**IN THE SUPREME COURT OF TENNESSEE**
**SPECIAL WORKERS' COMPENSATION APPEALS PANEL**
**AT JACKSON**
**(July 12, 1999 Session)**

**FILED**

**October 29, 1999**

**Cecil Crowson, Jr.**
**Appellate Court Clerk**

| | | |
|---|---|---|
| **CHARLES D. SCOTT,** | ) | |
| | ) | |
| Plaintiff/Appellant, | ) | |
| | ) | **TIPTON CHANCERY** |
| v. | ) | |
| | ) | **NO. 02S01-9810-CH-00097** |
| **THE TRAVELERS INSURANCE COMPANY, and SUE ANN HEAD, DIRECTOR OF THE DIVISION OF WORKER'S COMPENSATION TENNESSEE DEPARTMENT OF LABOR,** | ) | **Hon. Dewey C. Whitenton, Chancellor** |
| | ) | |
| Defendants/Appellees. | ) | |

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**M E M O R A N D U M O P I N I O N**

**Members of Panel:**

Justice Janice M. Holder
Senior Judge F. Lloyd Tatum
Senior Judge L. T. Lafferty

**AFFIRMED**

**F. LLOYD TATUM, SENIOR JUDGE**

## OPINION

This workers' compensation appeal was referred to the Special Workers' Compensation Appeals Panel of the Supreme Court pursuant to Tennessee Code Annotated § 50-6-225(e)(3) (Supp. 1998) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The plaintiff, Charles D. Scott, brought this suit against Travelers Insurance Company, the workers' compensation insurance carrier for Kraus Model Cleaners (Kraus Cleaners), and the Second Injury Fund. After hearing the evidence, the chancellor found that the plaintiff did not prove by a preponderance of the evidence that his back injury was caused or aggravated out of or in the course of his employment for Kraus Cleaners and entered judgment for the defendants.

The plaintiff has presented two issues for review:

1. Did the trial court err in finding that there is not sufficient evidence to show that plaintiff's lower back problems arose out of and were incurred in the course of his employment and that defendants are not liable under the Tennessee Worker's Compensation Law?

2. Whether plaintiff's claim is barred by wilful misrepresentation and fraud in his employment application?

In considering these issues, we must be mindful of certain well established principles. Our review is *de novo* upon the record of the trial court with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. Code. Ann. § 50-6-225(e)(2). We are required to conduct an in-depth examination of the trial court's findings of fact and conclusions of law to determine where the preponderance of evidence lies. Thomas v. Aetna Life and Cas. Co., 812 S.W.2d 278, 282 (Tenn. 1991). In making such determination, this Court must give considerable deference to the trial judges's findings regarding the weight and credibility of any oral testimony received. Townsend v. State, 826 S.W.2d 434, 437 (Tenn. 1992); Thomas, 812 S.W.2d at 283. However, this court may draw its own conclusions about the weight, credibility, and significance of deposition testimony. Seiber v. Greenbrier Indus. Inc., 906 S.W.2d 444, 446 (Tenn. 1995).

The plaintiff in a worker's compensation case has the burden of proving causation and permanency of his injury by the preponderance of the evidence using expert medical testimony. See Thomas, 812 S.W.2d at 283; Roark v. Liberty Mut. Ins. Co., 793 S.W.2d

932, 934 (Tenn. 1990). Medical evidence must be considered in conjunction with the employee's testimony as to how his injury occurred and his subsequent physical condition. Thomas, 812 S.W.2d at 283. In determining where the preponderance of the evidence lies, this court may choose which expert's view to believe among differing opinions and may consider the expert's qualifications, circumstances of their examination, what information was available to them, and how important that information was to other experts. See Orman v. Williams Sonoma Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

The plaintiff testified that prior to beginning his work for Kraus Cleaners, he worked for several different employers. He testified that as a result of an accident at Swain and Sons, he received worker's compensation totaling $30,300 as a result of a 55.5 percent permanent disability to his left leg. This injury occurred prior to plaintiff's employment for Kraus Cleaners when he stepped in some cooking oil that was leaking from a pallet at a Kroger warehouse, causing him to fall. Also, prior to plaintiff's employment for Kraus Cleaners, he received worker's compensation benefits in the sum of $5,000 for the loss of a finger which was cut off in a forklift.

