

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

August 27, 2007 Session

AEROSTRUCTURES CORPORATION v. DENNIS F. McGUIRE

**Direct Appeal from the Chancery Court for Davidson County
No. 03-3566-II Carol McCoy, Chancellor**

**No. M2006-01797-WC-R3-WC - Mailed - January 11, 2008
Filed - February 12, 2008**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee, Dennis F. McGuire, alleged that he had sustained a compensable aggravation of a previous work-related back injury. The employer, Aerostructures Corporation (Aerostructures), took the position that the pre-existing condition had not been advanced or accelerated by the claimed work injury. The trial court found that Mr. McGuire failed to establish by a preponderance of the evidence that he had aggravated or advanced his pre-existing back injury, and granted Aerostructures's motion for involuntary dismissal at the conclusion of the proof. Mr. McGuire has appealed, contending that the evidence preponderates against the judgment of the trial court. We disagree, and so we affirm.

Tenn. Code Ann. § 50-6-225(e) (2006 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and ALLEN W. WALLACE, SR. J., joined.

Jamie D. Winkler and Jacky O. Bellar, Carthage, Tennessee, for the appellant, Dennis F. McGuire.

Aaron S. Guin and Stephen W. Elliot, Nashville, Tennessee, for the appellee, Aerostructures Corporation.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. McGuire was sixty-one years old at the time of trial. He had worked for Aerostructures and its predecessors since 1982, although there were several periods of time during which he had been laid off. He had a high school education and had also worked in farming, trucking and

construction. Mr. McGuire previously injured his low back in 2001 as a result of tripping over an air hose at work. He was treated by Dr. Robert Dimmick, an orthopaedic surgeon, for that injury. Dr. Dimmick assigned an impairment of ten percent to the body as a whole. That injury was the subject of a separate workers' compensation claim and lawsuit which resulted in benefits being awarded to Mr. McGuire.

The event at issue in this case occurred on Friday, September 19, 2003. Mr. McGuire was assisting some co-workers in moving a table from underneath a part of an airplane wing. Mr. McGuire testified that he felt a painful tearing sensation in his lower back while lifting and holding the part. He testified that his back always hurt but the pain became progressively worse over the weekend and he felt he should report it. He reported the incident to the first aid unit at the Aerostructures plant on September 22, 2003. He visited the first aid unit on three occasions complaining of back pain. On the third of these visits, which occurred on October 1, 2003, he reported the pain was back at the level it was prior to lifting the airplane part. Mr. McGuire testified at trial that after September 19, 2003, the pain spread into his legs, arms and hands, but there is no evidence these symptoms were reported to the first aid unit. Similarly, there is no evidence in the record that he sought or received medical treatment for his condition after the October 1, 2003, visit to the first aid unit.

Mr. McGuire continued to work for Aerostructures. At the time of trial, he held the same job title, but was performing a somewhat lighter task than he had been performing in 2003. He testified that since September 2003, his symptoms had progressed, starting with the pain in his hips and both legs extending into his feet. He related that he experienced pain in his right arm and numbness in his feet and both arms. Mr. McGuire did not believe he was physically able to perform any of his previous jobs, or any job other than his current light-duty position for Aerostructures. Mr. McGuire also testified that he was unable to "work the overtime hours" after September 2003.

On cross-examination, Mr. McGuire agreed that he had been on light-duty restrictions prior to September 2003 as a result of his 2001 work injury. He testified that he had never been pain-free after the 2001 injury, but that his pain was worse and affected more of his body after September 2003. Mr. McGuire continued working for Aerostructures following the September 2003 incident, and did not miss enough work after it occurred to qualify for temporary disability benefits.

Dr. Robert Landsberg, an orthopaedic surgeon, testified by deposition. He performed an independent medical examination at the request of Mr. McGuire's attorney. Dr. Landsberg reviewed records of the physicians who treated Mr. McGuire's 2001 injury, and conducted a physical examination of Mr. McGuire. That examination revealed, among other things, diminished range of motion and an absent ankle reflex. Dr. Landsberg testified that these findings differed from those of Mr. McGuire's previous doctors. On that basis, he opined that Mr. McGuire had sustained an additional permanent impairment of thirteen percent to the body as a whole as a result of the September 2003 injury. On cross-examination, Dr. Landsberg stated that Mr. McGuire had spinal stenosis which was mostly due to his degenerative disk disease and was a long-standing problem. He agreed that the condition was "age-related and possibly congenital."

