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

CECILIA NAULT, Plaintiff/Appellant	)	HAMILTON CHANCERY
v.	)	NO. 03S01-9903-CH-0003O
MOOTZ, INC., d/b/a SEASONS RESTAURANT & OHIO CASUALTY GROUP Defendant/Appellees	)	HON. FRANK BROWN, CHANCELLOR Received: April 4, 2000

For the Appellant:	**For the Appellee:**
J. Troy Wolfe 615 Houston Street Chattanooga, TN 37403	William A. Lockett 530 Pioneer Bank Bldg. 801 Broad Street Chattanooga, TN 37402

MEMORANDUM OPINION

Members of Panel:

Justice William M. Barker
Senior Judge John K. Byers
Special Judge Gary R. Wade

AFFIRMED **BYERS, Senior Judge**

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

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 548, 550 (Tenn. 1995).

The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988).

_____The trial court denied the plaintiff's claim for workers' compensation benefits and dismissed the complaint.

We affirm the judgment of the trial court.

_____FACTS

_____The plaintiff, 49 years of age at the time of trial, has a varied work history consisting mainly of waiting tables, clerical work, work as a maid, factory work, cook, baby sitting and nurse's aid. She has a high school diploma and two to three years of college credits. In college, she studied, among other subjects, machine shorthand and business law; she is currently taking classes to become a court reporter. She was born in New Hampshire and has lived in several states on both coasts. The plaintiff was married shortly after graduation from high school. Not long after the marriage, the plaintiff's husband suffered an on-the-job injury which necessitated the plaintiff's entry into full-time employment. Before coming to Tennessee, the plaintiff moved to California, divorced, took some college courses then moved back to New Hampshire.

In 1988, while in New Hampshire, the plaintiff was working waiting tables at the Golden Maple Restaurant when she sustained an injury in a manner curiously

similar to the one claimed in this case: she injured her back while lifting a bucket of ice.

The plaintiff later moved to Massachusetts, then returned to California, came back to New Hampshire, moved to Florida, back to New Hampshire, returned to Florida and then moved to Tennessee. She lived and worked near Nashville before coming to Chattanooga. During this time she worked in many places mostly waiting tables. She did work for Pinkerton Security for a time after coming to Chattanooga. While on a job for Pinkerton at Wheland Foundry, she missed a step and injured her ankle. She testified she did not file a claim but did receive medical treatment. The plaintiff went to the emergency room at Erlanger Hospital. Doctors at the hospital performed x-rays and diagnosed a "Grade I sprain of the ankle." The doctor's records reflect the plaintiff "appear[ed] to have pain out of proportion to her injury or mechanism of injury." She became rather hostile when the doctor told her of his plan to give her Percocet, saying it was like giving her water; she was given Merpergan. The doctor's notes also reflect the plaintiff's past medical history including a psychiatric disorder with transfer to Moccasin Bend for paranoid delusions. The doctor could find nothing in her records to suggest drug seeking behavior.

The plaintiff began working for the defendant in August of 1996 as a waitress on the evening dinner shift. The plaintiff described her job duties as including among other things, icing the salad bar area and carrying buckets of ice to the salad bars. The plaintiff claims she injured her back on September 10, 1996, when she was picking up a bucket of ice to ice down the salad bar. The defendant, however, stated that the salad bars were not open during the evening dinner shift to which the plaintiff was assigned and that salads were made in the back kitchen area in the evenings. The plaintiff claimed to have tried to report the injury at the time it occurred as well as on September 11th and 12th.

On September 13, 1996, the plaintiff began to work her regular shift. At some point during that shift, the plaintiff became busy and was unable to tend to a table within the allotted time so another server was sent to take drink orders–a common practice in restaurants. As a result, words were exchanged between the plaintiff and

management, and the plaintiff walked off the job without finishing her shift and did not return until September 23, 1996.

On September 23rd, the plaintiff arrived accompanied by two police officers to file a workers' compensation claim. The owner apparently was stunned and asked why the injury wasn't reported earlier to which the plaintiff claimed she had reported it to the manager. The manager denied any knowledge of a work injury. The plaintiff was unable to tell the owner the date of the injury at that time or even later at an unemployment hearing. She has since given several different versions of the time, place and mechanism of the injury. On September 23rd, she said the injury was a continuous build-up and didn't happen on one day. The owner took what information the plaintiff could provide and completed the First Report of Injury.

The plaintiff has shown other episodes of drama. She often uses crutches when going to the doctor's office and/or emergency room. The plaintiff was seen by the manager walking with crutches during the September 23rd meeting[1], but he also saw her discard the crutches to cross the street. During an October 23, 1996, visit to the emergency room, she created a scene, demanding pain medication and admittance to the hospital. Later, despite the tremendous pain she was suffering, she chose to walk from her home to the Memorial Hospital area to see Dr. Kahn. The plaintiff then decided the pain was too much and stopped to call 911 for an ambulance to take her the rest of the way.

MEDICAL EVIDENCE

After being admitted to the hospital, the plaintiff underwent surgery performed by Dr. Peter Boehm, M.D., a neurosurgeon, who testified via deposition. Dr. Boehm saw the plaintiff on September 7, 1997, nearly a year after the claimed accident. The plaintiff told Dr. Boehm that she had a long history of back pain. She also told him she developed the pain in her back and leg after picking up a bucket of ice in

[1] The plaintiff had not received any medical care for the claimed injury at that time.