The plaintiff testified that after his leg injury, he returned to work for Swain and Sons delivering trailers and that he was having no difficulty with arthritis in his knee or back. He quit working for Swain and Sons about one month after he went back to work, because he was placed on a night shift. The plaintiff stated that he could not see at night and thought driving at night was dangerous. Prior to going to work for Kraus Cleaners, the plaintiff worked for State Line Systems, pulling containers over the area of four states. He testified that he was having no difficulty with arthritis at that time. Plaintiff further testified that he filled out an application for employment at Kraus Cleaners on or about October 18, 1991. He testified that at that time, he did not have any back problems, and he gave a negative answer to the following questions on the employment application:

1. "Have you ever had back trouble?";
2. "Have you ever had any other disability?";
3. "Have you ever been paid worker's compensation?";
4. "Do you have any physical defects which would preclude you from performing certain jobs?"

Plaintiff testified that he rushed through this application and did not carefully read

it; hence, he did not mention the worker's compensation benefits for his finger and leg injuries. He testified that he was having no difficulty with his back at that time and did not think that he had ever had any difficulty with his back except for arthritis.

The plaintiff further testified that he had worked two full days for Kraus Cleaners when he hurt his back on the afternoon of October 29, 1991. He was pushing a full load of dirty linen down a ramp when his feet slipped out from under him and he injured his back. According to the plaintiff, he could not get out of bed the next day, and the management at Kraus sent him to a family clinic for his injury. The next day he could not control his kidneys and bladder and was sent to Dr. Lindermuth at St. Joseph's Hospital. Dr. Lindermuth ran a myelogram because the plaintiff was too large for an MRI. According to the plaintiff, Dr. Lindermuth told him that surgery could not be done because the plaintiff was too large. The doctor also told the plaintiff that he could not go back to work for Kraus Cleaners.

The plaintiff testified that he had been unable to go back to work except for a brief period with H. I. T. in January of 1992. He loaded trailers for H.I.T., but his work with them was interrupted by two heart attacks. He testified that he was in pain at all times while working for H.I.T. and has not worked since leaving H.I.T. Since that time, the plaintiff's back pain became worse, and he was paralyzed in his legs. A lumbar epidural block did not give him any relief, and his family physician referred him to Semmes-Murphy Clinic in May of 1994. A diagnosis of ruptured disc at L2-3 was made on May 11, 1994, and surgery was done on May 23, 1994, for an extruded disk at the L2-3 level which was complicated by the plaintiff's heart problems. The plaintiff testified that after surgery he could walk but was still in severe pain. He testified that he yet has ongoing pain which is both throbbing and aching, like someone is sticking a knife in his back. He did not have any of these problems or pain prior to his employment for Kraus Cleaners. Because of the pain, he cannot sleep more than 30 minutes to an hour at a time, and he is no longer able to work, because he cannot walk and has lost control of his kidneys.

The plaintiff gave a deposition on February 1, 1991, in the case involving his leg injury. In the deposition, referring to the accident at Kroger, he testified, "I felt like something in my lower back got out of, you know, knocked out of socket and my hip was

hurting." He testified that in the fall at Kroger's, he hurt his knees, hands, hip and lower back. He further testified in the deposition taken on February 1, 1991, that:

> "Everyday I wake up at one or two in the morning with shooting pains in my back and hurting so bad that I have to wake up and go sit on my easy chair and eat aspirins and drink coffee until I get relief from the pain and I go back to try to sleep a few more hours."

The plaintiff further testified on cross examination that after going to work for H.I.T. in January of 1992, he had two heart attacks and never went back to work.

Mr. Scott testified further on cross examination that he made an application for social security disability benefits after he sustained a heart attack and on his application he stated that he was unable to work due to his heart condition. In his social security application, Mr. Scott represented that he had neither made a worker's compensation claim, nor did he intend to do so. He represented in the application for social security benefits that he became disabled after suffering the heart attacks.

Mr. James Baden, general manager for H.I.T., testified that based upon company records, Mr. Scott hauled his first load for H.I.T. on January 16, 1992, and his last load on July 24, 1992.

Evelyn Scott, the plaintiff's wife, and Charles Scott, Jr., the plaintiff's son, both opined that the injury sustained by the plaintiff while working for Kraus Cleaners caused him constant pain and restricted his ability to work and perform other activities.

Dr. John R. Lindermuth, a neurosurgeon, testified by deposition. He first saw the plaintiff on November 6, 1991, on referral by Dr. Fred Palmer Wilson. Dr. Lindermuth testified that the plaintiff was a "morbidly obese man," who was six feet six inches tall and claimed to weigh 350 pounds. There were no scales available with sufficient capacity to weigh the plaintiff.

A myelogram "showed mild disc bulging that was consistent with a benign bulging annulus, and arthritic changes at L4-5, but otherwise was negative, in particular, no herniated disc was demonstrated." A myelogram was chosen because it is still considered the "the gold standard" test, and the plaintiff's size prevented doing a CT scan or an MRI scan with the available equipment.

Dr. Lindermuth testified that plaintiff did not have a herniated disc or any other obscure diagnosis, according to the myelogram, so the nature of the pain that plaintiff

complained of led to the diagnosis of muscle strain or musculoskeletal strain. Dr. Lindermuth prescribed a muscle relaxant and a non-steroidal anti-inflammatory medicine.

On November 21, 1991, the plaintiff reported symptomatic relief, but the pain returned when the plaintiff stopped taking the medications. At that time, the doctor's diagnosis did not change.

Dr. Lindermuth testified that he told the plaintiff that his strain would not heal because of his excessive weight. The healing process would be counteracted by repeated trauma caused by moving his excessive weight. The only other solution would be absolute bed rest. Dr. Lindermuth last saw the plaintiff in February of 1993 and his diagnosis remained the same. He stated that if plaintiff had a large herniated nucleus pulposus at L2-3 in November 1991, it would have been revealed on the myelogram. Dr. Lindermuth testified that plaintiff has zero impairment rating according to the AMA Guidelines. Dr. Lindermuth also testified that the mild disc bulge at L3-4 could not cause pain in the area that plaintiff described. If plaintiff had a disc herniation in 1994, it is most likely that it was caused by activity after February of 1993, according to Dr. Lindermuth.

Dr. Ernest Cashion, a neurosurgeon, testified by deposition. The plaintiff was referred to Dr. Cashion by his attorney for evaluation only. Dr. Cashion, who is associated with Semmes-Murphy Clinic, testified by deposition that the records of his clinic revealed that the plaintiff was seen by Dr. Engleberg of Semmes-Murphy Clinic on May 6, 1994. An MRI revealed that on May 11, 1994, the plaintiff had an extruded disc at the L2-3 level. Plaintiff was referred to a special service conducted at Methodist Hospital for persons without funds. The extruded disc was removed at Methodist Hospital.

Dr. Cashion saw the plaintiff only one time. After reviewing plaintiff's medical history and examining him, Dr. Cashion concluded that the plaintiff's condition was consistent with compression of the nerve between L2 and L3. He testified that the pressure had been relieved by surgery, but that plaintiff may have had some compression of the nerves in the cauda equina, because the plaintiff had a history of bladder impairment and sexual impairment. The discharge summary made after surgery stated that there was no bladder or bowel impairment. Dr. Cashion assumed that the bladder and sexual disfunction could have occurred after surgery. Dr. Cashion concluded that the plaintiff's back condition was

caused by the injury of October 29, 1991, explaining that the accident started in motion the chain of events that led to his surgery and his current condition. Dr. Cashion stated that due to plaintiff's pain and weakness, his height and weight, and "other medical problems", the plaintiff is unemployable. He testified that the plaintiff's permanent impairment to the body as a whole is 45 percent, according to the AMA Guidelines. However, he stated that climbing in and out of a truck or merely turning over in bed could cause a disc herniation in a man the size of plaintiff.

