IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, DECEMBER 1996 SESSION

FILED

June 11, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

ELMER BRAMLETT,	)	BRADLEY CIRCUIT
	)	
Plaintiff/Appellant	)	
	)	
v.	)	HON. EARLE G. MURPHY,
	)	JUDGE
BENDIX ALLIED SIGNAL, INC.	)	
and LARRY BRINTON, DIRECTOR	)	
OF THE SECOND INJURY FUND,	)	
	)	
Defendants/Appellees	)	NO. 03S01-9607-CV-00082

For the Appellant:

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

Members of Panel:

E. Riley Anderson, Justice
Roger E. Thayer, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED. **THAYER, 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.

Plaintiff, Elmer Bramlett, has appealed from the action of the trial court in dismissing his claim for benefits. The Circuit Judge found plaintiff had failed to establish he had sustained a new or additional compensable injury on March 16, 1994.

Bramlett, who was 38 years old and had a 12th grade education, had been employed by Defendant, Bendix Allied Signal, Inc., since 1977. He first injured his back sometime in 1990 but a compensation claim was not filed. On January 12, 1992, he sustained a work-related injury for which he was awarded workers' compensation benefits of 25% permanent partial disability to the body as a whole.

On March 16, 1994, he contends he was injured while climbing a ladder. He testified as he was pulling up with his weight, he felt a sharp pain in his leg and back, that he could not walk well and had to sit down for awhile. The record indicates he had suffered from a number of other physical problems prior to this event and had seen numerous doctors for bladder problems, intestinal condition, brain damage resulting from a mild stroke and cardiac problems.

Plaintiff first saw Dr. Dennis L. Stohler, an orthopaedic surgeon on August 6, 1992; he returned for two visits during 1993 and was seen twice during March 1994. One visit was on March 2nd (shortly before the event in question) and the other was on March 21st (after the event in question).

Dr. Stohler's testimony was by deposition. His diagnosis concerning the work-related accident of 1992 was "chronic thoracolumbar muscle strain and L3-4 facet joint arthritis on the right." He was of the opinion a 3% impairment existed as a result of this injury. Dr. Stohler said when he saw him on March 21, 1994, he did not report a new accident but said his pain was worse, and he had to leave work. His diagnosis at this time was the same, and he said he would continue to have flare-ups from time to time. He said there was no significant

change in his condition or complaints but his arthritis had improved to some degree. The doctor had been advised by plaintiff of some of his other physical problems, and he felt plaintiff could return to work with the same restrictions from an orthopaedic standpoint.

The trial court also heard the deposition testimony of Dr. Richard B. Donaldson, an orthopaedic surgeon. He first saw plaintiff on December 10, 1992, which was almost a year after the prior compensable injury. He also saw him on June 23, 1994, about 3 months after the event in question. His diagnosis was that he had sustained another lower back strain on March 16, 1994. He was of the opinion he had a 10-15% impairment as a result of the 1992 accident and a 30-35% impairment as a result of a 1994 accident. He told the court the latter rating did not take into consideration the other physical problems plaintiff was suffering from. Dr. Donaldson felt he should not return to work as his job was too strenuous; that he should have a sedentary type of job and only on a part-time basis.

The only other expert medical witness was the testimony of Dr. Mark W. Peterson, a psychiatrist. Dr. Peterson testified by deposition and indicated he saw plaintiff for the first time during November 1992. He testified he was suffering from depression which was caused by pain from his work-related accident; that the back pain diminished his self-esteem, and he was of the opinion he was almost totally unable to function. He felt plaintiff was impaired psychologically about 90-95% and attributed about 50% of the impairment to the back injury.

We must review the record of findings by the trial court de novo accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. *See* T.C.A. § 50-6-225(e)(2).

An employee has the burden of proving every element of the case, including causation and permanency by a preponderance of the evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987).

Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony are involved, the trial court is in a better position to judge credibility and weigh evidence and considerable deference must be accorded to those circumstances. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). On the other hand, where evidence is introduced by deposition, the appellate court is in as good a position as the trial court in reviewing and weighing testimony. *Landers*, 775 S.W.2d at 356.

It has often been stated in cases of this nature that the trial court must decide which medical testimony to accept where the evidence is conflicting. In making that decision, the court may consider the qualifications of the experts, the circumstances of their examination, the information available to them and the evaluation of the importance of that information by other experts. *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).

The general rule is that where an employee's work aggravates a pre-existing condition by making the pain worse but does not otherwise injure or advance the severity of the problem, there is no compensable injury because of the aggravation. *Townsend v. State*, 826 S.W.2d 434 (Tenn. 1992); *Cunningham v. Goodyear Tire and Rubber Co.*, 811 S.W.2d 888 (Tenn. 1991); *Smith v. Smith's Transfer Corp.*, 735 S.W.2d 221 (Tenn. 1987).

It is rather apparent the trial court accepted the testimony and opinion of Dr. Stohler over the testimony and opinion of Dr. Donaldson. The opinion of Dr. Peterson seems to relate a portion of the psychological problem to plaintiff's back problem without distinguishing between the prior injury and the event in question. We must say that from our review of the case, we cannot conclude the evidence preponderates against the conclusion reached by the trial court.

Although plaintiff contends he sustained a new injury, he also argues he is entitled to a reconsideration of the award of benefits for the 1992 industrial accident pursuant to T.C.A. § 50-6-241()(2). Subsection (a)(1) of the statute provides that an injured employee's recovery is limited to two-and-a-half times

the employee's medical impairment rating if the pre-injury employer returns the employee to work at a wage equal to or greater than that received prior to the injury; subsection (a)(2) provides that the industrial disability award may be reconsidered by the court when the employee is no longer employed by the pre-injury employer, the loss of employment occurs within 400 weeks of the day the employee returned to work, and a new cause of action is filed within one year of the employee's loss of employment.

We have carefully examined the statute and are unable to agree with this interpretation. The accident which resulted in an award of disability to plaintiff occurred during January 1992, and the general language used in the statute appears only to apply to "injuries arising on or after August 1, 1992." Thus our construction of the statute is that the right of reconsideration of an award applies to injuries capped by the statute and does not apply to awards outstanding upon passage of the statute.

The judgment is affirmed as entered below. Costs of the appeal are taxed to the plaintiff and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

ELMER BRAMLETT,	)	Bradley Circuit
	)	No. V-94-449
Plaintiff/Appellant,	)	
vs.	)	Hon. Earle G. Murphy
	)	Judge
BENDIX ALLIED SIGNAL, INC. AND LARRY BRINTON. DIRECTOR OR THE SECOND INJURY FUND	)	
Defendant/Appellee,	)	S. Ct. No. 03S01-9607-CV-00082

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 the plaintiff-appellant and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this ____ day of June, 1997.

PER CURIAM

Anderson, J. - Not Participating