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

JOHNNY T. BROWN,	)	
	)	TENNESSEE CLAIMS COMMISSION
Claimant / Appellee,	)	AT NASHVILLE
	)	
v.	)	NO. 2A01-9701-BC-0001
	)	(Claims Comm. No. Below 104181-02)
STATE OF TENNESSEE,	)	
	)	HON. MARTHA B. BRASFIELD
Defendant / Appellant.	)	COMMISSIONER, WESTERN DIV.

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FILED

July 7, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

MEMORANDUM OPINION

Members of Panel
Justice Janice Holder
Senior Judge John K. Byers
Special Judge Robert L. Childers

AFFIRMED **CHILDERS, Special Judge**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with TENN. CODE ANN. § 50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

In this case the Commissioner of Claims found that the claimant/appellee was entitled to total disability payments from August 9, 1994 through November 9, 1994, in the amount of $3,617.57. The Commissioner also found that the claimant sustained a permanent partial impairment of 50% to the body as a whole in the amount of $55,050. Further, the Commissioner found that the State was not liable for payment of any medical expenses incurred for the services of Jackson-Madison County General associated with the claimant's August 9, 1994 surgery or for any deposition fees or medical bills of Dr. George Copple, Dr. Ray Hester or Dr. Joseph P. Rowland. Attorney's fees in the amount of $11,733.51 (20%) were awarded to the claimant. Because the evidence preponderates in favor of the decision of the Claims Commissioner, we affirm.

The State admits in November 1991 that the claimant, Johnny T. Brown, then a 40-year-old male, sustained a back injury while pushing a two-hundred pound tent out of the back of a truck, a duty within the scope of his employment as a maintenance supervisor at Paris Landing State Park. Mr. Brown is a high school graduate with extensive experience in construction, maintenance and electrical work. He also has experience in tobacco farming and in computer applications.

When the injury occurred, the claimant did not go directly to the emergency room, but later saw his family physician Dr. Charles Tucker. Dr. Tucker ordered a CT scan and an MRI and, in his Attending Physician's Report of November 21, 1991, diagnosed the claimant with a "lumbar strain from lifting heavy objects." Dr. Tucker then referred the claimant to Dr. Robert Merriweather, a neurosurgeon.

Dr. Merriweather treated the claimant conservatively with physical therapy and anti-inflammatory and pain medications. During the course of treatment, Dr. Merriweather conducted a physical examination and reviewed the MRI ordered by Dr. Tucker. In addition, Dr. Merriweather ordered a myelogram and post-myelogram CT

scan which revealed no evidence of a disc herniation. Dr. Merriweather stated that the tests indicated a "conjoined nerve root on the right at L5-S1." Dr. Merriweather released the claimant to return to work with no restrictions on January 6, 1992.

Mr. Brown returned to work where, because of a decrease in the number of maintenance workers, he was required to perform some of the maintenance duties in addition to his supervisory duties. He informed his supervisor that his back pain was such that he was unable to perform these expanded duties. On February 27, 1992 the claimant returned to Dr. Merriweather, who opined that Mr. Brown had reached maximum medical improvement. Dr. Merriweather offered no opinion as to causation and assessed permanent anatomical impairment at 5%. He later revised that figure to 10-15% or as high as 20% depending on the claimant's job capacity. Dr. Merriweather released the claimant for light duty. Although he was never officially terminated by the State, the claimant was informed that there was no light duty available.

Shortly after February 27, 1992 claimant requested a list of three doctors from the Division of Claims Administration (DCA). From the list provided by the DCA, claimant selected and next saw Dr. Cooper W. Beazley on two dates: July 27,1992 and November 18, 1992. Dr. Beazley, an orthopaedic surgeon, treated the claimant conservatively and diagnosed him with "persistent sciatica with very mild disc bulging." Dr. Beazley recommended an epidural cortisone shot and assessed the permanent anatomical impairment rating at 3% to the body as a whole based solely on the claimants "complaints of chronic pain." Dr. Beazley did not offer an opinion on causation.

During this period of treatment, the claimant applied for disability through the Tennessee Consolidated Retirement System, but the claim was denied. However, as a part of the application process the claimant was referred to Dr. Carl W. Huff, whom he first saw on February 5, 1992. Dr. Huff performed an Isostation 200 test, but he did not express an opinion on causation. Dr. Huff noted a "good-faith effort" by Mr. Brown and prescribed a rehabilitation program. Dr. Huff saw the claimant again on May 12, 1993 and performed another Isostation 200 test. Dr. Huff noted that the second Isostation 200 test result differed from the earlier one, indicating a discrepancy in the pain pattern

and “exaggerated” responses.

