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

FREIDA PACK,	)	BLOUNT CIRCUIT
	)	
Plaintiff/Appellant	)	NO. 03S01-9706-CV-00066
	)	
v.	)	HON. W. DALE YOUNG,
	)	JUDGE
BTR DUNLOP, INC.,	)	
	)	
Defendants/Appellees	)	

For the Appellant:
John M. Foley
Foley, Bowers & Bell
712 Walnut Street
Knoxville, TN 37902

For the Appellee:
F. R. Evans
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800 First Tennessee Building
Chattanooga, TN 37402

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

Members of Panel:

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

REVERSED **INMAN, Senior Judge**

This workers' compensation appeal has been referred to the Special

Workers' Compensation Appeals Panel of the Supreme Court in accordance with T.C.A. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Because arthritis is not an occupational disease and is normally not caused by trauma but is part of the aging process and thus not within the ambit of the Workers' Compensation Law, this case is not without its difficulties as a matter of law.

The plaintiff is 54 years old and at the time of trial had been employed by the defendant in a non-skilled position for 17 years. she has a litany of health problems not relevant to this case, which arises from a job-related accident on October 24, 1991 and a second job-related accident on October 5, 1993, involving injuries to her left knee.

The first accident occurred when the plaintiff twisted her left knee in a misstep. She was treated by a panel physician who referred her to an orthopedic specialist, Dr. Bryan Smalley, who diagnosed an internal derangement of hr knee and performed a diagnostic arthroscopy on December 9, 1991.

Because her rehabilitation was slow, the plaintiff was referred to Dr. William Hovis, who also performed an arthroscopy which diminished pain and soreness. She returned to work with limitations on climbing or kneeling. On July 9, 1993, Dr. Hovis opined that the plaintiff had a five percent *disability to her left leg due to the aggravation of an arthritic condition.*

_____As stated, the plaintiff suffered another injury to her left leg on October 5, 1993 when she slipped while pushing a heavy buggy causing her to hyper-extend her left knee in a backward manner. For this injury she was treated by Dr. William K. Bell, an orthopedic surgeon in Maryville. He found that the

employee had suffered a patellar subluxation or dislocation of the left knee for which she was wearing a centralizing brace previously prescribed by Dr. Hammett. Dr. Bell approved her continuing to work provided she wore the brace. A month later he found that as she continued working she was experiencing swelling and pain of the left knee by the end of her workshift. His final diagnosis was an aggravation of pre-existing arthritis. Dr. Bell continued to treat her until March 26, 1996 at which time he released her, fixing her permanent impairment rating at thirty percent to her left leg with permanent work restrictions.

When asked whether there was any advancement of the arthritis by reason of the October 5, 1993 work incident, Dr. Bell stated,

> "I cannot say that her arthritis advanced specifically on the basis of those episodes. *It's impossible for me to say that her arthritis would not have advanced regardless of her activities.* You know, arthritis travels at its own rate independent of treatment, from our standpoint pretty much. So the rate of progression is something that's hard for me to predict, I guess is the best way to put it . . . She did have a relative progression of arthritis from the time of injury to the time of this last evaluation. Based on our x-ray view of the width of her joint, there was some progression. Again, whether that was acceleratedby these episodes or not, I really can't say. I can only *say that her pain symptomatically was remarkably different from this injury until this final exmaination."*

Dr. Bell testified that the thirty percent impairment rating was based on a loss of range of motion as well as the x-ray findings of joint space narrowing. When asked, "Can you tell us to a reasonable degree of medical certainty whether the joint space narrowing was attributable to her work injury?" he answered,

> "[t]he joint space narrowing, again, would have been present to a degree. Again, I can't go back unfortunately and say exactly what degree, but it would have been present at the time of her injury to some extent, based on just the x-rays from that time. So it certainly

> doesn't, again, correlate with just the time from accident to final rating. There would have been joint space narrowing predating the injury."

Dr. Bell was asked whether within a reasonable degree of medical certainty the on-the-job happening of October 5, 1993 aggravated the arthritic condition of the knee and caused it to worsen and cause the problems for which he treated Mrs. Pack. *He answered that it was probable that the injury aggravated the pre-existing arthritic condition.*

The trial judge concluded that the plaintiff failed to carry the burden of proof of "showing by the greater weight of the evidence that the pre-existing arthritic condition was aggravated directly and proximately by the October 5, 1993 incident," and that there is insufficient proof of permanent disability as a result of either injury.

The issue on appeal is whether these conclusions are correct.

Our review is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). We review questions of law *de novo* with no presumption of correctness. *Perry v. Sentry Ins. Co.,* 938 S.W.2d 404 (Tenn. 1996).

The appellant argues that the trial judge was plainly in error in finding no permanent disability resulted from the 1991 injury when the medical proof was uncontroverted that the injury was job-related and that it resulted in disability. We agree.

The 1993 injury is more difficult to analyze, principally because Dr. Bell equivocated. He essentially found a pre-existing arthritic condition which became increasongly painful as a result of the plaintiff's employment. The

thrust of his testimony is that he found no new injury, but concluded that the plaintiff's arthritic knee was aggravated by activity, including job requirements.

The appellee relies on the holding in *Cunningham v. Goodyear Tire and Rubber Co.*, 811 S.W.2d 888 (Tenn. 1991) as controlling. *Cunningham* is authority for the proposition that the aggravation of pre-existing arthritis which does not advance the condition but merely increases pain without the intervention of a job-related injury is not compensable. But *Cunningham* is inapposite here, because the plaintiff *admittedly* suffered injuries by accident, which under all the proof aggravated the underlying disease.

We find the evidence preponderates against the judgment and in favor of a finding that the plaintiff has a 25 percent permanent, partial disability to her left leg. The judgment is accordingly reversed and the plaintiff is awarded benefits for a 25 percent permanent, partial disability to her left leg. Costs are assessed to the appellee and the case is remanded.

_____
William H. Inman, Senior Judge

CONCUR:

_____
Frank F. Drowota, III, Justice

_____
Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FREIDA PACK,	)	BLOUNT CIRCUIT
	)	No. L-9110
Plaintiff/Appellant	)	
	)	
vs.	)	Hon. W. Dale Young
	)	Judge
	)	
BTR DUNLOP, INC.	)	
.	)	NO. 03S01-9706-CV-00066
	)	
Defendants/Appellees.	)	
	)	

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' 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 fact 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 appellee, BTR Dunlop, Inc., which execution may issue if necessary.

02/19/98

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.

Costs will be paid by the plaintiff-appellant and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this ____ day of June, 1997.

PER CURIAM

Anderson, J. - Not Participating

al 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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