IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(November 15, 1999 Session)

# RAYMOND HICKS v. WILBERT VAULT COMPANY.

**Direct Appeal from the Chancery Court for Madison County**
**No. 53891 Joe C. Morris, Chancellor**

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**No. W1999-00182-WC-R3-CV - Mailed May 18, 2000; Filed June 29, 2000**

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This is an appeal by the employer, Wilbert Vault Company, from a judgment awarding worker's compensation benefits to the employee, Raymond Hicks, based upon a finding that the employee sustained 40 percent permanent partial disability to the body as a whole. On this appeal, the defendant/employer presents issues alleging that the trial court erred in finding that the plaintiff/employee sustained any permanent disability as a result of the work-related injury and that the award of 40 percent permanent partial disability to the body as whole was excessive and not supported by a preponderance of the evidence. Upon our de novo review, we find that the award should be based upon permanent partial disability of 30 percent to the body and modify the judgment accordingly.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Modified.**

TATUM, SR. J., delivered the opinion of the court, in which HOLDER, J., and ELLIS, SP. J., joined.

Gregory D. Jordan and Jeffery G. Foster, Jackson, Tennessee, for the appellant, Wilbert Vault Company.

George L. Morrison, III, and Mary Dee Allen, Jackson, Tennessee, for the appellee, Raymond Hicks.

## MEMORANDUM OPINION

The plaintiff began working for the defendant in July, 1997, preparing grave sites for funerals. It is undisputed that on September 29, 1997, while in the process of lifting an eighty (80) pound piece of equipment, he felt a sharp "pop" in his back which caused excruciating pain. It is also uncontradicted that the plaintiff had mild Grade 1 spondylolisthesis of L5 and S1 and pars defect at this level. This condition was congenital and, of course, preceded the industrial accident.

The plaintiff testified that he was 31 one years of age and had completed the 11th grade but has since obtained his GED. Before beginning his employment with the defendant, he had worked

as a carpenter and landscape foreman. He had been taking computer courses for about six months prior to trial but lacked about six months in finishing this training.

The plaintiff testified that he had been feeling soreness in his back for about a week before his injury but had missed no work and had not gone to a doctor. He testified that since the accident, he has had constant pain in his lower back. He cannot sit or stand for long, and he testified that if he twisted his back the "wrong way," he would be "down" for two days. He offered to attempt to return to work for the defendant after he was released by Dr. Parsioon, but the defendant "laid him off" over the telephone. He has since applied for work at numerous places without success.

The defendant insists that the plaintiff has failed to prove that his disabling pain grew out of an accident which arose out of and in the course of his employment, citing Hill v. Royal Ins. Co., 937 S.W.2d 873 (Tenn. 1996), and other cases with similar holdings. It is the defendant's theory that the accident aggravated the spondylolisthesis only by increasing pain but did not otherwise aggravate or advance the underlying spondylolisthesis. The plaintiff cites Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591-92 (Tenn. 1989); Boling v. Raytheon Co., 448 S.W.2d 405, 40[8] (Tenn. 1969), and Cunningham v. Goodyear Tire & Rubber Co., 811 S.W.2d 888, 89[1] (Tenn. 1991). The general rule on this subject is stated in Sweat v. Superior Indus., Inc., 966 S.W.2d 31,32-33 (Tenn. 1998) (adopting and quoting the findings of the trial court):

> "The general rule is that aggravation of a pre-existing condition may be compensable under the workers' compensation laws of Tennessee, but it is not compensable if it results only in increased pain or other symptoms caused by the underlying condition. See Cunningham v. Goodyear, 811 S.W.2d 888, 890 (Tenn. 1991); Smith v. Smith's Transfer Corp., 735 S.W.2d 221, 225-226 (Tenn. 1987); Boling v. Raytheon Co., 223 Tenn. 528, 448 S.W.2d 405, 408 (1969); Conner v. Rite Aid, 1995 WL 274486, 1995 Lexis 220 (W. Comp. Appeals Panel). It has been otherwise stated that, to be compensable, the pre-existing condition must be [']advanced['] (Springfield v. Eden, 1995 WL 595602), 1995 Lexis 67 (W. Comp Appeals Panel), or there must be an [']anatomical change['] in the pre-existing condition (Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989)), or the employment must cause [']an actual progression … of the underlying disease.['] Cunningham, supra at 890.["]

In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991). When medical testimony is documentary or by deposition, this court is as able to pass on the weight and value of such evidence as the trial court. Cooper v. INA, 884 S.W.2d 446, 451 (Tenn. 1994). All of the expert medical evidence in this case is documentary. Thus, in considering the first issue, we must examine the medical evidence.

