

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

FILED

January 26, 1998

Cecil W. Crowson
Appellate Court Clerk

JEFFREY GLENN BOGLE,)	RUTHERFORD CHANCERY
)	
Plaintiff/Appellant)	NO. 01S01-9706-CH-00128
)	
v.)	HON. ROBERT E. CORLEW, III,
)	CHANCELLOR
DISTRIBUTION AND AUTO SERVICE,)	
INC. and TOKIO MARINE)	
MANAGEMENT, INC.,)	
)	
Defendant/Appellee)	

For the Appellant:

Wm. Kennerly Burger
301 North Spring Street
P.O. Box 1969
Murfreesboro, TN 37133-1969

For the Appellee:

Sarah Castle Hardison
Manier, Herod, Hollabaugh & Smith
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150 Fourth Avenue North
Nashville, TN 37219

MEMORANDUM OPINION

Members of Panel:

Justice Adolpho A. Birch, Jr.
Senior Judge John K. Byers
Special Judge Hamilton V. Gayden, Jr.

AFFIRMED

BYERS, Senior Judge

OPINION

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 plaintiff filed this suit and alleged he had sustained permanent impairment to his knees as the result of an injury in the course and scope of his employment with the defendant.

The trial judge denied the plaintiff's claim for workers' compensation and dismissed his case. The plaintiff says he carried his burden of proving by a preponderance of the evidence that he sustained a work related injury.

We affirm the judgment of the trial court.

The plaintiff was age 40 at the time of trial. He had a high school education and was trained in automobile body repair work.

The plaintiff alleged his knees were injured when he fell off an automobile frame rack and landed on both knees on August 16, 1994. The plaintiff did not see a doctor about his knee problems until late 1994 or early 1995.

The evidence of whether the injury to the plaintiff's knees was causally connected to his work with the defendant is based upon the testimony of the plaintiff and one doctor.

The plaintiff testified that he considered the work related fall to be minor at first but that later he developed a gradually progressive serious problem in both knees. The plaintiff explained that he could not have known the seriousness of the fall until the onset of symptoms.

Dr. Robert Russell, an orthopaedic surgeon, testified that it was not until after he performed arthroscopic surgery on the plaintiff's knees that he concluded the condition was "trauma related." Dr. Russell further testified that the plaintiff's injury was "consistent" with a fall to both knees, but he did not testify based upon a reasonable degree of medical certainty that the plaintiff's work related fall caused his knee problems. Dr. Russell assessed a 12 percent permanent partial impairment to each knee and restricted the plaintiff from climbing, squatting, and crawling.

We review the judgment of the trial judge *de novo* upon the record with a presumption of the correctness of the finding. Tenn. Code Ann. § 50-6-225(e)(2). We are required to make an in depth review of the record to see where the preponderance of the evidence lies. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584 (Tenn. 1991).

In this case, the plaintiff had to establish the causal relationship between the injury and the occurrence at work by expert medical evidence. *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). In finding causation, the judgment may not be based upon medical evidence which is so far speculative as to make such a finding arbitrary. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935 (Tenn. 1987). However, in reaching a conclusion, the trial judge must consider the expert testimony in conjunction with the testimony of the employee and any other lay witnesses who testify. *Thomas v. Aetna Life & Casualty Co.*, 812 S.W.2d 278 (Tenn. 1991).

When there is evidence given by deposition, we may determine the credibility of the witnesses so testifying. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355 (Tenn. 1989).

The trial judge in this case did not credit the testimony of the plaintiff whom he saw and heard testify. Further, although the trial judge acknowledged Dr. Russell's testimony that the plaintiff's knee injury was "trauma related" and thus "consistent" with a fall on both knees, the trial judge had difficulty conceiving that the type of trauma about which Dr. Russell testified would occur without at least some recognition of pain or other manifestation at time of the plaintiff's work related fall. We have reviewed the record as we are required to do and find the evidence does not preponderate against the judgment of the trial court.

The cost of this appeal is taxed to the plaintiff.

John K. Byers, Senior Judge

CONCUR:

Adolpho A. Birch, Jr., Justice

Hamilton V. Gayden, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

JEFFREY GLENN BOGLE,	}	RUTHERFORD CHANCERY
	}	No. 96WC-12 Below
<i>Plaintiff/Appellant</i>	}	
	}	Hon. Robert E. Corlew, III,
vs.	}	Chancellor
	}	
DISTRIBUTION AND AUTO	}	
SERVICE, INC., and TOKIO	}	
MARINE MANAGEMENT, INC.,	}	No. 01S01-9706-CH-00128
	}	January 26, 1998
<i>Defendants/Appellees</i>	}	AFFIRMED.

<p>FILED</p> <p>No. 01S01-9706-CH-00128 January 26, 1998</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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JUDGMENT ORDER

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 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 Plaintiff/Appellant and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on January 26, 1998.

PER CURIAM