In July 1993 the Vocational Rehabilitation Counselor arranged for the claimant to be evaluated by Dr. Ray Hester, a neurosurgeon. Dr. Hester diagnosed the claimant with “a degenerative joint at L4-5 with a bulging disc.” He assessed the permanent anatomical impairment rating at 7% to the body as a whole. Dr. Hester also noted evidence of symptom magnification syndrome.

The Vocational Rehabilitation Section later referred Mr. Brown to Dr. Joseph Rowland, a neurosurgeon. Dr. Rowland saw him in May 1994 and diagnosed “degenerative disc disease and a possible injured disc at L5 on the right side.” Dr. Rowland performed a hemilaminectomy during which he found only “arthritic, degenerative” changes in the spine. He found no evidence of acute injury to the spine and later testified that the work-related injury could not have caused or furthered degeneration but could have made the condition more painful. Dr. Rowland testified in his deposition that Mr. Brown had a 9% disability to the body as related to a disc operation.”

Our review is *de novo* on the record accompanied by a presumption that the findings of fact made by the trial court are correct unless the evidence preponderates otherwise. TENN. CODE ANN. § 50-6-225(e).

We find that the evidence preponderates in favor of the finding that the claimant/appellee sustained permanent disability that arose out of and within the course and scope of his employment in November, 1991.

The record in this case reveals that the claimant/appellee was asymptomatic before this injury occurred. Mr. Brown testified during direct examination at trial that he had had only one back injury prior to the November 1991 injury in question, a strained muscle in the left side of his back in 1990. On cross examination he agreed that he reported that he strained his back in 1990. He also admitted that he may have filed a report in May 1991 that he twisted his back jumping from a backhoe. He also agreed that if the records showed that he reported straining his back in 1982 lifting bags of gravel, and that he reported hurting his back while crawling in a tunnel in 1981, the records would be correct, but that he did not remember these incidents. He stated that

he did not receive medical treatment for any of these incidents that he recalls. There is no proof in the record that he received any medical treatment for any of these incidents.

The record further shows that after the November 1991 injury he was treated by several different physicians and was in substantial pain. During this time he also received anti-inflammatory and pain medications. He attempted to return to work in January 1992 with expanded duties, but later told his supervisor that he was unable to perform his job. His employer then gave him a lay-off slip. He then returned to see Dr. Merriweather who later returned Mr. Brown to light duty, but no light duty was available.

With regard to pain, Mr. Brown testified that he was in a great deal of pain from the time of the November 1991 injury to the surgery by Dr. Rowland on August 8, 1994. Dr. Rowland testified that when he next saw Mr. Brown after the surgery on August 31, 1994, Mr. Brown stated he was "doing much better and having much less pain." When Dr. Rowland saw Mr. Brown again on November 2, 1994, his office notes "patient stated he is much better, but still does not think he can return to work."

At trial claimant/appellee testified that he had pain every day, "all day long and all night long . . . I couldn't sleep", from the date of the November 1991 injury to the August 1994 surgery. He took pain and anti-inflammatory medications all during this time. After the August 1994 surgery he testified that he was much better, but "there are nights that I don't sleep." He further testified that, "I may sleep in the recliner rather than the bed, but I do sleep now." Mr. Brown also asked the Court to allow him to stand periodically during the trial because "the sitting created pressure or strain on my back, and even after the surgery if I get active or if I sit for quite a while then the pain returns and . . . sitting here is just more than I can handle." He also testified that he still has to take pain and anti-inflammatory medications.

Relevant expert medical testimony exists in this case regarding aggravation of the claimant/appellee's pre-existing degenerative arthritis. During the cross examination of Dr. Rowland in his deposition the following exchange took place:

> Q. By aggravation of an arthritic condition, do you mean make it more painful, or do you mean make it progress more rapidly?

A. Make it more painful.

Q. But it cannot make it progress more rapidly?

A. Unless it is a severe injury where the bones are injured themselves.

Q. And that would be such as a blow to the back?

A. Yes, sir.

However, on further direct examination Dr. Rowland testified as follows:

Q. Doctor, I'm a little bit confused. I want to know, could the injury that he described to you in 1991 have caused or contributed to the problem that you ultimately corrected in his back?

A. Again, sir, in my opinion, the patient had arthritic changes in his back, it could have been aggravated from his lifting incident.

If a work injury aggravates a pre-existing condition merely by increasing the pain, the claim is not compensable. *Townsend v. State*, 826 S.W. 2d 434 (Tenn. 1992); *Cunningham v. Goodyear Tire and Rubber Co.,* 811 S.W.2d 888 (Tenn. 1991). The medical evidence must show that, in addition to the manifestation of increased pain, there is a permanent anatomical change in the pre-existing injury or condition. *Talley v. Virginia Insurance Reciprocal*, 775 S.W. 2d 587 (Tenn. 1989). Further, the claimant must show that there is a causal relationship between that anatomical change and the work-related injury to the pre-existing condition. *Boling v. Raytheon Co.*, 448 S.W. 2d 405 (Tenn. 1969).