The treating physician was Dr. Glenn Barnett, a neurological surgeon with the Semmes-Murphy Clinic in Jackson, Tennessee. His reports and records are in evidence in lieu of a deposition. In Dr. Barnett's notes, he states that the plaintiff has an impairment to his body which

was a pre-existing condition (spondylolisthesis) "that obviously was made worse" by the incident at work. In Dr. Barnett's final letter dated April 30, 1998, he states in part:

> In regard to impairment, I think he is impaired referable to the spondylolisthesis that he has but this, in my opinion, did precede the event at work. It seems to have been made a major problem by the work event. My feeling is that he would have a 5 percent impairment to his body as a whole as a result of the structural changes present in his back.

Dr. Robert J. Barnett, an orthopedic surgeon, testified by deposition that he examined the plaintiff for evaluation only. He thought that there were anatomical changes in the plaintiff's back caused by the lifting incident at work. However, he stated that he could not demonstrate this by objective findings from the diagnostic studies performed on the plaintiff and could not demonstrate any objective identifiable anatomical changes relevant solely to the lifting incident at work.

The defendant offered the deposition of Dr. Fereidoon Parsioon, a board eligible but not certified neurosurgeon, who examined the plaintiff for evaluation only at the defendant's request. It was Dr. Parsioon's opinion that the work injury did not cause anatomical changes in the plaintiff's back. Dr. Parsioon could not say whether the injury aggravated the plaintiff's spondylolisthesis, because Dr. Parsioon could not prove it. He testified that he could prove that the incident did not change the pre-existing abnormal anatomy of his back.

The record is clear that the plaintiff had no symptoms of consequence prior to the lifting incident at work and that, immediately upon the lifting incident, the plaintiff has major problems with his back. Both Drs. Glenn Barnett and Robert Barnett testified that he could no longer do heavy lifting and must find other employment.

We accredit the evidence given by Dr. Glenn Barnett who treated the plaintiff for a long period and was more familiar with his condition. He stated that the plaintiff had 5 percent impairment to his body as a result of the "structural changes present in his back." We also note Dr. Glenn Barnett's statement that the event at work caused a "major problem" and that the pre-existing spondylolisthesis "obviously was made worse" by the incident at work.

We find and hold that the plaintiff did suffer a compensable injury in the course and scope of his employment with the defendant. We accredit the testimony that the plaintiff had structural changes in his back as a result of the industrial accident and, as a result of the industrial accident, there was a progression or actual worsening of the plaintiff's underlying spondylolisthesis. The first issue is overruled.

We now address the second issue as to whether the award based on the finding that the plaintiff sustained 40 percent permanent partial disability to the body as a whole is excessive. The trial judge did not state what anatomical impairment rating as given by the medical experts that he accredited. The court stated only "he has impairment ratings from 20 percent to zero percent."

Dr. Robert J. Barnett rated the plaintiff at 7 percent impairment to the whole body based on the AMA Guidelines. He rated the plaintiff at 20 percent under the orthopedic guidelines but stated that the 20 percent rating was applicable only when a patient had osteoarthritic lipping and that the plaintiff did not have osteoarthritic lipping.

Dr. Parsioon testified that the plaintiff had zero impairment. He testified that nothing on examination would require any work restrictions, but if a person with back pain is doing something that aggravates the pain, he should change this activity.

Finally, Dr. Glenn Barnett testified that the plaintiff had 5 percent impairment as a result of the structural changes in the plaintiff's back. As previously stated, we accredit his testimony and find that the plaintiff had 5 percent medical impairment to the body as a whole as a result of the work related accident. The defendant has not returned the plaintiff to employment at a wage equal to or greater than the wage he was receiving at the time of the injury, and we find that Tenn. Code Ann. § 50-6-241(b), limiting a recovery to six (6) times the medical impairment rating, is applicable.

The medical proof establishes that the plaintiff can no longer do heavy lifting. He has limitation of motion in his back and is no longer a candidate to do heavy manual labor. However, he has the equivalent of a high school education and is actually in the process of learning new skills involving a computer. In considering his age, training and experience, along with the other elements above discussed, we find that the plaintiff is entitled to compensation based on 5 percent impairment to the body as a whole multiplied by six (6), which is 30 percent permanent partial disability to the body as a whole. The judgment of the trial court is modified accordingly.

Costs are adjudged against the defendant.

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## JUDGMENT

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 on appeal are taxed to the Defendant/Appellant, Wilbert Vault Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM