

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 15, 2006 Session

**WANDA SPIRES v. WATSON SUPERMARKETS, INC. and THE
PMA INSURANCE GROUP, THEIR WORKER'S COMPENSATION
INSURANCE CARRIER**

**Direct Appeal from the Circuit Court for Bradley County
No. CV-03-500 Honorable John B. Hagler, Judge
Filed January 31, 2007**

No. E2005-02431-WC-R3-WC - Mailed December 21, 2006

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 trial court dismissed the employee's complaint. On appeal, the employee contends that the evidence supports a determination that she suffered a compensable aggravation of her preexisting degenerative disc disease. The employer contends that the trial court properly found that the employee did not sustain a compensable injury and that an award of costs, including discretionary costs, is appropriate. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e)(3)(2005) Appeal as of Right; Judgment of the Circuit Court is Affirmed.

THOMAS R. FRIERSON, II, SP. J., DELIVERED THE OPINION OF THE COURT, IN WHICH CHIEF JUSTICE WILLIAM M. BARKER, PRESIDING AND CHANCELLOR TELFORD E. FORGETY, JR., SPECIAL JUDGE, joined.

H. Franklin Chancey, CHANCEY, KANAVOS, LOVE & PAINTER, 166 North Ocoee Street, P. O. Box 42, Cleveland, TN, 37364, for the Appellant, Wanda Spires.

John W. Barringer, Jr., MANIER & HEROD, Suite 2200, First Union Tower, 150 Fourth Ave., North, Nashville, TN, 37219, for the Appellees, Watson Supermarkets, Inc. and The PMA Insurance Group, Their Worker's Compensation Insurance Carrier.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

The claimant, Wanda Spires, was 51 years of age at the time of trial. When Ms. Spires began her employment with Watson Supermarkets, her initial job responsibilities included making cabbage slaw and lifting containers weighing at least 50 pounds. The evidence preponderates in favor of a finding that on June 19, 2002, Ms. Spires began treatment with Dr. David T. Rahamut, D.C., a chiropractor with A Family Chiropractic Center in Cleveland, Tennessee. Dr. Rahamut treated the employee for sharp and aching pain in her back, hip and neck regions.

Ms. Spires underwent nineteen chiropractic treatments, with service ending August 15, 2002. On June 27, 2002, Ms. Spires slipped on grease and fell on her right knee in a work-related incident. The employer was notified of this incident. No claim for benefits under the Act was made by the employee by reason of that injury.

On August 2, 2002, while in the course and scope of her employment, the employee slipped on the frozen floor of a freezer and fell. Ms. Spires claims that she immediately experienced a "shooting pain" through her neck. Following a visit to the local emergency room and a walk-in clinic, Ms. Spires was referred to the care of Dr. Barry R. Vaughn, who conducted an examination on September 20, 2002.

The employee was examined by Dr. Raymond Sean Brown on December 13, 2002. Dr. Brown, who practices physical medicine and rehabilitation, ordered that an M.R.I. be performed, which diagnostic testing was accomplished on December 29, 2002. With respect to the cervical spine, the report indicated a central disc herniation at C3 and C4 levels. Ms. Spires was subsequently examined by Dr. David H. Hauge, a neurological surgeon, on March 10, 2003.

The employee was next examined by Dr. Scott D. Hodges on November 16, 2004. On June 30, 2005, Dr. Charles P. Hughes, neurologist, conducted an independent medical examination of the claimant.

The instant action was submitted to the trial court by means of a bifurcated hearing addressing solely the issue of compensability. Upon review and consideration of all the evidence, the trial court concluded that the employee was unable to prove that her condition was compensable under the Workers' Compensation Act and that the complaint should be dismissed.

II. STANDARD OF REVIEW

The standard of review in a workers' compensation case 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, T.C.A. 50-6-225(e)(2); Houser v. Bi-Lo, Inc., 36 S.W.3d 68 (2001). We are required to conduct an independent examination of the record to determine where the preponderance of the evidence lies, Wingert v. Government of Sumner Co., 908 S.W.2d 921 (1995). Moreover, we are required by law to examine in depth a trial court's factual findings and conclusions, GAF Building Materials v. George, 47 S.W.3d 430 (2001). "Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances", Orman v. Williams-Sonoma, Inc., 803 S.W.2d 672 (1991).

Where the medical testimony in a workers' compensation case is presented by deposition, we may make an independent assessment of the medical proof to determine where the preponderance of the proof lies, Cooper v. INA, 884 S.W.2d 446 (1994). Conclusions of law are subject to *de novo* review on appeal without any presumption of correctness, Nutt v. Champion International Corp., 980 S.W.2d 365 (1998).

III. COMPENSABILITY OF INJURY

Under the Tennessee Workers' Compensation Act, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable, T.C.A. 50-6-102(13). An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of fortuitous circumstances, A. C. Lawrence Company v. Loveday, 455 S.W.2d 141 (1970). It is the resulting injury which must be unexpected in order for the injury to qualify as one by accident, R. E. Butts Company v. Powell, 463 S.W.2d 707 (1971). An injury has been defined as including "whatever lesion or change in any part of the system (that) produces harm or pain or lessened facility of the natural use of any bodily activity or capability," Brown Shoe Company v. Reed, 350 S.W.2d 65 (1961).

