IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION PANEL
KNOXVILLE, JANUARY 1996 SESSION

FILED

May 1, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

ROSS N. EVERETT,	)	
	)	KNOX CHANCERY
Plaintiff/Appellant	)	
	)	Hon. Frederick D. McDonald,
v.	)	Chancellor
	)	
WAL-MART STORES, INC.,	)	NO. 03S01-9508-CH-00093
	)	
Defendant/Appellee	)	

For the Appellant:

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For the Appellees:

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MEMORANDUM OPINION

Members of Panel:

E. Riley Anderson, Chief Justice, Supreme Court
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED **THAYER, Special Judge**

_____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.

Plaintiff, Ross N. Everett, has appealed from the action of the trial court in awarding 45% permanent partial disability benefits to his left leg. His primary contention is the Chancellor was in error by not finding his pre-existing arthritic condition was aggravated by the accident.

Plaintiff, 71 years of age at the time of the trial, was injured on March 20, 1992, while working for the defendant Wal-Mart Stores, Inc., when he was attempting to hang fishing lures. He testified he turned his foot to move and his knee twisted causing the injury. He related to the court a knee problem pre-existed the accident as he had seen a doctor during February, 1992. He said he was having pain and swelling in his knee, and he was unable to fully flex it.

The only other witness to testify was Dr. Edwin E. Holt, an orthopedic surgeon, who testified by deposition. Dr. Holt stated his pre-existing problem in his knee was caused by arthritis; that the arthritic condition was not caused by the accident but the accident probably aggravated the arthritis by causing more pain; that the accident did not increase the arthritis; and that the accident did cause a meniscal tear which he corrected by arthroscopic surgery on September 12, 1992.

Dr. Holt gave a 14% impairment rating to the left leg as a result of the meniscal tear and a 10% impairment rating to the pre-existing arthritic condition.

We do not believe the Chancellor misapplied the ruling in the *Cunningham v. Goodyear Tire & Rubber Co.*, 811 S.W.2d 888 (Tenn. 1991) case as insisted by the plaintiff. Although a question as to whether plaintiff had sustained an injury by an "accident at work" was involved, the general rule concerning aggravation of a pre-existing condition was set forth, the rule being where an employee's work aggravates a pre-existing condition by making the pain worse but does not

otherwise injure or advance the severity of the problem, there is no compensable injury because of the aggravation.

In the later case of *Townsend v. State*, 826 S.W.2d 434 (Tenn. 1992), the Court was dealing with the same issue again and ruled the determinative question was not whether there was an aggravation but the nature of the aggravation. If the work aggravates a pre-existing condition merely by increasing the plain, the claim is not compensable. However, if the severity of the condition is advanced, or if it results in a disabling condition other than increased pain, the claim is compensable. *See also Smith v. Smith's Transfer Corp.*, 735 S.W.2d 221 (Tenn. 1987) which is in accord.

From our review of the case, which is *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance is otherwise, TENN. CODE ANN. § 50-6-225(e)(2), we do not find any evidence in the record to support the contention plaintiff's arthritic was advanced or resulted in a disabling condition other than increased pain. Therefore, we conclude the trial court was correct in limiting the disability to the meniscal tear which was caused by the accident. We also find the award of 45% to be reasonable under the evidence submitted.

Plaintiff also assigns error in the Chancellor's ruling the defendant would not be liable for the future medical expenses of a total knee replacement surgery. While our ruling on plaintiff's primary issue probably diminishes this assignment, we note that Dr. Holt did testify that there was a reasonable chance of a total knee replacement procedure being necessary but he was clear in stating this procedure was not due to the meniscal tear injury.

Finding the evidence does not preponderate against the trial court's decision, the judgment is affirmed with costs of the appeal taxed to plaintiff and sureties.

Roger E. Thayer, Special Judge

CONCUR:

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E. Riley Anderson, Chief Justice

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John K. Byers, Senior Judge