IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

FILED

August 25, 1997

Cecil W. Crowson
Appellate Court Clerk

IRA ANTONIO TENPENNY, Plaintiff/Appellee	)	DAVIDSON CHANCERY
	)	NO. 0S01-9609-CH-00173
v.	)	(No. 95-979-III below)
USAIR, INC., Defendant/Appellant	)	HON. ROBERT S. BRANDT, CHANCELLOR

FOR THE APPELLANT:

JOHN THOMAS FEENEY
LEE ANNE MURRAY
P.O. Box 198685
Nashville, TN 37219-8685

FOR THE APPELLEES:

STEVE C. NORRIS
28 Middleton Street
Nashville, TN 37210

MEMORANDUM OPINION

MEMBERS OF PANEL:

FRANK F. DROWOTA,III, ASSOCIATE JUSTICE, SUPREME COURT
WILLIAM H. INMAN, SENIOR JUDGE
WILLIAM S. RUSSELL, RETIRED JUDGE

AFFIRMED RUSSELL, SP. J.

This appeal from the judgment of the trial court in a workers' compensation case has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 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 that on January 25, 1995, Ira Antonia Tenpenny sustained a disc herniation at L4-5 with nerve compression in the course and scope of his employment by USAIR, INC. The court further found that Mr. Tenpenny was temporarily and totally disabled from January 25, 1995, to June 30, 1995; and that he returned to work with a 17% permanent partial disability to the body as a whole. Judgment was also entered for past and future medical expenses and certain discretionary costs.

The employer has prosecuted this appeal, contending (1) that the preponderance of the evidence showed that the plaintiff employee was injured before he reached the defendant employer's premises, (2) that plaintiff's back injury was idiopathic unrelated to a special risk involved with plaintiff's employment, and (3) the trial court erred in shifting the burden of proof to the defendant to refute causation rather than forcing the plaintiff to carry his burden of proving causation. The appellee asks that the impairment judgment be increased from 17% to 25%.

After a careful and thorough review of the record we hold that the judgment of the trial court is supported by a preponderance of the evidence, and that there was no improper shifting of the burden of proof. Our review has been de novo upon the record of the trial court, accompanied by a presumption of the correctness of that court's findings of fact. Tennessee Code Annotated Section 50-6-225 (e)(2).

Credible evidence establishes that on January 25, 1995, Mr. Tenpenny arrived in the employee parking area at the employer's premises to commence his work day. He testified that as he got out of his car he felt a twitch in his back. He walked to a stairway leading into his workplace and his back commenced hurting severely as he climbed the stairs. Upon entering the door he fell to the floor, in excruciating pain, and asked that an ambulance be called. He was hospitalized and the next day was diagnosed by Dr. Vaughan Allen, M.D., a neurosurgeon, as having a large disc rupture with encroachment upon the L5 nerve root. A laminectomy was done the following day. Dr. Allen testified that Mr. Tenpenny retains a permanent anatomical impairment of 10% to the body as a whole.

There was evidence that Mr. Tenpenny first injured his back on the job in July 1993 when he twisted and stumbled over some luggage. This injury appeared to resolve after three physician visits. Then, on December 12, 1994, he again injured his back on the job when he picked up a heavy suitcase. He continued to have a degree of back pain right up to the time of the injury at bar.

Given this background, Dr. Vaughan Allen testified that the most probable cause of his disc rupture would have been lifting and damaging the annulus prior to that time (January 25, 1995) and then having a trivial thing cause the rupture on January 25, 1995.

This testimony constitutes convincing evidence that this disc rupture was not idiopathic. The preponderance of all of the evidence shows that the plaintiff was initially injured by accident arising out of and in the course of his employment by the defendant on December 12, 1994, lifting luggage, and subsequently aggravated that injury on January 25, 1995, either getting out of his car or, more likely, climbing steps to get to his work station.

The trial court did not shift the burden of proof to the defendant regarding causation. The trial court found, from ample evidence, that the plaintiff was hurt climbing the steps entering the workplace. Only then did the trial court look to the defendant for rebuttal evidence on the issue.

The appellee contends that we should increase the disability award from 17% to 25%. While current law would have allowed in an appropriate case a two-and-a-half times multiplier to the 10% anatomical impairment set by Dr. Allen, the law sets a maximum and does not establish a mandatory multiplier. We are satisfied with the appropriateness of the trial court's judgment of 17% whole body industrial disability.

The judgment of the trial court is affirmed. Costs on appeal

are assessed to the appellant.

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WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

_____
FRANK F. DROWOTA, III,
ASSOCIATE JUSTICE

_____
WILLIAM H. INMAN, SENIOR JUDGE

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Plaintiff-Appellee,	(	
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	(	
v.	(	Davidson Chancery, No. 95-979-III
	(	S. Ct. No. 01S01-9609-CH-00173
	(	
USAIR, INC.,	(	Hon. Robert S. Brandt,
	(	Chancellor
Defendant-Appellant.	(	AFFIRMED.

JUDGMENT ORDER

This case is before the Court upon motion for review 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; and

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 will be paid by defendant-appellant, for which execution may issue if necessary.

IT IS SO ORDERED this 25th day of August, 1997.

PER CURIAM

DROWOTA, J. - Not participating.