Dr. M. Robert Weiss, a neurosurgeon, also testified by deposition. He conducted an independent medical examination of Mr. McGuire at the request of Aerostructures's attorney. Dr. Weiss also examined Mr. McGuire's prior medical records and performed a physical examination. He concluded that Mr. McGuire had age-related degenerative disk disease. In Dr. Weiss' opinion, Mr. McGuire had not sustained a permanent impairment as a result of a work injury. He disagreed with the physicians who had assigned permanent impairment as a result of the 2001 injury. Dr. Weiss was unaware Mr. McGuire was claiming a separate September 2003 injury. He testified, however, that because he did not believe Mr. McGuire had a work-related impairment, his opinion would be the same whether Mr. McGuire was claiming one or two separate injuries.

Bebe Holland was a human relations generalist for Aerostructures. She testified that Mr. McGuire worked 223 hours of "straight overtime" and an additional 58 hours of "double time" between January 1 and December 31, 2005. From January 1 until July 16, 2006 (four days prior to the trial), he had worked 71.5 hours of overtime and 16 hours of double time.

After Mr. McGuire closed his proof, Aerostructures made a motion for involuntary dismissal pursuant to Rule 41.02(2) of the Tennessee Rules of Civil Procedure. The trial court denied the motion. After presenting evidence and closing its own proof, Aerostructures renewed that motion. The trial court found that Mr. McGuire had not "sustained a permanent disability, either slight or significant[,]" as a result of the September 2003 incident and granted the motion to dismiss. On appeal, Mr. McGuire contends that the evidence preponderates against the trial court's finding, and also that the trial court erred in granting the motion for involuntary dismissal.

II. STANDARD OF REVIEW

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2006). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

III. ANALYSIS

Aerostructures does not seriously dispute the occurrence of the September 2003 incident. Mr. McGuire does not contend the incident entitles him to any temporary total disability

benefits. Neither Mr. McGuire's testimony nor the medical evidence demonstrate that he received any medical care as result of the incident, other than the three visits to Aerostructures's medical unit. Therefore, the only issue presented in this case is whether or not Mr. McGuire sustained an additional permanent disability as a result of the events he described as occurring on September 19, 2003.

In a workers' compensation case, the employee has the burden of proving every essential element of his or her claim. White v. Werthan Indus., 824 S.W.2d 158, 159 (Tenn. 1992). In order to be eligible for 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(13) (Supp. 2004). In the instant case, it is apparent that Mr. McGuire had a condition in his lower back that preceded the event that occurred on September 19, 2003. The issue presented is whether Mr. McGuire sufficiently proved that the condition in his back was aggravated by his employment on the latter date to amount to a compensable injury.

The general rule is that aggravation of a pre-existing 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 & Rubber Co., 811 S.W.2d 888, 891 (Tenn. 1991). An employer is responsible for workers' compensation benefits, even though the claimant may have been suffering from a serious pre-existing condition or disability, but only if the employment causes an actual progression or aggravation of the prior disabling condition or disease. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 488 (Tenn. 1997) ; White, 824 S.W.2d at 159; Talley v. Va. Ins. Reciprocal, 775 S.W.2d 587, 592 (Tenn. 1989). It is true that an employer takes the employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability greater than if he or she had not had the pre-existing condition. If, however, work aggravates a pre-existing condition merely by increasing pain, there is no injury by accident. Sweat v. Superior Indus., Inc., 966 S.W.2d 31, 32-33 (Tenn. Workers' Comp. Panel 1998). To be compensable, the pre-existing condition must be advanced, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. Id.

Mr. McGuire testified that he had not been pain free in his back since his 2001 injury. As a result of that injury, he had been placed on work restrictions. He described his level of pain as being greater after September 2003, and as affecting his hips, legs, feet and hands which had previously been asymptomatic. According to Mr. McGuire, he was unable to work at any job other than his current light-duty position.

Mr. McGuire went to Aerostructures's medical department three times within ten days after the incident with complaints of low back pain. He did not seek or receive any additional medical treatment for the symptoms he described from October 2003 through the date of trial, a period of almost three years. He missed little or no work after September 2003. Despite his testimony to the contrary, he worked a considerable amount of overtime during the year and a half that immediately preceded the trial.

