had she carried her burden of proof.

**I. Whether the evidence preponderates against the finding of the trial court that the plaintiff did not sustain a compensable work related injury on November 11, 1997, arising out of and in the course of her employment.**

The employee has the burden of proving every essential element of his claim. *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992).

In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." *Tenn. Code Ann.* § 50-6-102(12). The phrase "arising out of" refers to causation. *Reeser v. Yellow Freight Systems, Inc.*, 938 S.W.2d 690, 692 (Tenn. 1997).

Except in the most obvious and routine cases, the claimant in a workers' compensation action must establish causation by expert medical evidence. *Orman v. Williams Sonoma, Inc.* 803 S.W.2d 672, 676 (Tenn. 1991).

If a work injury aggravates a pre-existing condition merely by increasing pain, but does not otherwise “injure or advance the severity” of the employee’s condition the claimant did not sustain an injury by accident with the meaning of the Workers’ Compensation Act and is not entitled to compensation. *Cunningham v. Goodyear Tire and Rubber Co.*, 811 S.W.2d 888, 891 (Tenn. 1991).

To be compensable, the pre-existing condition must be advanced, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. *Sweat v. Superior Industries, Inc.*, 966 S.W.2d 31, 33 (Tenn. 1998).

Ms. Mason’s treating physician, Dr. O’Brien, testified that two days after the accident a straight leg raise of the left leg did not elicit a pain response. He concluded that there was no permanent anatomical change in her pre-existing back condition. He assigned 10% to 15% impairment rating to Ms. Mason before her fall and did not think the fall increased her impairment rating.

Dr. Gaw’s opinion that she did suffer an increase in severity of her pre-existing condition was based upon the history given by Ms. Mason as to how the fall occurred and how it caused subsequent left leg pain. In its ruling at the conclusion of trial, the trial court expressed concern about Ms. Mason’s credibility in some points of her testimony: “I find some of your testimony inconsistent. There were some things about falling in the box, telling the doctors about being on probation, not being on probation; whether the surgery was going to take place or not, and I have to consider all those things when I’m making that decision.” The trial court, who was in the best position to judge the weight and credibility of oral testimony, questioned the underlying facts upon which Dr. Gaw based his opinion.

The trial court ruled as follows: “I do not believe you’ve carried your burden of proof—the burden’s on you to prove this – that that fall in that box was the cause or aggravated this condition.” The court concluded that “the incident of 11-11-97 was not the cause of the surgical procedure” and therefore Ms. Mason did not sustain a compensable workers’ compensation injury.

After thoroughly reviewing the record in this case, we find that the evidence supports the finding of the trial court.

**II. Does the evidence preponderate against the finding of the trial court that the plaintiff did not sustain an accident arising out of and in the course of her employment and therefore sustained no work related injury.**

Tennessee Code Annotated § 50-6-103(a) provides:

Every employer and employee subject to the Workers' Compensation Law 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....

The appellant argues that Ms Mason is entitled to medical expenses for her injury. Although there is no dispute that Ms. Mason fell while working for the defendant on November, 11, 1997, the court found that she failed to carry her burden of proof that as a result of this fall she had a compensable workers' compensation injury which would entitle her to any workers' compensation benefits including medical expenses.

As we have upheld the trial court's ruling regarding causation, we find this issue to be without merit.

**III. Whether the trial court erred in its conclusions that the plaintiff sustained a thirty-five percent (35%) permanent impairment to the body as a whole had she carried her burden of proof.**

As we have upheld the trial court's ruling, this issue is moot and therefore pretermitted.

#### CONCLUSION

The judgment of the trial court is affirmed. The costs are assessed to Ms. Mason.

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CAROL CATALANO, SP. J.

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**JUDGMENT ORDER**

This case is before the Court upon motion for review filed by the appellant, Susan Mason, 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied.

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs are taxed to the appellant, Susan Mason, and her surety for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Birch, J., not participating