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

VERNON HARRIS, Plaintiff/Appellant v. BURLINGTON INDUSTRIES, INC., Defendant/Appellee	)))))))))	WASHINGTON CIRCUIT NO. 03S01-9606--CV-00069 HON. RICHARD G. JOHNSON JUDGE

FILED

June 3, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

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M E M O R A N D U M O P I N I O N

Members of Panel:

Frank F. Drowota, III, Justice
William H. Inman, Senior Judge
Joseph C. Loser, Jr., Special Judge

AFFIRMED **INMAN, Senior 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.

The appellant recognizes the established rule in this State that a second injury is not compensable unless there is evidence of an anatomical change, *Cunningham v. Goodyear,* 841 S.W.2d 888 (Tenn. 1991), but insists the rule should not have been applied in this case.

The plaintiff alleged and testified that he injured his back on January 4, 1994 while lifting a heavy object during the course of his employment.

He had injured his back in 1991, and was treated by chiropractic, but did not pursue a claim for benefits. Between 1991 and 1994 he denied a re-injury, but testified to a number of "flare-ups." The plaintiff insists that he suffered an aggravation of the 1991 injury and that he is entitled to benefits accordingly.

Following the January 4, 1994 injury, he sought chiropractic treatment again, and was referred to Dr. Stephen Natelson, a neurosurgeon, who performed a hemilaminectomy. The plaintiff represented to Dr. Natelson that he had no previous back problems. He was initially seen by Dr. Natelson on November 14, 1994. The corrective surgery was performed on January 10, 1995.

On January 5, 1994, the day after the plaintiff allegedly injured his back, he was seen by Dr. John L. Holbrook, an orthopedic surgeon, to whom he related a lengthy history of back problems. A comprehensive examination was made resulting in a final diagnosis of degenerative disc disease. He was seen again on May 24, 1994, complaining of back pain, and another examination resulted in the same findings as before. During all this time the plaintiff was also being treated by chiropractic. Dr. Holbrook testified that there were no anatomical changes in the plaintiff's lumbar spine between 1991 and 1994; i.e., that the plaintiff had not suffered a re-injury as claimed.

Our review is *de novo* on the record, accompanied by a presumption of correctness of the findings of fact of the trial court unless the preponderance of

evidence is otherwise. T. C. A. § 50-6-225(e); *Lock v. National Union Fire Insurance Company,* 809 S.W.2d 483 (Tenn. 1991). This standard of review requires the reviewing court to examine, in depth, the trial court's factual findings and conclusions. *Galloway v. Memphis Drum Services,* 822 S.W.2d 584 (Tenn. 1991). 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 County,* 908 S.W.2d 921 (Tenn. 1995).

All of the medical proof in this case was taken by deposition and these depositions were introduced as exhibits at the trial. This court is, therefore, as well situated to gauge the weight, worth and significance of the medical proof as was the trial court. *Seiber v. Greenbrier Industries, Inc.,* 906 S.W.2d 444 (Tenn. 1995).

The medical evidence clearly reveals that the plaintiff had a significant low back problem before his claimed work injury on January 4, 1994, and that this history extended over at least a two-year period. In Tennessee, work that aggravates an employee's pre-existing injury or condition by increasing the amount of pain, but which does not otherwise "injure or advance the severity" of the employee's injury or pre-existing condition, is not compensable. *Cunningham v. Goodyear Tire and Rubber Company,* 811 S.W.2d 888 (Tenn. 1991).

Both orthopedic surgeons testified that there was no significant change in the plaintiff's low back condition during the interim as revealed by the 'pre-injury' and 'post-injury' MRI scans.

The Chancellor applied the rule in *Cunningham, supra,* and dismissed the complaint. We have reviewed all of the medical evidence and agree with the appellee that the great preponderance of the evidence establishes beyond peradventure that the severity of the plaintiff's low-back condition was "not advanced" by the claimed 1994 injury. Moreover, we note that the credibility of the plaintiff posed a serious barrier to the resolution he seeks; his discovery testimony about an injury brought on by weight lifting, or from alighting from an automobile, or from yard work, or from a water slide while on vacation, as contradistinguished from in-court testimony, was productive only to buttress the expert testimony.

The evidence does not preponderate against the judgment of the trial court, which is affirmed at the costs of the appellant.

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William H. Inman, Senior Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

_____
Joseph C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

VERNON HARRIS,	)	WASHINGTON CIRCUIT
	)	No. 16599
Plaintiff/Appellant,	)	
vs.	)	Hon. Richard G. Johnson.,
	)	Judge
BURLINGTON INDUSTRIES, INC.	)	
	)	
Defendant/Appellee,	)	No. 03S01-9606-CV-00069

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Worker' Compensation 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 act 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 plaintiff-appellant, Vernon Harris and Gilbert and Faulkner. surety, for which execution may issue if necessary.

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