Dr. Landsberg testified that Mr. McGuire had degenerative disk disease caused primarily by age and congenital factors. However, he was of the opinion that the September 2003 incident aggravated that condition based upon the subjective reporting of Mr. McGuire. Dr. Landsberg also noted a reduced range of motion and absent ankle reflex that were not contained in physicians' reports related to the earlier injury. Dr. Weiss, to the contrary, was of the opinion that the condition of Mr. McGuire's spine was not related to his work at Aerostructures. After reviewing the MRI's that had been taken of Mr. McGuire's spine in 2001 and 2002, Dr. Weiss described the images as being typical of a person in Mr. McGuire's age group. He testified that lack of reflexes in the lower extremities is not uncommon. Dr. Weiss also believed the degenerative disk disease and stenosis he observed on the MRI's could not be the cause of all the symptoms that were described by Mr. McGuire. The trial court in a workers' compensation case has the discretion to accept the opinion of one medical expert over another, Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990), and, in this case, reasonably could have accepted the testimony of either physician.

Although the trial court did not make an express finding concerning Mr. McGuire's credibility, it took note of the discrepancies between his testimony concerning his abilities and other proven facts. For example, the trial court noted Mr. McGuire testified he had been unable to work overtime since the September 2003 incident, yet the records from Aerostructures indicated he had worked 279 hours of overtime in 2005 and 87 ½ hours of overtime through mid-July 2006. We would also note that "a trial court's findings with respect to credibility and the weight of the evidence . . . generally may be inferred from the manner in which the trial court resolves conflicts in the testimony and decides the case." Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733-34 (Tenn. 2002). The willingness of Mr. McGuire to exaggerate some of the effects of the September 2003 incident could have caused the trial court to question or reject his testimony with regard to the symptoms he described as having. Moreover, the trial court reasonably could have given less weight to Dr. Landsberg's opinion since it was based on the subjective reporting of Mr. McGuire.

We have carefully considered all of the evidence in the record, both the lay testimony and the medical depositions. We find it noteworthy that Mr. McGuire describes some very debilitating effects he relates to the September 2003 incident, yet he sought no medical treatment for his condition during the almost three years that had elapsed prior to trial. Mr. McGuire had two MRI's of his lumbar spine during the treatment of his 2001 injury. The first was taken December 29, 2001, and the second on October 8, 2002. Unfortunately, there is no MRI taken after September 2003 by which the condition of his lumbar spine could be compared. The trial court found Mr. McGuire failed to prove that he aggravated or advanced his degenerative disk disease as a result of the incident that occurred on September 19, 2003. Having reviewed the record, we are unable to find the evidence preponderates against the trial court's finding.

Mr. McGuire also contends that the trial court erred in granting Aerostructures's motion for involuntary dismissal. Mr. McGuire argues that the evidence which he introduced was sufficient to establish a *prima facie* case that he had suffered a compensable injury, as

demonstrated by the denial of Aerostructures's motion at the close of Mr. McGuire's proof. In dismissing the case, the trial court indicated it considered the evidence presented by Aerostructures. For those reasons, Mr. McGuire contends that dismissal pursuant to Rule 41.02(2), Tennessee Rules of Civil Procedure, was improper. In a non-jury case, when a motion to dismiss is made under Rule 41.02(2), the trial judge must impartially weigh and evaluate the evidence in the same manner as though it were making findings of fact at the conclusion of all of the evidence for both parties, determine the facts of the case, apply the law to those facts, and, if the plaintiff's case has not been made out by a preponderance of the evidence, the action should be dismissed. City of Columbia v. C.F.W. Const. Co., 557 S.W.2d 734, 740 (Tenn. 1977). This standard is the same as would be applied by a trial court when ruling on the merits and was obviously employed by the trial court when making its determination in this case. We, therefore, find the trial court's action to be the equivalent of a ruling on the merits.

IV. CONCLUSION

The judgment of the trial court is affirmed. Costs of the appeal are assessed against the appellant, Dennis McGuire, and his surety for which execution may issue, if necessary.

DONALD P. HARRIS, SENIOR 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 appeals 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, Dennis McGuire, and his surety for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM