IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JOE W. DILLARD,	)	DAVIDSON CHANCERY
	)	NO. 96-2110-III
PLAINTIFF/APPELLANT,	)	
	)	HON. ELLEN HOBBS LYLE,
v.	)	CHANCELLOR
	)	
TEXTRON, INC., d/b/a	)	
TEXTRON AEROSTRUCTURES,	)	S. CT. NO. 01S01-9802-CH-00022
	)	
DEFENDANT/APPELLEE.	)	AFFIRMED

JUDGMENT

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 Defendant/Appellee, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

BIRCH, J. NOT PARTICIPATING

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(January 19, 1999 Session)

JOE W. DILLARD,	)	DAVIDSON CHANCERY
	)	
Plaintiff-Appellant	)	Hon. Ellen Hobbs Lyle,
	)	Chancellor.
v.	)	
	)	No. 01S01-9802-CH-00022
TEXTRON, INC., d/b/a/	)	
TEXTRON AEROSTRUCTURES,	)	
	)	
Defendant-Appellee.	)	

For Appellant:

William H. Partin, Jr.
Clark, Ward & Cave
Brentwood, Tennessee

For Appellee:

Frederick W. Hodge
Howell & Fisher
Nashville, Tennessee

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

Members of Panel:

Adolpho A. Birch, Jr., Associate Justice
James L. Weatherford, Senior Judge
Joe C. Loser, Jr., Special Judge

REVERSED AND REMANDED Loser, Judge

MEMORANDUM 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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employee, Dillard, contends the evidence preponderates against the findings of the trial court that his permanent disability is not connected to his work related injury because it did not cause an aggravation of the pre-existing condition, spinal stenosis. As discussed below, the panel has concluded the judgment should be reversed and the case remanded to the trial court.

The employee or claimant commenced this action to recover workers' compensation benefits resulting from injuries occurring while employed by the employer, Textron, now The Aerostructures Corporation (TAC), on October 18, 1995 and January 2, 1996. At the conclusion of the plaintiff's evidence, the defendant moved to dismiss per Tenn. R. Civ. P. 41.02(2). The trial judge found the claimant and his five lay witnesses to be credible, but granted the motion for lack of the expert medical evidence of causation required in all but the most obvious cases. The trial judge expressly found that the testimony of the treating physician, Dr. Arendall, failed to establish any causal connection between the claimant's injury and his permanent disability. