IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE MAY 1996 SESSION

RAYMOND PHILLIPS,	)	
	)	CAMPBELL CHANCERY
Plaintiff/Appellee,	)	
	)	
v.	)	NO. 03S01-9511-CH-00122
	)	
LINCOLN BRASS WORKS, INC.,	)	
	)	
Defendant/Appellant	)	HON. BILLY JOE WHITE

For the Appellant:

Janet L. Hogan
603 Main Avenue, 5th Floor
Knoxville, TN 37902

For the Appellee:

John T. March
P. O. Box 231
LaFollette, TN 37766

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

Members of Panel:

E. Riley Anderson, Chief Justice
John K. Byers, Senior Judge
William H. Inman, Senior Judge

REVERSED

INMAN, Senior 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.

This appeal involves two complaints for workers' compensation benefits which were consolidated for trial. The first action was filed on March 10, 1989 for low back injuries which allegedly were sustained on February 17, 1989 and March 8, 1989. On March 25, 1991 the plaintiff filed another complaint alleging a low back injury on February 27, 1991.

While not alleged in either complaint, the plaintiff testified that on March 8, 1989, he sustained a hernia in addition to the low back injury, proof concerning which was offered without objection. The Court, in effect, was concerned with four allegedly discrete injuries. The Chancellor found the claims to be compensable and awarded 20 percent permanent impairment. Two issues are presented for review: Whether there was proof that the described incidents resulted in anatomical changes and are thus compensable, as contrasted to increased pain only with no anatomical changes, and whether the hernia is compensable.

The plaintiff testified that he "fell out in the floor and kindly split my legs" on February 17, 1989 when he stumbled over a box.

On March 8, 1989, he and another employee were pulling a heavy piece of equipment when he felt a "pop in his back" which "run down in my legs and all the way up to the back of my neck and burning."

On February 27, 1991, he was picking up parts from a tub when his "back popped."

He suffered no lost time from work for any of these incidents.

Before these asserted episodic events occurred the plaintiff had experienced a litany of back ailments, commencing in 1978 when he saw Dr. Lindon Owens, a chiropractor.

Dr. Owens testified that he first saw the plaintiff on January 31, 1978 and thereafter 241 times through August, 1991 and treated him for "no predominant problems," that the plaintiff had no impairment and no time off from work attributable to disability.

Dr. Alan Weems, a neurosurgeon, testified that he first saw the plaintiff in November, 1989 with a history of chronic back pain. When asked if the plaintiff ever told him that he had no leg or groin pain until the industrial accidents, he replied that he had not; he further testified that based on a reasonable degree of medical certainty, the plaintiff has a degenerated disc at L3-4, with low back pain. He rated the plaintiff to have a seven percent impairment. Significantly, he testified that it was highly likely the disc was degenerated before "the accident," and that he could not say "it was caused by the accident." Dr. David Stanley, a general surgeon, initially saw the plaintiff on December 18, 1989 on a referral by Dr. Weems. He found a bilateral inguinal hernia which was surgically repaired on January 17, 1990. He testified, in response to a hypothetical question, that in his opinion the hernia problem was related to his work.

Dr. Samuel Marcy, orthopedic surgeon, testified that he initially saw the plaintiff in March, 1989 with complaints of back pain. He said that x-rays revealed no abnormality, and that he had a soft tissue injury. He saw the plaintiff on seven occasions, the last time on September 29, 1992 when he complained of low back pain. Dr. March opined that the plaintiff had a five percent impairment "just on range of motion."

Dr. Dennis Jones, a chiropractor, testified that he initially saw the plaintiff in July, 1992 who complained of chronic low back pain. He said, in response to a hypothetical question, that the plaintiff had an eighteen percent permanent impairment. He testified that the plaintiff did not reveal any back problems prior to February 17, 1989, and that if the plaintiff had been suffering from low back problems for ten years before February 17, 1989, the "incidents he complained of" may be "just another in a series of incidents that occurred to the plaintiff over the years."

The deposition of Dr. Fred Killefer, a board-certified neurosurgeon, was taken on December 2, 1993. He testified that he examined the plaintiff on April 10, 1992 who revealed only that he had sustained a work-related injury in February 1989 and again in March 1989. He did not mention his ten-year history of back ailments, which, as it developed from a study of the chiropractic records of Dr. Owens, involved injuries from lawn mowing and a number of hunting accidents dating back to 1975.

He opined that the incidents at work definitely did not anatomically affect the plaintiff's condition; that they only caused a transient flare-up of pain much like any other activity.

The thrust of the prolix medical testimony was essentially that there were no anatomical changes or impairment attributable to the work incidents.

The hernia repair resulted in no physical impairment, and there was substantial proof offered that the plaintiff had no vocational impairment. As the Chancellor observed, the plaintiff had a ten-year history of back problems.

Our review is *de novo* on the record accompanied by the presumption that the findings of fact of the trial judge are correct unless the preponderance of the evidence is otherwise. TENN. CODE ANN. §50-6-225(e)(2).

We think the evidence preponderates against the finding of disability attributable to the episodes of February and March 1989 and February 1991. None of the experts opined that these three incidents resulted in additional impairment or anatomical changes. Taken as a whole, the expert proof established only a recurrence of pain similar to that experienced many times in off-job activities, and liability cannot be thus fastened. *Boling v. Raytheon Co.,* 448 S.W.2d 405 (Tenn. 1969); *Loy v. North Brothers Co.,* 787 S.W.2d 916 (Tenn. 1990); *Cunningham v. Goodyear,* 811 S.W.2d 888 (Tenn. 1991); *Smith v. Smith's Transfer Corp.,* 735 S.W.2d 221 (Tenn. 1987).

With respect to the hernia, which was not treated until nine months after the March 1989 incident, we agree with the appellant that it does not comport with the statutory requirements for compensability.

TENN. CODE ANN. § 50-6-212 requires proof that the hernia appeared suddenly. Neither complaint alleges the occurrence of a hernia, and the plaintiff made no complaint of groin pain for more than two months after the hernia was allegedly sustained. In any event, Dr. Stanley testified that no impairment resulted.

The judgment is reversed and the case is dismissed at the costs of the appellee.

_____
William H. Inman, Senior Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

RAYMOND PHILLIPS,	)	CAMPBELL CHANCERY
	)	No. 12,295
Plaintiff/Appellee	)	
	)	Hon. Billy Joe White,
vs.	)	Chancellor
	)	
LINCOLN BRASS WORKS, INC.,	)	S. Ct. No. 03-S-01-9511-CH-00122
	)	
Defendant/Appellant	)	Reversed

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.

Cost will be paid by appellee, for which execution may issue if necessary.

It is so ordered this _____ day of _____, 1996.

PER CURIAM

Anderson, J., not participating