September of 1996. Dr. Boehm diagnosed left L-5 radiculopathy and cauda equina compression secondary to a ruptured disc, part of which extruded. He performed surgery from which the plaintiff recovered "beautifully" and according to the doctor she is now asymptomatic in her back and legs. Dr. Boehm testified that a seemingly minor event such as lifting a bucket of ice would rarely rupture a disc. There was no doubt in his mind that the plaintiff had pre-existing problems; however, he still believed the alleged lifting event "precipitated" the surgery. Dr. Boehm assessed the plaintiff's impairment at 10% to the body as a whole and restricted her from lifting or bending on a repetitive basis and from lifting 15-20 pounds.

Dr. Harry Stearns, M.D., an orthopedic surgeon, also testified via deposition as to his treatment of the plaintiff for the 1988 injury. He testified he had diagnosed a herniated disc at L4-5. He also testified that if the plaintiff presently had a herniated L4-5 disc then it was the same herniation she had in 1988; the condition had not resolved when the plaintiff left his care in October of 1989. When Dr. Stearns last saw the plaintiff he was frustrated by her lack of motivation to help herself and released her with restrictions in regard to lifting–no more than 10 lbs. He felt she was not motivated to seek another opinion regarding her back condition or to look for work within her restrictions. He did not see or treat her for the claimed 1996 injury.

The plaintiff's medical records show she changed doctors often. Her first post-injury appointment was with Dr. Leisha Espy, a chiropractor, who noted the plaintiff gave a history of the injury occurring when she lifted heavy buckets of ice to fill the food bar. She saw Dr. John Ellis. The plaintiff came to Dr. Ellis's office on crutches and claimed to have been injured while doing "side work". Dr. Ellis referred her to Dr. Robert Sendele. She was scheduled to see Dr. Sendele but claimed she could not wait a month to see him and saw Dr. Susan Stutes instead. However her first appointment with Dr. Stutes was made for a date around the same time as the cancelled appointment with Dr. Sendele. Dr. Stutes's history shows the plaintiff told her the injury occurred when lifting a tea jug and that she had a previous similar episode over the past several years including the "1989" [sic] disc herniation. The

plaintiff also told Dr. Stutes she had been seen in the emergency room for arthritis and that she suffered chronic depression associated with her chronic pain. Dr. Stutes diagnosed chronic pain syndrome, sciatica, depression, and noted she suspected a "significant component of psychiatric overlay with possible manipulative or malingering behavior." Dr. Stutes ordered an MRI which showed degenerative disc disease, extruded disc, L4-5 level, centrally and towards the left with mass effect upon the left L5 and the S1 nerve root with the spinal canal. The plaintiff stopped seeing Dr. Stutes even though the physical therapy prescribed by her was, according to the plaintiff herself, helping with the pain. The plaintiff next saw Dr. Shabaz Kahn. It was on the way to Dr. Kahn's office that the plaintiff called the ambulance and was subsequently admitted to the hospital for back surgery.

DISCUSSION

The plaintiff contends the trial court erred in failing to find the evidence showed she injured her back in the course and scope of her employment on September 10, 1996. The plaintiff claims she established a prima facie case and the defendant failed to adequately show the injury was not work related.

In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." TENN. CODE ANN. § 50-6-102(a)(5). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight Sys., Inc.,* 938 S.W.2d 690, 692 (Tenn. 1997) (citations omitted); *Fink v. Caudle,* 856 S.W.2d 952 (Tenn. 1993).

Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.,* 734 S.W.2d 315 (Tenn. 1987). However, when the medical testimony is presented by deposition, as it was in

this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA,* 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.,* 775 S.W.2d 355, 356 (Tenn. 1989).

In this case, the trial judge made a determination as to the credibility of the plaintiff vis á vis the two witnesses who testified for the defendant–Mr. Mootz, the owner and Mr. Lawson, the manager. The trial judge found the defendant's witnesses "very credible." We find the evidence does not preponderate against the trial judge's assessment of the live witnesses. Likewise, our independent assessment of the medical proof is that the preponderance of the evidence supports the trial judge's decision.

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 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., Inc.,* 942 S.W.2d 483 (Tenn. 1997), citing *Fink v. Caudle,* 856 S.W.2d 952, 958 (Tenn. 1993); *White v. Werthan Indus.,* 824 S.W.2d 158, 159 (Tenn. 1992); *Talley v. Virginia Ins. Reciprocal,* 775 S.W.2d 587, 591 (Tenn. 1989). It is also true that an employer takes the employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the pre-existing conditions; but if work aggravates a pre-existing condition merely by increasing pain, there is no injury by accident. *Sweat v. Superior Indus., Inc.,* 966 S.W.2d 31, 32 (Tenn. 1998). To be compensable, the pre-existing condition must be advanced, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. *Id.* at 33.

The record in this case does not show by a preponderance of the evidence that there was an actual progression or anatomical change in the plaintiff's pre-existing condition. An increase in pain, which is not disabling, is not compensable. The plaintiff had a disc herniation in 1988 that required surgery; surgery was never

performed to correct that condition. The medical evidence does not show that the claimed work-related incident worsened or caused a progression in her pre-existing condition.

For the reasons stated herein, we affirm the judgement of the trial court. The costs of the appeal are taxed to the plaintiff.

_____

John K. Byers, Senior Judge

CONCUR:

William M. Barker, Justice

Gary R. Wade, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

CECILIA NAULT v. MOOTZ, INC., d/b/a SEASONS RESTAURANT & OHIO CASUALTY GROUP

Hamilton Chancery Court for Hamilton County
No. 97-0895

Received: April 6, 2000

No. E 1999-01467-WC-R3-CV

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgement of the Court.

Costs on appeal are taxed to the plaintiff/appellant, Cecilia Nault, for which execution may issue if necessary.

04/06/00