

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

October 18, 2001 Session

ANGELA LEMMONS v. P & P ENTERPRISES, LLC

**Direct Appeal from the Circuit Court Robertson County
No. 8982 James E. Walton, Judge**

**No. M2001-00616-WC-R3-CV - Mailed - January 16, 2002
Filed - February 20, 2002**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The employee appeals the finding of the trial court that she failed to carry her burden of proof that her injuries arose out of and in the course of her employment. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Robertson County Circuit Court is Affirmed.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., JUSTICE, and WILLIAM H. INMAN, SR. J., joined.

James M. Balthrop, Springfield, Tennessee, for the Appellant, Angela Lemmons.

Sean Hunt, Nashville, Tennessee, for the Appellee, P & P Enterprises, LLC.

MEMORANDUM OPINION

FACTS

Angela Lemmons Ortega, hereafter "plaintiff," worked for P & P Enterprises, LLC at Lee's Kitchen in Springfield, Tennessee on September 12, 1997 when she slipped

on a rug and fell on her back. A co-employee took her to the emergency room where she was treated and released. She returned to work but quit in November for reasons unrelated to her injury. She subsequently worked for Junior's Food Mart, and then, Caroline's doing a job that involved sewing and picking up boxes of pillows. In addition, she also worked about 20 hours a week as a sitter with a physically disabled individual. She testified that part of her duties as a sitter involved changing the diaper of the gentleman who was not able to walk, and that she did that job until sometime in 1998 "(w)hen I started having my problems with my back and legs." On August 13, 1998, she went to see Dr. Robert G. Ferland, a family physician. She reported the remote fall in 1997 to him. Dr. Ferland testified that he billed her group health care because "I didn't think this was necessarily work-related." Dr. Ferland opined that trauma had caused the back condition he saw on the M.R.I. performed on plaintiff's back.. He testified the trauma would have occurred at least six months prior to the M.R.I. and "could have been one, two, three years, could have been ten years. You just can't tell by the M.R.I." The medical report of Thomas J. O'Brien, M.D. was admitted into evidence by stipulation. Dr. O'Brien performed a physical examination on plaintiff and reviewed the records of Dr. Ferland. He concluded that she had a minor soft tissue injury that resulted in no permanent impairment. The trial court found that plaintiff had failed to establish, by expert medical proof, that she suffered a permanent injury and that the permanent injury was work-related.

STANDARD OF REVIEW

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 findings, 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 depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452 456 (Tenn. 1988). Conclusions of law are subject to *de novo* review with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293 (Tenn. 1997). When the medical testimony is presented by deposition or on written reports, 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).

ISSUE

The determinative issue of this appeal is whether the plaintiff carried her burden of proof that her injuries arose out of the course and scope of her employment.

DISCUSSION

The trial judge noted that he looked at the expert medical proof for testimony that plaintiff's fall at work on September 12, 1997, more likely than not, caused the injury for which she sues. He noted that he was "faced with the testimony of Dr. Ferland which is equivocal at best. I have the testimony of Dr. O'Brien who says absolutely there is no relationship." 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); *Fink v. Caudle*, 856 S.W.2d 952 (Tenn. 1993). In all but the most obvious cases, such as the loss of a member, expert testimony is required to establish causation. *Thomas v. Aetna Life & Casualty Co.*, 812 S.W.2d 278 (Tenn. 1991). An award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reese*, supra.

The trial judge concluded, based upon the lay testimony he heard and the medical evidence, that plaintiff had failed to carry her burden of proof. When the trial judge has made a determination based upon the testimony of witnesses 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. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). We have reviewed the lay testimony and find that the preponderance of such evidence does not raise an inference that the fall on September 12, 1997 was the cause of plaintiff's complaints. We concur in the trial court's finding that the plaintiff has failed to prove, by a preponderance of the evidence, that she has a permanent disability caused by a work-related injury on September 12, 1997.

CONCLUSION

The judgment of the trial court is affirmed. Costs of the appeal are taxed against the Appellant and her surety.

Howell N. Peoples, Special Judge

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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 will be paid by the Appellant and her surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM