

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 17, 2006 Session

PHILLIP BROW V. PENSKE LOGISTICS, INC., et al

**Direct Appeal from the Chancery Court for Shelby County
No. CH-04-0864-2 Arnold Goldin, Chancellor**

No. W2006-00096-WC-R3-CV - Mailed July 26, 2006; Filed August 30, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The plaintiff, Phillip Brow, has appealed the trial court's dismissal of his workers' compensation claim. He contends that the trial court erred when it failed to award him workers' compensation benefits as a result of a fall at work that he contends aggravated a pre-existing shoulder condition. After carefully considering the record, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right;
Judgments of the Chancery Court Affirmed**

J.S. (Steve) Daniel, Sr. J., delivered the opinion of the court, in which Janice M. Holder, J., and Joe C. Loser, Jr., Sp. J., joined.

James Randall Krenis, Jackson, Tennessee, for the appellant, Phillip Brow.

Garrett M. Estep, Memphis, Tennessee, for the appellee, Penske Logistics, LLC.

Lauren S. Lamberth, Assistant Attorney General, Nashville, Tennessee, for the appellee, Department of Labor, Second Injury Fund.

OPINION

I. Facts and Procedural History

On April 3, 2003, Mr. Brow slipped and fell within the course and scope of his employment, seriously injuring his left knee and slightly injuring his left shoulder. Mr. Brow was treated by Dr. Kerry Anderson who imposed restrictions on Mr. Brow's activities in lifting, standing, bending, pushing, pulling, climbing, squatting, and kneeling. Dr. Anderson saw Mr. Brow a second time on April 15, 2003, concerning complaints of left shoulder pain. Dr. Anderson diagnosed Mr. Brow with a left shoulder rotator cuff strain. On April 23, 2003, Mr. Brow went to Dr. Brent R. Sokoloff, an orthopedic surgeon, for an evaluation of his left shoulder and knee. On this occasion, Mr. Brow

reported an increase in left shoulder pain since the fall on April 3, 2003. Dr. Sokoloff ordered an MRI of Mr. Brow's left shoulder which was completed on April 25, 2003, and which revealed a massive rotator cuff tear in the left shoulder with atrophy in the left arm. Dr. Sokoloff opined that these findings indicated that Mr. Brow's symptoms were chronic in nature and not due to the April 3 fall. Mr. Brow was released back to light duty work with his employer, Penske Logistics, Inc.

On June 8, 2003, Dr. James Varner performed arthroscopic surgery on Mr. Brow's knee. Mr. Brow subsequently settled his claim associated with the April 3, 2003, fall. This settlement encompassed the left knee only. Dr. Varner assigned a 10% permanent partial anatomical impairment rating to the knee injury and a 30% partial anatomical impairment as a result of both the fall and pre-existing arthritis to the left knee. Dr. Varner imposed severe work restrictions associated with the left knee injury. These restrictions were so limiting that Mr. Brow was unable to return to his employment. The left knee claim was settled based on 40% permanent partial vocational disability, and future medical care was closed in February of 2004.

On May 31, 2003, while working for Penske, Mr. Brow slipped in a puddle of water at his employment and fell injuring his left shoulder. The fall was within the scope and course of the employment and was properly reported and is the subject of this appeal.

Mr. Brow's medical history reveals that in August of 1994 he had experienced a torn rotator cuff in his right shoulder as a result of a work injury and settled that claim after surgery with his prior employer, General Motors Corporation. At that time Mr. Brow was advised that he should medically retire. However, after relocating, Mr. Brow obtained employment with Penske and continued his truck driving activities. In addition to his knee and shoulder problems, Mr. Brow suffers from high blood pressure and has underwent heart surgery on a prior occasion.

In the present litigation Mr. Brow insists that his left rotator cuff condition was aggravated as a result of the May 31 fall. In support of his position at trial, Mr. Brow testified to the effect that his left rotator cuff injury was asymptomatic and that he had no left shoulder problems prior to the May 31, 2003, fall. He contended that he had lost his job and had been forced to retire because of the left shoulder injury as opposed to his severe knee problems. Mr. Brow contended that "[e]verything is more difficult" such as yard work, fishing, and gardening, primarily due to the left shoulder injury as opposed to his knee injury.

In stark conflict with Mr. Brow's testimony, our review of the record demonstrates that Mr. Brow in his discovery deposition had admitted long standing left shoulder rotator cuff pain that preceded his May 31 fall. The medical records demonstrated that he has sought treatment in April on two occasions for left shoulder problems and had convinced Dr. Sokoloff to order an MRI April 23, 2003, that revealed a completely torn rotator cuff that preceded both the April 3 and May 31, 2003, events by some time. Settlement documents associated with the April 3 claim reveal that Mr. Brow was unable to return to work because of permanent restrictions and limitations associated with his left knee.

