IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
Assigned on Briefs, June 11, 2004 Session

CLYDE DOUGLAS BISHOP v. EARTHGRAINS BAKING COMPANIES

Direct Appeal from the Circuit Court for McMinn County
No. L-24406 Lawrence Puckett, Judge

Filed October 13, 2004

No. E2003-02714-WC-R3-CV - Mailed July 21, 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. The Plaintiff claimed to have suffered a compensable back injury. The evidence revealed that he had a congenital back condition which was not aggravated by the claimed injury, and his suit was dismissed. The judgment of dismissal is affirmed. The trial judge disallowed discretionary costs because to allow such costs would deter the filing of workers' compensation cases. On the issue of discretionary costs we reverse and remand for a determination and award of discretionary costs.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Reversed in Part and Remanded

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and ROGER E. THAYER, SP. J., joined.

Ralph Brown, Knoxville, Tennessee, attorney for Appellant, Clyde Douglas Bishop.

John David Barry, Chattanooga, Tennessee, attorney for Appellee, Earthgrains Baking Company.

MEMORANDUM OPINION

The Plaintiff alleged that he injured his back on June 28, 2001, while lifting a tray of bread during the performance of his job duties. The Employer answered that it was "greatly uncertain" that the Plaintiff's back condition arose out of his employment, and denied that the Plaintiff sustained any permanent disability as alleged. The trial judge ruled that

> "these cases rise and fall on the medical proof as far as causation is concerned . . . . Tennessee law finds compensable injuries where an

> underlying pre-existing medical condition is dormant but has become aggravated as a result of on-the-job activity . . . . the greatest question would be, would pain alone be enough to - if that aggravation causes more pain - to be a compensable injury . . . Mr. Bishop has a history of back problems that go back 15 years and has had quite a bit of symptomatology throughout the years, both left and right leg pain, but significantly he's had diagnosed multiple bulges in his spine at L4-5, and L5-S1 as far back as 1994 . . . . in October 2000. MRI's showed a bulge in L4-5 . . . every doctor except Dr. Hague seems to have noted that . . . whatever happened on June 28, 2001 to be compensable would have to have been an aggravation of that previous disc problem . . . *but nobody's testified that it was."*

The complaint was thereupon dismissed and the Plaintiff appeals. He presents for review the issue of whether the court erred in finding that the Plaintiff did not suffer a compensable injury. Our review is *de novo* on the record accompanied by the presumption that the judgment, as to factual matters, is correct unless the evidence otherwise preponderates. Tenn. Code Ann. § 50-6-225(e)(2); ***Hill v. Eagle Bend Mfg Co., Inc.,*** 942 S.W.2d 483 (Tenn. 1999).

The court is not bound by the trial court's factual finding, but rather conducts an independent examination to determine where the preponderance of the evidence lies. ***Walker v. Saturn Corp.***, 986 S.W.2d 204, 207 (Tenn. 1998). In making this determination, the court gives considerable deference to the trial court's findings regarding credibility and weight of any oral testimony. ***Hill***, 942 S.W.2d at 487 (citing ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315 (Tenn. 1987). However, the court conducts its own independent assessment of any evidence presented by deposition or documentation, such as medical testimony. ***Cooper v. Ins. Co. of N. Am.***, 884 S.W.2d 446, 451 (Tenn. 1994); *accord*, ***Humphrey***, 734 S.W.2d at 315. Accordingly, any impressions of weight and credibility to be attributed to this evidence are drawn from the contents of the deposition. ***Orman v. Williams Sonoma, Inc.***, 803 S.W.2d 672, 676 (Tenn. 1991); *accord*, ***Humphrey***, 734 S.W.2d 315. If the preponderance of all the evidence indicates the plaintiff suffered a compensable work-related injury, the court must find for the plaintiff.

Discussion

Two different tests for determining the compensability of a work-related injury to a plaintiff with a pre-existing condition have been enunciated. One test was stated in ***Sweat v. Superior Indus.***, 966 S.W.2d 31 (Tenn. 1998):

> 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. It has been otherwise stated that, to be compensable, the pre-existing condition must be "advanced" or there must be an "anatomical change" in the pre-existing condition or the employment must cause "an actual progression . . . of the underlying disease."

Id. at 32-3 (internal citations omitted). The ***Sweat*** test in ***Tobitt v. Bridgestone/Firestone, Inc.***, 59 S.W.3d 57 (Tenn. 2001) was reaffirmed. According to this test, the plaintiff cannot recover for merely increased pain. Rather, the plaintiff must prove two elements to recover: first, an advancement, anatomical change or progression in the pre-existing condition, ***Sweat***, 966 S.W.2d at 32-3, *accord,* ***Tobitt***, 59 S.W.3d at 62; and second, the work injury caused this change in the pre-existing condition, ***Boling v. Raytheon*** *Co.*, 448 S.W.2d 405, 408 (Tenn. 1969), *accord,* ***Cleek v. Wal-Mart Stores, Inc.***, 19 S.W.3d 770, 777 (Tenn. 2000).