The trial judge filed a thorough "trial opinion" in this case in which he fully summarized the evidence. In the trial opinion, the trial court reviewed the plaintiff's medical history from April 1989 through the time of the diskectomy in 1994. This history is very lengthy, but we will quote the history prior to the accident of October 29, 1991, at Kraus Cleaners:

1. The plaintiff first suffered and complained about low back pain in April 1989. (Letter dated April 14, 1989, to Dr. Richard Porter, M.D. from D. Stanley M. Patterson, M.D.

2. Degenerative spondylitic changes involving the L-3, L-4 and L-5 disc levels. Mild posterior spondylitic changes involving the L-3 through L-5 disc levels. Degenerative posterior bulging of the L-1 disc. Abnormal signal intensity of superior left aspect of L-2 and inferior aspect of L-1 disc. Decreased height of L-1 disc. (Methodist Hospital radiology report, MRI of Lumbar Spine - Exam date of April 20, 1989, by Dr. Hollis Halford, III, M.D.)

3. Neuforaminal narrowing of L-1 and L-2 on the right side, with degenerative changes. (Methodist Hospital radiology report, Exam date of April 20, 1989, by Dr. Frank Parks, M.D.)

4. Hypertrophic formation at L-1, with some inferior sclerosis. Also spur formation at right side T-7 and T-8, and at T-11 and T-12, and mild degenerative narrowing at T-11 and T-12. Interspace narrowing at L-1 to the left side. Minimal spur formation at L-4 and L-5. (Methodist Hospital radiology report, Exam date of April 24, 1989, by Dr. Jon C. Jenkins, M.D.)

5. Multilevel degenerative lumber disc disease and spondylosis, with diffuse end plate sclerosis at L-1 and L-2. (Memphis Orthopaedic Group records, dated April 25, 1989, by Dr. Riley Jones, M.D.)

6. Degenerative osteoarthritis of the thora columnar spine. (Methodist Hospital Discharge summary, dated April 28, 1989, by Dr. Stanley Patterson, M.D.)

7. Interspace narrowing and degenerative changes of L-1 and L-2 level. Disc space desiccation at L-4 and L-5-S-1 indication degenerative changes. (Methodist Hospital radiology report, Exam date of June 12, 1989, by Dr. Frank Parks, M.D. MRI of lumbar spine.)

8. Compression at T-12, mild degenerative changes of L-1, L-4, L-5 disc levels. (Methodist Hospital radiology report, Exam date of July 19, 1990, by Dr. James Mitchum, M.D.)

9. Lumbosacral strain, multilevel and degenerative changes of T-11-T-12 lumbar spine. (Methodist Hospital Discharge summary dated July 19, 1990, by Dr. Riley Jones, M.D.)

10. T-12 compression, vacuum disc phenomenon and mild degenerative changes at L-1, L-4 and L-5 disc levels. (Methodist Hospital radiology report, Exam date of July 19, 1990, by Dr. James Mitchum, M.D.)

11. Mild spondylitic change at T-11 and T-23, and at T-12-L-1 disc levels. (Methodist Hospital radiology report, Exam date of July 20, 1990, by Dr. Hollis Halford, III, M.D., CT of lower thoracic spine.)

12. Subtle area of increased activity in the region of the L-1, L-2 interspace on the left, probably representing degenerative change. (Methodist Hospital radiology report, Exam date of July 21, 1990, by Dr. James Mitchum, M.D.)

13. 50% restriction of flexion due to back pain. (Dr. Joseph H. Miller, M.D., letter to Sharon Ott, Crawford & Co., dated July 31, 1990.)

14. Degenerative disc and vacuum disc changes at L-5, L-4 and L-1 disc levels, with marked facet hypertrophy (arthritis at those levels.) (Dr. Davis D. Moser, M.D., CT Scan of lumbosacral spine, Exam date of September 15, 1990, and Dr. Thomas I. Miller, M.D., Report, dated September 19, 1990.)

15. The plaintiff states that he had injured his lower back when he fell and injured himself at a Kroger warehouse on July 19, 1990. (Plaintiff's deposition in Scott v. Kroger, Shelby Co. Circuit No. 36433 T.D., dated February 1, 1991.)

