

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
September 28, 2000 Session

**LOEWS VANDERBILT PLAZA HOTEL v. STEPHANIE KEATON SIMON**

**Appeal from the Chancery Court for Davidson County  
No. 98-346-III Ellen Hobbs Lyle, Chancellor**

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**No. M1999-02576-WC-R3-CV - Mailed - January 30, 2001  
Filed - April 16, 2001**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel 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. The defendant employee, Stephanie Keaton Simon, raises two issues, arguing that the trial judge erred in (1) failing, in the face of reasonable doubt regarding causation, to grant all inferences to Simon, and (2) finding that Simon's injury did not arise in the course of her employment. The Panel concludes that the evidence does not preponderate against the finding that Simon's injury arose outside the course of her employment. Furthermore, we do not find error in the trial court's asserted failure to resolve all reasonable doubt in Simon's favor regarding causation. Therefore, we affirm the judgment of the Chancery Court for Davidson County.

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

CAROL CATALANO, Sp. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JAMES L. WEATHERFORD, Sr. J., joined.

R. Stephen Doughty, Nashville, Tennessee for the appellant, Stephanie Keaton Simon.

David T. Hooper, Brentwood, Tennessee for the appellee, Loews Vanderbilt Plaza Hotel.

**MEMORANDUM OPINION**

I. Facts and Procedural History

Simon began working as a front line cook for Loews Vanderbilt Plaza Hotel (Loews ) in January 1996. On December 31, 1996, Simon was preparing salads in the pantry of the hotel when she dropped a cucumber wrapper. When she bent over to pick up the wrapper, she felt a pain in her lower back. She told her supervisor, Jeff Beverly, that her back was hurting, but she did not express a need for medical attention. Simon also did not report her back pain to Loews security department, despite Loews policy that all on-the-job injuries were to be reported to that department. Simon continued to work until being sent home later in the evening due to lack of business. Because of the pain in her back, Simon did not go out with friends after work as she had planned but instead visited the house of her friend Sharon Boyers in Nashville. While there, Simon told Boyers that she had “maybe pulled a muscle or she was hurting in her back and down her leg.” While at Boyers’s house, however, Simon did not require any help walking or moving around. After midnight, Simon drove herself to her home in Clarksville, where she resided with her parents. Simon reported to work without difficulty on January 2, 1997, her next scheduled work day, and she did not miss any work or seek any medical attention.

Subsequently, on January 5, 1997, Simon was washing her car at her parents’ house when she twisted her back while bending over, immediately causing her to experience a severe pain in her back. Unable to walk because of the pain, Simon crawled into her house and lay on the sofa. She could not move around the house without assistance, and eventually her father drove her to the emergency room at Nashville Memorial Hospital for treatment. While at the emergency room, Simon did not suggest that her pain was related to her work. On her next two scheduled work days, January 8 and 9, Simon called her supervisor and stated that she was unable to work because of her back pain.

On January 17, 1997, Simon went to orthopedist Phillip Rosenthal, M.D., for further treatment for her back pain. While there Simon filled out a form listing the date of her injury as January 5, 1997, when she “reached to get something and felt a sharp pain,” and on another form she indicated that she was not seeing Rosenthal for a work-related injury. At no time during her January 17 visit with Rosenthal did she mention that she had experienced any pain in her back on December 31, though at trial she explained that she did not mention the December 31 incident because she had used up her sick leave and she feared being reprimanded by her manager. An MRI ordered by Rosenthal showed a large right paracentral disc herniation at the L4-5 level. Rosenthal provided conservative care for Simon and did not place any lifting restrictions on her at work. Though Rosenthal recommended surgery for Simon’s back, she decided against it. Rosenthal last saw Simon on February 28, 1997.

On April 13, 1997, Simon experienced another episode of back pain when she picked up a 25- to 40-pound bucket of potatoes while working at Loews. She described the pain as very sharp in her lower back, with pain shooting down her leg, and indicated that the pain was severe enough to bring her to tears. Although Simon reported the pain to Loews security department at 11:45 p.m. that same evening, however, she indicated in her report that the incident happened at approximately 3 p.m., over eight hours earlier. During the time between the incident and the time of her report, Simon performed her usual work duties and worked her complete shift, taking regularly scheduled

breaks, and she did not mention her back pain to any management personnel or seek medical help. She returned to work the following day and worked a complete shift, and she worked a half-day the next day before her supervisor suggested that she consult Loews's occupational health department because of her complaints about back problems.

After going to the occupational health department, Simon was referred to orthopedic surgeon Stanley Hopp, M.D. On a form completed in Hopp's office, Simon related that her back pain began from an on-the-job injury on December 31, 1996, and continued through the car washing incident on January 5, 1997, and the incident while lifting the potato bucket on April 13, 1997. On May 7, 1997, Hopp performed a lumbar disc removal on the right side at L 4-5. After the operation, Simon was off work until September, after which she was permitted to return to work, first on a part-time basis and later on full-time duty. After her return, she missed no further work time as a result of her back problem until February 1998, when she re-injured her back in an fall on the steps at her apartment complex. Following that fall she underwent several other surgeries, resulting in her having to use a cane to walk.

On February 4, 1998, Loews filed a complaint in the Chancery Court for Davidson County seeking a determination of the parties' rights and responsibilities under the Tennessee Workers' Compensation Act. Simon filed a counterclaim for workers' compensation benefits alleging that her back injury arose on December 31, 1996, while in the course of her employment with Loews. Simon presented the deposition testimony of Hopp to support her claim that her injury was caused by the December 31 incident. Hopp testified that Simon told him she had suffered an on-the-job injury on December 31 when she bent over, twisting her back, that she had gone to the emergency room about a week later after she had felt her back hurt "a little bit worse" while washing her car, and that she had felt worsening pain of the right sciatica and weakness of her leg after picking up a bucket of potatoes on April 13, 1997. Based on this history from Simon, Hopp opined that she "probably initially had torn the disc December 31, 1996 with the bending over and twisting at work. She probably aggravated it a little bit January 5, '97 washing her car, but then ruptured the disc out on April 13 of 1997 at work lifting the potatoes." Notably, however, on cross examination Hopp was asked whether it was possible to predict exactly when Simon herniated her disk. Hopp conceded that it would be impossible, based on the history he had been given by Simon, to say exactly when the disc had herniated. Moreover, when Hopp reviewed Rosenthal's notes, which were in his file, he noted that an MRI from January 21, 1997, revealed a right-sided disc herniation. Hopp then acknowledged that the MRI demonstrated that Simon's disc was herniated as early as January 21, despite his earlier suggestion that the disc had not ruptured until April 13, 1997.

Rosenthal also testified by deposition and opined that Simon's condition was caused by a "degenerative disk, which is a process which takes years to occur before the disc becomes so weak that it can fall out." Rosenthal testified that traumatic disc herniations were rare and typically involved "high-energy injuries such as two automobiles hitting head-on where there's many broken bones involved." Rosenthal testified that a person could have a degenerative disc condition without symptoms for quite some time before reporting a painful injury, but when asked if there were any

way to tell, apart from the history given by Simon, when the condition of the disc first manifested itself, Rosenthal replied, “Definitely not.”

At the close of trial, the Chancellor found that Simon had failed to carry her burden of proving by a preponderance of the evidence that her back problems were caused by the December 31, 1996 injury and not by the January 5, 1997, injury while washing her car, and the Chancellor further found that Simon’s back problems on April 13, 1997 were no more than a “temporary exacerbation of a pre-existing injury.” Therefore, the court held that Loews would have no obligation to Simon for any workers’ compensation benefits. Simon appealed, arguing that the chancery court erred in (1) failing to grant all reasonable inferences to Simon on the issue of causation and (2) finding that Simon’s injury did not arise in the course of her employment. After careful review of the record and relevant authority, the Panel concludes that the evidence does not preponderate against the chancery court’s findings, and thus we affirm.

## II. Standard of Review

In workers’ compensation cases, the standard of review is de novo upon the record, accompanied by a presumption of the correctness of the trial court’s factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Spencer v. Towson Moving and Storage, Inc., 922 S.W.2d 508, 509 (Tenn. 1996). The application of this standard requires the Court to weigh in more depth the factual findings and conclusions of the trial court in a workers’ compensation case. Cleek v. Wal-Mart Stores, 19 S.W.3d 770, 773 (Tenn. 2000).

## III. Analysis

To prove a compensable injury under Tennessee workers’ compensation law, the claimant must establish by a preponderance of the evidence that he or she sustained an injury “arising out of and in the course of employment.” Tenn. Code Ann. § 50-6-102(12) (1999). The phrase “arising out of” refers to the cause or origin of the injury, while the phrase “in the course of” refers to the “time, place, and circumstances” of the injury. Lollar v. Wal-Mart Stores Inc., 767 S.W.2d 143, 144 (Tenn.1989). An injury arises out of and is in the course of employment “if it has a rational connection to the work and occurs while the employee is engaged in the duties of employment.” Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn.1991). In proving that an injury arose out of the employment, an employee may not base his or her claim on speculative or conjectural proof, and in most cases a plaintiff must establish causation by expert medical evidence. See Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997); Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). As stated by the Court in Long v. Tri-Con Industries, Ltd., however,

Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required, and reasonable doubt must be extended in favor of the employee. Accordingly, a trial judge may properly predicate an award in favor of an employee based on medical evidence that an incident “could be” the cause of

the injury, where the trial judge has also heard lay testimony from which it reasonably inferred that the incident was in fact the cause of the injury.