The second test was enunciated in ***Hill v. Eagle Bend Mfg.***, 942 S.W.2d 483 (Tenn. 1997). According to ***Hill***, "[a]n 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." The ***Hill*** Court specifically rejected the requirement of an advancement, anatomical change or progression in the pre-existing condition. For, despite the fact the plaintiff's own medical expert admitted there was no "significant interval change" in the pre-existing condition following the work injury, the plaintiff's injury was held to be compensable. The argument that the work injury was not compensable because it only increased the plaintiff's pain was rejected: "The Second Injury Fund argues that the October 20 injury is not compensable because it produced only an increase in Hill's pain. We disagree." Instead, the ***Hill*** test requires a plaintiff to prove that the work injury causes an aggravation of the pre-existing condition and that this aggravation produces increased pain that is disabling.

The record reveals that all of the medical proof was documentary, including the deposition of two physicians, Drs. Hague and Johnson, both of whom testified that the plaintiff suffers from congenital spondylolisthesis, for which he was treated by three orthopedic specialists from 1994 to 2000. This disease progresses naturally and generally worsens with age.

In December 2000, approximately seven (7) months before the injury complained of, Mr. Bishop underwent surgery directed at the L5/S1 area of his back. Dr. Hague performed that surgery. The Plaintiff does not contend that the need for that surgery was related to his employment.

The Plaintiff returned to work as a route salesman delivering bread. In May of 2001, he returned to his family practitioner, Dr. Kahn, complaining of back pain, left foot pain, numbness, and left thigh spasms. A back brace was prescribed by Dr. Kahn which the Plaintiff never wore on the job.

On June 28, 2001, the Plaintiff was carrying a tray or basket of bread which weighed no more than eighteen (18) pounds. He testified that he twisted while holding the bread and injured himself feeling pain in his back, right leg and calf. Following that incident, he was able to finish loading his truck with bread but continued to work his route that day with help from another employee. He continued working his route for several weeks after the claimed injury. The first medical attention that the Plaintiff sought for the June 28, 2001, incident was from Dr. Kahn on July 18, 2001, whose records reveal that the Plaintiff reported that over the last few days he started having back pain after

normal bread delivery and that he had a similar problem ten (10) months earlier and underwent surgery in December. Dr. Kahn ordered an MRI which was performed on July 28, 2001, and revealed a Grade I spondylolisthesis at L5/S1, unchanged from prior examination. It also again found mild disc bulging at L4-L5.

An MRI of the Plaintiff's lumbar spine had been taken on October 18, 2000. Both Dr. Hague and Dr. Johnson agree that the comparison of the October 18, 2000, pre-injury MRI to the July 28, 2001, post-injury MRI, demonstrated progression of Mr. Bishop's spondylolisthesis from Grade I to Grade II at the L5/S1 level, but disagreed as to whether the MRIs concerned show any anatomical change of disc at the L4-L5 level.

Dr. Johnson testified that the Plaintiff's claimed injury of July 28, 2001, did not cause progression of the spondylolisthesis from Grade I to Grade II, while Dr. Hague was uncertain as to whether the spondylolisthesis progressed due to the claimed accident.

Dr. Hague and Dr. Johnson disagreed concerning the L4-L5 disc bulge revealed on the MRI studies of October 18, 2000, and July 28, 2001. Dr. Hague believes the L4-L5 bulge is a "new" finding in the Plaintiff's back which he testified was not present on the pre-injury MRI, and believed it represented an anatomical change in Mr. Bishop's back, which has caused the majority of Mr. Bishop's pain and problems. He relates that to the June 28, 2001 incident, involving the lifting of the bread tray. Dr. Hague also disagreed with the radiologist's interpretation that there has been no change in the L4-L5 disc. Dr. Johnson testified that there is no anatomical change whatsoever at the L4-L5 level, and that the only change *in the anatomy of Mr. Bishop's back is the progression of spondylolisthesis*. He further testified that the most likely explanation for the progression of the spondylolisthesis from Grade I to Grade II is the surgery that Dr. Hague did on Mr. Bishop's back in December, 2000.

The trial judge was confronted with conflicting medical opinion – not unusual in a workers' compensation cases – and we cannot say that the evidence preponderates against his conclusion. While we are as well situated as the trial judge to judge the weight and worth of depositional testimony – as contrasted to testimony in open court – we are unable to critique the conclusion of the trial judge that the testimony of Dr. Johnson was more credible than the testimony of Dr. Hague. The judgment of dismissal is therefore affirmed.

The Defendant presents for review the issue of whether its motion for discretionary costs should have been granted. Rule 54, Tenn R. App. P.

The trial judge opined that the allowance of these costs would deter the rightful pursuit of workers' compensation benefits. While the exercise of discretion is involved, we do not believe that potential deterrence to seek workers' compensation benefits is an appropriate reason to deny costs otherwise proper to be assessed under Rule 54. *See*, ***White & White v. Amer. Hosp. Supply Corp.***, 786 F.2d 728 (6th Cir. 1986). The case is remanded for a determination and award of discretionary costs.

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WILLIAM H. INMAN, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon 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 on appeal are taxed to Clyde Douglas Bishop.

IT IS SO ORDERED this 13TH day of October, 2004.

PER CURIAM

Anderson, J. - not participating.