Dr. Joseph Boals, III was presented to establish medical causation for the shoulder injury. Dr. Boals premised his opinion that the fall caused a work-related aggravation of Mr. Brow's shoulder

injury and resulted in pain on the subjective complaints from Mr. Brow that he suffered pain immediately subsequent to the May 31 fall. The record reveals there are no objective findings, tests, x-rays, or MRIs that support an aggravation of a pre-existing condition and that the medical provider had to accept the subjective complaints of Mr. Brow to relate this as an aggravation of a pre-existing condition. Dr. Boals candidly admitted that his opinion that Mr. Brow had suffered an aggravation of a pre-existing condition was completely dependent on the acceptance of those subjective complaints and that if that history was inaccurate, his opinion would change.

At the conclusion of the proof, the trial court found that "[t]he testimony from the plaintiff is simply not consistent with the physical findings that are contained in the medical reports in this case." Thereafter, the trial court recited passages of the medical reports and prior testimony of Mr. Brow that were inconsistent. The trial court ultimately concluded "The court just simply does not find [Mr. Brow's] testimony credible. That he had no problems with his shoulder, not only before May 31st, but that he had no problems before April 3, based on the medical proof before the record (sic)." The trial court thereupon dismissed Mr. Brow's complaint finding that he had failed to prove an aggravation of a pre-existing condition caused by his May 31, 2003, fall.

II. 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). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial judge requires this panel to examine in depth the trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. Workers' Comp. Panel 2001). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Our standard of review of questions of law is de novo without a presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 626 (Tenn. 2003). When medical testimony is presented by deposition, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

III. Analysis

It is the burden of the plaintiff in a workers' compensation suit to prove every element of the case by a preponderance of the evidence including the existence of a work-related injury by accident. Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989). In order for an injury to be compensable the injury must arise out of as well as be in the course of employment. The phrase "in the course of" refers to time, place, and circumstances, and "arising out of" refers to cause or origin. An accidental injury arises out of and in the course and scope 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). The claimant in a workers'

compensation action must establish causation between the work-related accident and the claimed injury by expert medical evidence except in the most obvious of cases. Id.

An employer is responsible for workers' compensation benefits if the employment causes an actual progression or aggravation of a prior disabling condition or disease which produces increased pain that is disabling. Hill v. Eagle Bend Mfg, Inc. 942 S.W.2d 483, 488 (Tenn. 1997). Pain itself is considered a disabling injury compensable under the workers' compensation statutes when occurring as the result of a work-related injury. Tally, 775 S.W.2d at 592.

In considering the burden placed upon the plaintiff to prove the causal relationship between the work-related incident and the claimed injury, we have reviewed the medical testimony afforded the trial court. In that review, the lynch pin of Dr. Boals' testimony to the effect that the fall of May 31, 2003, aggravated and made the left rotator cuff tear symptomatic was the subjective complaints of Mr. Brow that he first experienced left shoulder pain following the May 31 fall. Dr. Boals had no objective finding to support his conclusions but was relying exclusively upon the subjective complaints of Mr. Brow.

Our review of the record supports the trial judge's findings that preceding the May 31 incident, Mr. Brow had made complaints to medical providers concerning left shoulder pain. The objective MRI findings prior to the fall establish a long-standing prior complete tear of the left rotator cuff, and the settlement documents from the April 3, 2003, injury demonstrate restrictions to the left knee prevented Mr. Brow from returning to work as opposed to his left shoulder injury. Our review of the record, therefore, establishes that the medical records, prior discovery depositions, and prior judicial pleadings support the trial court's conclusion that Mr. Brow's testimony was not credible. This determination also affects the weight and effect of Dr. Boals' testimony who relies upon the truthfulness of the subjective complaints of Mr. Brow in establishing medical causation. The weight of a physician's testimony must be weighed in light of the trial court's concern about the plaintiff's credibility. Clarke v. Prot. Serv., Inc., 100 S.W.3d 197, 200 (Tenn. Workers' Comp. Panel 2001).

The trial court being in the best position to evaluate the credibility of the witness and having concluded that Mr. Brow was not credible, we conclude that the court did not err in dismissing the claim.

Therefore, we affirm the trial court and assess costs against the appellant, Phillip Brow, and his surety for which execution may issue.

J. S. DANIEL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 17, 2006 Session

PHILLIP BROW v. PENSKE LOGISTICS, INC., et al.

**Chancery Court for Shelby County
No. CH-04-0864-2**

No. W2006-00096-WC-R3-CV - Filed August 30, 2006

JUDGMENT ORDER

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 on appeal are taxed to the Appellant, Phillip Brow, and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM