

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 31, 2003 Session

ROGER RAYMOND DESMARAIS v. THE BAILEY COMPANY, ET AL.

**Direct Appeal from the Chancery Court for Wilson County
No. 00194 C. K. Smith, Chancellor**

**No. M2002-02637-WC-R3-CV - Mailed - January 26, 2004
Filed - March 15, 2004**

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. In this appeal, the employee insists the trial court erred in dismissing his claim. As discussed below, the panel has concluded the evidence fails to preponderate against the findings of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JAMES L. WEATHERFORD, SR. J., joined.

Michael W. Ferrell, Mt. Juliet, Tennessee, for the appellant, Roger Raymond Desmarais

D. Andrew Saulters, Nashville, Tennessee, for the appellee, The Bailey Company

Paul G. Summers, Attorney General & Reporter, and E. Blaine Sprouse, Assistant Attorney General, Nashville, Tennessee, for the appellee, Second Injury Fund

MEMORANDUM OPINION

The employee or claimant, Mr. Desmarais, initiated this civil action to recover workers' compensation benefits. The employer, The Bailey Company, and the Second Injury Fund denied liability. After a trial on the merits, the trial court dismissed the claim for insufficient proof of a compensable injury by accident. The claimant has appealed.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn.

Code Ann. § 50-6-225 (e)(2). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991).

The claimant began working for the employer in January 2000 as a brick mason. He alleges that he felt back pain at work on April 24, 2000, while lifting a cover on a forklift. There were no witnesses to the incident. The claimant received treatment from two different doctors, but continues to have back pain. Medical restrictions prevent him from returning to work for the employer.

The claimant has a history of back problems. He suffered an injury in 1985, while working for another employer in Massachusetts. His workers' compensation claim was settled for \$160,000.00. In May 1999, he suffered a second back injury for which he did not seek workers' compensation benefits. Diagnostic testing revealed a large herniated disc at L5-S1 following the 1999 injury.

The record contains conflicting medical testimony as to whether the claimant's present injury is work related. Dr. Thomas O'Brien, who treated the claimant, reported that the claimant did not inform him of the claimant's injuries of 1985 or 1999, when the medical history was taken. In addition, after comparing an MRI that was ordered in May 1999 with one ordered by Dr. Daniel McHugh in May 2000, Dr. O'Brien testified that the reports of the MRIs were essentially the same and that there was no anatomic change revealed by comparing the two reports. Dr. David Gaw, an examining physician, opined that the claimed injury probably was causally related to the work the claimant was performing for the employer. However, Dr. Gaw was unaware of the claimant's 1999 injury. Moreover, when Dr. Gaw compared the two MRI reports, he agreed there was no significant difference between the two. Dr. Gaw also conceded that there were inconsistencies in the history given by the claimant. The claimant contends the trial court should have found his injury to be work related based upon medical testimony by Dr. Gaw that there could be some undetected nerve damage.

The 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 the employee 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. Kellerman v. Food Lion, 929 S.W.2d 333, 335 (Tenn. 1996) To be compensable, the pre-existing condition must be advanced, there must be an anatomic change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. Sweat v. Superior Industries, Inc., 966 S.W.2d 31, 32 (Tenn. 1998). From our independent examination of the record, the evidence fails to preponderate against the trial court's finding that the claimant did not suffer a compensable injury while working for the employer, as claimed. The finding was largely based on the claimant's lack of credibility.

The claimant further contends the trial court erred in rejecting his testimony and accepting the testimony of medical experts that he gave them an incomplete history. The trial court explicitly found the claimant to be lacking in credibility. Where the trial judge has seen and heard the

witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). Giving due deference to the finding of the trial court that the claimant lacked credibility, we cannot say the preponderance of the evidence is otherwise.

The judgment of the trial court is therefore affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

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No. M2002-02637-SC-WCM-CV - Filed - March 15, 2004

JUDGMENT

This case is before the Court upon a motion for review filed by Roger Raymond Desmarais 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 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 assessed to Roger Raymond Desmarais for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating.