IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
November 1, 2001, Session

NICOLAIE DANIEL LUCESCU, v. TWIN CITY MOTORS, INC.

Direct Appeal from the Chancery Court for Blount County
No. 00-043 Telford Fogerty, Jr., Chancellor

Filed April 22, 2002

No. E2001-00672-WC-R3-CV

The issue presented by this appeal is whether there is evidence to support the finding of the trial court that the hernia experienced by the employee occurred before the date of the report of the accident and is, therefore, not compensable under the Hernia Statute, T.C.A. §50-6-212. After a review of the record and the briefs and after consideration of the arguments of counsel, we find that the trial court simply chose to believe the plaintiff's treating physician rather than the plaintiff as to when the hernia occurred. We, therefore, affirm.

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

W. NEIL THOMAS, III,, delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and JOHN K. BYERS, JUDGE, joined.

Robert L. Cheek, Jr., and Jesse Guin, for the appellant, Nicolaie Daniel Lucescu

Frank Q. Vettori, for the appellee, Twin City Motors, Inc.

MEMORANDUM OPINION

This workers' compensation action was commenced on February 23, 2000, and the complaint alleges that Nicolaie Daniel Lucescu ("Lucescu") suffered an on-the-job injury on July 30, 1997, while attempting to re-install a transmission into a car. An answer was filed on March 13, 2000, generally denying or denying knowledge of the allegations of the complaint. The case was heard on February 7, 2001, and a judgment dismissing the complaint was filed on February 26, 2001. Notice of Appeal was filed March 16, 2001.

The issue presented by this appeal is relatively straightforward. Did Lucescu suffer a hernia

on July 30, 1997, or did he suffer it some three to four months prior to that date?

The reason that this issue is dispositive of the case is because of the Hernia statute, T.C.A. §50-6-212, which provides in pertinent part as follows:

> (a) In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the court that:
>
> (1) There was an injury resulting in hernia or rupture;
> (2) The hernia or rupture appeared suddenly;
> (3) It was accompanied by pain;
> (4)The hernia or rupture immediately followed the accident; and
> (5) The hernia or rupture did not exist prior to the accident for which compensation is claimed.

Thus, under the statute recovery is barred if the hernia existed prior to July 30, 1997.

Lucescu and his wife testified that the accident and the hernia occurred on July 30, 1997. The history taken on July 31, 1997, however, the day after the alleged injury by the first physician to see Lucescu says that it occurred some three to four months prior to that date. Not only does that physician, Dr. Pershing, say that Lucescu told him that he lifted a transmission "three to four months ago" but that "at that time" he felt a burning in his right inguinal region. The history goes on to state that he didn't "report any discomfort at that time because he thought it would 'go away'." Next, the history states that "[t]wo weeks ago the pain began to increase particularly with lifting and when it continued to give him discomfort he reported it yesterday." Given this kind of detail, it is not credible that Dr. Pershing would take the history down incorrectly.

This Court is presented, therefore, with the issue of the deference to be given to the trial court's findings, especially where the trial court was able to observe the demeanor of Lucescu and his wife. Normally, in a workers' compensation case the review of the findings of the trial court is *de novo* with a presumption of the correctness of the decision unless a preponderance of the evidence is contrary to those findings. Spencer v. Towson Moving & Storage, Inc., 922 S.W. 2d 508 (Tenn. 1996). In addition, this Court is required make an independent determination of the preponderance of the evidence. Galloway v. Memphis Drum Service, 822 S.W. 2d 584 (Tenn. 1991). As stated by the Court in Galloway, supra at 586, this Court "is not bound by a trial court's factual findings but instead [is to] conduct an independent examination to determine where the preponderance of the evidence lies." Where, however, findings hang upon the credibility of the witnesses, the trial court is in the "best position to evaluate the credibility of witnesses. Nance v. State Industries, Inc., 33 S.W. 3d 222 (Tenn. 2000) In addition, in Story v. Legion Ins. Co., 3 S.W. 3d 450 (Tenn. 1999), the Special Panel held as follows at page 451:

> "However, considerable deference must be given to the trial judge who has

> seen and heard the witnesses especially where issues of credibility and weight of oral testimony are involved."

This Court is in no better position and, indeed, is in a lesser position, to pick which version to believe. Accordingly, the trial court will be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed, and costs are taxed to the appellant.

_____

W. NEIL THOMAS, III

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

NICOLAIE DANIEL LUCESCU v. TWIN CITY MOTORS, INC.

Chancery Court for Blount County
No. 00-043

Filed April 22, 2002

No. E2001-00672-SC-WCM-CV

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Nicolaie Daniel Lucescu 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.

Costs are assessed to the appellant, Nicolaie Daniel Lucescu and her surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Barker, J., not participating