FILED

October 22, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, APRIL 1997 SESSION

MERLIN STEPHEN HANDLEY,	)	
	)	McMINN CHANCERY
Plaintiff/Appellant	)	
	)	Hon. Earl H. Henley,
v.	)	Chancellor
	)	
TRAVELERS INSURANCE COMPANY and CANTEEN FOOD SERVICES, INC.,	)	
	)	NO. 03S01-9611-CH-00113
	)	
Defendants/Appellees	)	

For the Appellant:	**For the Appellees:**
Charles C. Guinn, Jr. #1 Washington Ave. P.O. Box 946 Athens, Tenn. 37371-0946	Thomas E. LeQuire David C. Nagle Suite 200 Flatiron Bldg. 707 Georgia Ave. Chattanooga, TN 37402

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

Members of Panel:

E. Riley Anderson, Justice
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, Merlin Stephen Handley, has appealed from the action of the trial court in dismissing his claim for benefits. The Chancellor held plaintiff had failed to carry the burden of proof in establishing his heart attack was caused by his work activity.

Plaintiff, 44 years of age, was employed by defendant, Canteen Food Services, Inc., as a route salesman. His duties required him to stock and service vending machines on an established route. On December 13, 1994, he had moved a large number of soft drink cases (75-80) prior to servicing vending machines on his route. This work was at a time when the building where he was working was particularly warm. He began to feel unusually short of breath; had some pain in his chest and tingling under his arm.

After some period of time, he decided to go to a doctor who concluded he was having or was about to have a “full blown” heart attack. He was immediately admitted to a hospital where he remained for less than one week. After being discharged, he was off work for about six weeks. Sometime after returning to work, he continued to experience further problems and eventually terminated his employment with defendant. He found employment involving desk work where his income at the time of trial was somewhat higher than his earnings as a route salesman.

Plaintiff testified he had never experienced any heart problems prior to his heart attack; that his mother had a heart attack in her fifties and he had a couple of uncles who died at a young age from heart disease. He also admitted he had smoked since the age of twenty and was a heavy smoker consuming one and a half to two packs a day.

The only expert medical testimony was the deposition of Dr. Gregory Brewer, a cardiologist who treated plaintiff. His diagnosis was acute myocardial infarction. He

found atherosclerotic disease as evidenced by a 80-85% blockage one coronary artery and a 90% blockage of another coronary artery.

At different points during his examination, Dr. Brewer declined to be pinned down on the causation questions. When asked if the physical activity of moving the soft drink cases could have caused the heart attack, the doctor replied; "It's difficult to say what specific activity causes a heart attack. So it cannot be excluded, but I can't say for sure definitely that that caused myocardial infarction . . . ." When told by counsel he was not asking for certainty in his question, the doctor replied: "There's not a way that I can say for sure." (Deposition of Dr. Brewer, pages 16 & 17).

At another point, when faced with the same question of causation, the doctor replied: "That's hard to answer too. And the fact that he was also smoking at the time. And that's known to cause vasal constriction." (Deposition of Dr. Brewer, page 20).

Finally, counsel tried again and asked if physical activity could have aggravated his pre-existing heart disease to the extent that it would precipitate a heart attack and the doctor replied: "I'm going to say that there is no way that I cannot exclude that that is a contributor." (Deposition of Dr. Brewer, pages 21 & 22).

On cross-examination, the doctor admitted the "myocardial infarction can occur at random without an obvious precipitating event. So, yes, it can possibly occur at work; it can possibly occur at home in a recliner." (Deposition of Dr. Brewer, page 33).

The review of the case is *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

An employee has the burden of proving every element of the case, including causation and permanency by a preponderance of the evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn. 1987).

The rule is well-settled that if the physical activity or exertion or strain of the employee's work produces the heart attack or aggravates a pre-existing heart

condition, the resulting death or disability is the result of an accident arising out of and in the course and scope of the employment. *Bacon v. Sevier County*, 808 S.W.2d 46 (Tenn. 1991). It makes no difference that the employee, prior to the attack, suffered from a pre-existing heart disease or that the attack was produced by only ordinary exertion or the usual physical strain of the employee's work. *Flowers v. South Central Bell Telephone Co.*, 672 S.W.2d 769, 770 (Tenn. 1984).

In reviewing the testimony of the only expert medical witness, we find that he gave several explanations as to what could cause a heart attack but he had no opinion as to the probable or likely cause of plaintiff's heart attack. The trial court found the evidence did not preponderate towards establishing the heart attack was caused by plaintiff's work activity. We cannot say the evidence preponderates against this conclusion by the trial court.

Plaintiff also contends the trial court was in error in excluding an exhibit from the evidence. Counsel attempted to introduce a small card which was styled "Medical Examiner's Certificate" and was dated October 20, 1994. The certificate was signed by a doctor and stated plaintiff was found to be qualified to drive a commercial vehicle. Defendants objected to its introduction on the ground it was hearsay, and the Chancellor sustained the objection.

On appeal plaintiff contends the document is required by certain federal regulations and that these regulations provide that a certificate of this nature cannot be issued unless the party is found to be free of any heart disease etc. which would adversely affect one's ability to drive a commercial vehicle. Plaintiff argues that since 44 U.S.C. § 1507 provides the contents of the Federal Register shall be judicially noticed, the document is admissible under subsection (10) of Rule 902, TENN. R. OF EVID.

We do not find any error on the exclusion of this evidence. At the trial below, it was offered in evidence without counsel giving the trial court any reason why it was admissible or for what purpose. On its face it appears to be a hearsay statement, and counsel did not offer to introduce it under Rule 902 or any other rule. Therefore,

we are of the opinion it cannot be insisted admissible for this purpose for the first time on appeal. TENN. R. EVID., Rule 103(a)(2).

The judgment entered below is affirmed. Costs of the appeal are taxed to the plaintiff and sureties.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FILED

October 22, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

MERLIN STEPHEN HANDLEY	)	McMinn County No. 18,859
	)	
Plaintiff/Appellant	)	Hon. Earl H. Henley,
	)	Chancellor
vs.	)	
	)	Supreme Court
TRAVELERS INSURANCE COMPANY and CANTEEN FOOD SERVICES, INC.	)	No. 03-S-01-9611-CH-00113
	)	
	)	Affirmed
Defendants/Appellees	)	

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied; 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.

Cost will be paid by plaintiff-appellant and surety, for which execution may issue if necessary.

It is so ordered this _____ day of _____, 1997.

PER CURIAM

Anderson, C.J., not participating