The trial judge made the following findings in his "trial opinion" with which we agree:

> There is substantial medical evidence that what has occurred is not a new injury, but a continued and progressive degeneration of the lumbar and lumbosacral spine of the plaintiff and some degeneration of his thoracic spine. This spinal degeneration and low back pain relates to at least two years prior to 1989. This is not a new injury, but only a possible aggravation of the same condition that existed in 1989. The condition identified by the plaintiff's MRI and physical examinations in 1993 and 1994 show a continued degeneration of the condition that existed in 1989.
>
> If the plaintiff's back condition is work related, a preponderance of the evidence shows that it was his subsequent work at H.I.T. Transportation Company that could have caused or exacerbated the condition, and not the incident on October 29, 1991, while employed by the defendant, Krauss [sic] Model Cleaners. The plaintiff's myelogram on November 7, 1991, following the fall on October 29, 1991, did not indicate any tear or herniated disc at any location.
>
> After the myelogram on November 7, 1991, the plaintiff began to work for H.I.T. Transportation Company as a truck driver climbing in and out of a tractor-trailer cab. Dr. Louis Cashion testified that such climbing could cause a disc herniation in a man the size of the plaintiff and that the climbing could have caused the ruptured disk at L-2 and L-3. This condition was not shown in the plaintiff's myelogram on November 7, 1991, and it was not identified until the subsequent MRI on May 6, 1994, after the plaintiff had been

> employed in the truck driving job at H.I.T. Transportation Company.
>
> There is not sufficient evidence to show that the plaintiff's lower back problems were cause[d] by or exacerbated by the work he did at Krauss [sic] Model Cleaners. Therefore, there is not sufficient evidence that the plaintiff's lower back problems arose out of and were incurred in the course of his employment at Krauss [sic] Model Cleaners.
>
> The burden of proof rests upon the party claiming the benefits of the Workmens' Compensation Act to establish the claim of permanent or permanent partial disability by a preponderance of all the evidence. Parker v. Ryder Truck Lines, Inc., 591 S.W.2d 755 (Tenn. 1979). Due to the lack of sufficient, credible medical evidence to show that the plaintiff's lower back problems were aggravated by the work he did at Krauss [sic] Model Cleaners, this burden of proof was not sustained by the plaintiff. There is simply no definitive causal link between any permanent disability of the plaintiff and his employment at Krauss [sic] Model Cleaners. Therefore, the defendants in this case are not liable under the Tennessee Workers' Compensation Law, and the case must be dismissed.

* * * * *

For the foregoing reasons, the first issue is overruled.

The second issue deals with the defendants defense of alleged willful misrepresentation and fraud in the employment application of the plaintiff. The trial court did not rule on this proposition after dismissing the case on the grounds that the plaintiff had failed to establish by a preponderance of the evidence that there was causal relationship between his permanent condition and the accident while plaintiff was working for Kraus Cleaners. Trial judges are encouraged to rule on all issues before them. Had we sustained the first issue, it would be necessary for us to remand the case back to the trial court for a ruling on the misrepresentation and fraud issue. However, since we have concurred with the trial court on the first issue, a remand is unnecessary since our holding on the first issue is dispositive of this case.

It results that the judgment of the trial court is affirmed.

Costs are adjudged against the plaintiff/appellant.

F. LLOYD TATUM, SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
L. T. LAFFERTY, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

| | | |
|---|---|---|
| CHARLES D. SCOTT, | ) | TIPTON CHANCERY |
| | ) | NO. 11,123 |
| Plaintiff/Appellant, | ) | |
| | ) | Hon. Dewey C. Whitenton, |
| vs. | ) | Chancellor |
| | ) | |
| THE TRAVELERS INSURANCE COMPANY, and SUE ANN HEAD, DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION TENNESSEE DEPARTMENT OF LABOR, | ) | NO. 02S01-9810-CH-00097 |
| | ) | |
| | ) | |
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| | ) | |
| Defendants/Appellees. | ) | AFFIRMED |



JUDGMENT ORDER

This case is before the Court upon 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 Memorandum Opinion of the Panel should be accepted and approved; 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 Appellant and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 29th day of October, 1999.

PER CURIAM