996 S.W.2d 173, 177 (Tenn. 1999) (citations omitted).

In this case, the preponderance of the evidence does not weigh against the trial court's finding that Simon's injury did not arise out of and in the course of her employment. As noted by the trial court, Simon's own testimony suggested that her January 5 injury was more severe and more consistent with a herniated disc injury. Her back pain on December 31 was relatively insignificant and did not cause her to miss work, whereas the January 5 incident caused her such extreme pain that she was rendered unable to walk and was forced to miss at least two subsequent work days. Additionally, neither side's medical expert testified that there was any way to discern whether Simon's herniated disc first manifested itself on December 31, 1996, when she picked up the cucumber wrapper at work, or January 5, 1997, when she hurt her back while washing her car. Rosenthal testified that Simon's condition suggested a "degenerative disc, which is a process which takes years to occur before the disc becomes so weak that it can fall out." Thus, according to him, Simon may have had problems in her disc for quite some time without symptoms, and Simon's picking up the cucumber wrapper did not necessarily produce the injury. Rosenthal's testimony provides no clear reason to conclude that either of the two incidents was a more probable cause of Simon's injury.

Likewise, though Hopp testified that he believed Simon "probably initially had torn the disc December 31, 1996 with bending over and twisting at work," the value of this testimony is limited. Hopp based his opinion on Simon's statements that she had first hurt her back on December 31 and then felt her back "hurt a little bit worse" on January 5 while washing her car. Hopp's characterization of Simon's January 5 injury, however, is not in concordance with Simon's testimony and her actions after the two incidents, which suggest that Simon's back pain on December 31 was relatively minor and temporary while the January 5 incident caused her extreme and lasting pain. Because Hopp's testimony was based at least in part upon erroneous assumptions about the case and a misleading history provided by Simon, it has limited probative value regarding the issues presented in this case.

The evidence also does not preponderate against the Chancellor's conclusion that Simon's alleged injury on April 13, 1997, was simply a temporary, noncompensable exacerbation of her preexisting injury. For an exacerbation of a preexisting condition to be compensable, the condition must be advanced, or there must be anatomical changes in the preexisting condition. Sweat v. Superior Industries, Inc., 966 S.W.2d 31, 33 (Tenn. 1998). If the exacerbation "results only in increased pain or other symptoms caused by the underlying condition," there is no injury by accident and the exacerbation is not compensable. Id. at 32. There is no evidence in the record of any anatomical change in Simon's physical condition between her MRI in January 1997 and her condition after the April 13 incident. Thus, in the absence of evidence that Simon's physical

condition was worsened by the April 13 incident, the Chancellor's conclusion that the April 13 incident did not cause a compensable injury is not against the preponderance of the evidence.

Because the Chancellor's conclusions that Simon's back problems arose from her January 5 injury and that the April 13, 1997 was but a temporary exacerbation of that injury are not against the greater weight of the evidence, those conclusions must be presumed correct upon appeal. Simon's contention that the Court's holding in Long v. Tri-Con Industries, Ltd. compels the trial court to "resolve all reasonable doubt in favor of the employee" misconstrues the holding of that case. See generally Long, 996 S.W.2d at 177. The Long Court held that an award would be upheld, despite uncertain medical proof of causation, "where the trial judge has also heard lay testimony from which it reasonably inferred that the incident was in fact the cause of the injury." Id. In other words, a trial court's finding that an injury arose out of the employment will be presumed correct, despite a lack of clear medical proof, if the trial court reasonably concludes that non-medical testimony in the case also supports its decision. That holding is inapplicable to this case because the Chancellor found that neither the medical proof nor the lay testimony in this case supported a conclusion that Simon's injury arose out of her employment. As we have emphasized above, that finding is not contrary to the preponderance of the evidence and must be presumed correct. Simon's assertion that the trial court must resolve all reasonable doubt regarding causation in favor of the employee effectively would shift the burden of proof to the employer, forcing it to prove beyond a reasonable doubt that the injury did not arise out of and in the course of employment. Such a result would clearly contravene the burden of proof established by Tennessee law. See Oster v. Yates, 845 S.W.2d 215, 217 (Tenn. 1992) ("The party claiming the benefits of the Workers' Compensation Act has the burden of proof to establish her claim by a preponderance of all the evidence.").

#### IV. Conclusion

For the foregoing reasons, the Panel concludes that the evidence does not preponderate against the trial court's finding that Simon failed to prove her back problems were caused by a work injury on December 31, 1996, or April 13, 1997. We further conclude that the Chancery Court did not err by failing to resolve all reasonable doubt concerning causation in the favor of Simon. Therefore, the judgment of the Chancery Court is affirmed. Costs on this appeal will be taxed to Stephanie Keaton Simon, for which execution may issue if necessary.

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CAROL CATALANO, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE  
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**JUDGMENT**

This case is before the Court upon Stephanie Keaton Simon's 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 Stephanie Keaton Simon, for which execution may issue if necessary.

**IT IS SO ORDERED.**

**BIRCH, J., NOT PARTICIPATING**