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). Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required and reasonable doubt is to be construed in favor of the employee. *White v. Werthan Indus.,* 824 S.W.2d 158, 159 (Tenn. 1992). It is entirely appropriate for a trial judge to predicate an award on medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when the trial judge also has heard lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury. *Orman,* 803 S.W.2d at 676.

While it is true that Dr. Rowland testified that the November 1991 incident made the arthritic condition more painful, but did not make it progress, he also testified that the arthritic changes in Brown's back could have been aggravated from his November 1991 lifting incident. Taken as a whole the evidence shows that:

(1) Mr. Brown was asymptomatic before the November 1991 incident;

(2) the August 1994 surgery would not have been necessary but for the pain caused by the November 1991 incident;

(3) Mr. Brown now has a 9% anatomical disability to the body as a result of the August 1994 surgery, and;

(4) Mr. Brown continues to have pain after the surgery.

Dr. Rowland also testified, as to future symptoms, that there is always a 10% chance of a recurrent disc problem, and that there is always a chance that people who have disc operations will have pain post-op.

As the Court stated in *Thomas v. Aetna Life & Casualty Company et al,* 812 S.W. 2d 278 (Tenn. 1991), "[w]hile causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition."

When considered in conjunction with the claimant/appellee's testimony, any equivocation reflected in Dr. Rowland's testimony as to causation constitutes exactly the type of reasonable doubt that must be construed in favor of the employee and compensability. *White,* 824 S.W.2d at 160.

The evidence in this record shows that the claimant/appellee had surgery resulting from the November 1991 injury, and that he now has a permanent disablilty because of the surgery and permanent pain. An employer is responsible for workers compensation benefits, even though the claimant may have been suffering from a serious pre-existing condition or disability, if the employment causes an actual progression or aggravation of the prior disabling condition or disease which produces increased pain that is disabling. *Hill v. Eagle Bend Mfg. Co.,* 942 S.W. 2d 489 (Tenn. 1997).

When the opinions of medical experts differ in a workers compensation case, the trial court has absolute discretion to accept the opinion of one medical expert over another. *Johnson v. Midwesco, Inc.*, 801 S.W. 2d 804 (Tenn. 1990). Furthermore, there is a clear distinction between anatomical impairment as determined by a physician and vocational disability which results from such impairment. *Hinson v. Wal-Mart Stores Inc.*, 654 S.W.2d 675 (Tenn. 1983). The trial court is not limited to estimates of anatomical impairment in determining the percentage that plaintiff has become disabled as a result of the injury. *Bailey v. Knox County Tennessee*, 732 S.W. 2d 587 (Tenn. 1987).

In determining whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee and in assigning permanent partial disability, the trial court should consider both expert and lay testimony, as well as the employee's age, education, skills, training, local job opportunities, and capacity to work at types of employment available in the claimant's disabled condition. *Orman v. Williams Sonoma, Inc.*, 803 S.W. 2d 672, 678 (Tenn. 1991).

The record before us reflects that Mr. Brown has a high school education and that all of his training and employment experience involved physical labor and the use of his back. The record also reflects that he cannot sit or stand for long periods of time without pain, and that he continues to take medication for the pain. The numerous physicians who treated Mr. Brown opined that he sustained permanent anatomical impairment ranging from 3% to 20%. Furthermore, the vocational expert, Dr. Copple, opined that Mr. Brown sustained a 60-70% vocational disability.

We find that the evidence in the record preponderates in favor of the Claims Commissioner's award of 50% permanent partial disability to the body as a whole, and temporary total disability benefits from August 9, 1994 through November 9, 1994. The judgment of the Claims Commissioner is affirmed and the case is remanded to the Claims Commission for the entry of any order necessary to carry out this judgment. The cost of this appeal is assessed against the defendant/appellant.

Robert L. Childers, Special Judge

CONCUR:

Justice Janice Holder

John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

FILED

July 7, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

JOHNNY T. BROWN,	)	TENNESSEE CLAIMS COMMISSION
	)	NO. 104181-02
Claimant/Appellee,	)	
	)	Hon. Martha B. Brasfield,
vs.	)	Commissioner
	)	
STATE OF TENNESSEE,	)	NO. 02S01-9704-BC-00036
	)	
Defendant/Appellant.	)	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, for which execution may issue if necessary.

IT IS SO ORDERED this 7th day of July, 1998.

PER CURIAM

(Holder, J., not participating)