The employee maintains the burden of proving every essential element of his or her claim, White v. Werthan Indus., 824 S.W.2d 158 (1992). The burden of proving causation and permanency of the injury must be met by a preponderance of the evidence, Roark v. Liberty Mutual Insurance Company, 793 S.W.2d 932 (1990). "While causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition", Thomas v. Aetna Life and Casualty Co., 812 S.W.2d 278 (1991). Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award and the Court may properly predicate an award on medical testimony to the effect that a given incident could be the cause of the claimant's injury, McCaleb v. Saturn Corp., 910 S.W.2d 412 (1995). Any reasonable doubt regarding causation is to be construed in favor of the employee, Reeser v. Yellow Freight System, Inc., 938 S.W.2d 690 (1997).

The employer takes the employee as he or she is, with all preexisting defects and diseases,

Express Personnel Services, Inc. v. Belcher, 86 S.W.3d 498 (2002). An injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability if a work connected accident can be fairly said to be a contributing cause of such injury, Fink v. Caudle, 856 S.W.2d 952 (1993).

The general rule recognized by Tennessee courts is that aggravation of a preexisting condition may be compensable but not if it results only in increased pain or other symptoms caused by the underlying condition, Cunningham v. Goodyear Tire and Rubber Co., 811 S.W.2d 888 (1991). "The employer is liable if an accidental injury is causally related to and brings about the disability by the aggravation, actual progression or anatomical change of the preexisting condition", Fritts v. Safety National Casualty Corp., 163 S.W.3d 673 (2005); Tobbit v. Bridgestone/Firestone, Inc., 59 S.W.3d 57 (2001). If the work aggravates a preexisting condition merely by increasing the pain however, there is no injury by accident, Hill v. Eaglebend Manufacturing, Inc., 942 S.W.2d 483 (1997).

In concluding that the claimant did not prove any anatomical change or actual progression of her preexisting degenerative disc disease as a result of the claimed injury occurring August 2, 2002, the trial court explained by Memorandum Opinion as follows:

Unfortunately, defendant's counsel did not have the benefit of Exhibit 7 when he examined or cross-examined the various medical experts or when he prepared his brief. Exhibit 7 indicates that it was not faxed from the chiropractor's office until July 19, 2005, the day before the trial. It had been sitting there for over three years containing the simple solution to this case: Claimant was not truthful about an essential aspect of her medical history. She has thus destroyed the opinions of Drs. Brown and Hodges that she was asymptomatic before the accident or that her condition was made "progressively worse," and has accredited the opinions of every expert who found that her complaints were unrelated to her employment, going all the way back to Dr. Vaughn.

Clearly the trial court did not find the employee to be credible. The panel affords considerable deference to the trial court when issues of credibility and weight of oral testimony are concerned, Orman v. Williams-Sonoma, Inc., *supra*. Dr. Vaughn determined that Ms. Spires demonstrated objective findings "most consistent with symptom magnification or malingering".

Dr. Brown, in concluding that the employee's work related incident caused an injury, was not apprised of Ms. Spires' prior history of cervical pain. Likewise, Dr. Hodges determined that the employee's increase in cervical pain symptoms following the August 2002 accident constituted a key component of his opinion. Dr. Hodges' records reflected that Ms. Spires denied any history of similar symptoms prior to the August 2002 work related incident. Dr. Hughes testified by deposition that there were no findings on the M.R.I. which indicated any acute or traumatic changes to Ms. Spires' cervical spine. Dr. Hauge found nothing regarding the employee's neck to suggest any

abnormalities associated with trauma. The employee had denied any prior history of cervical problems in providing the patient history in connection with Dr. Hauge's physical examination.

Having conducted an independent examination of the record, this panel concludes that the evidence preponderates in favor of a finding that the employee failed to prove that her claimed injury of August 2002 was causally related to and brought about a disability by the aggravation, actual progression or anatomical change of her preexisting condition. As Ms. Spires did not suffer a compensable aggravation of her preexisting degenerative disc disease resulting from the work related incident in August 2002, her claim must be denied.

IV. AWARD OF COSTS

Although the employee as appellant has not raised as an issue the trial court's award of costs including discretionary costs, the employer urges that the trial court's award of costs be affirmed. In addressing such an issue, the special Workers' Compensation Appeals Panel in Moffitt v. U. S. XPress Enterprises, 2006 LEXIS 646 (WCAP 2006) explained as follows:

Tennessee Code Annotated section 20-12-101 states that "the successful party in all civil actions is entitled to full costs unless otherwise directed by law, or by a court of record for which judgment is rendered." Trial courts are free to apportion costs between litigants as the equities of each case demands. Furthermore, the assessment of such costs falls within the reasonable discretion of the trial court which may allocate the costs between the parties as it feels the equities require. Perdue v. Green Branch Mining Co., Inc. 837 S.W.2d 56, 60 (Tenn. 1992). Appellate courts will generally not interfere with the trial court's assessment of costs absent a clear abuse of discretion. *Id.*

In light of the comprehensive findings made by the trial court we uphold the trial court's assessment of costs.

V. CONCLUSION

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

Thomas R. Frierson, II, 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Wanda Spires, for which execution may issue if necessary.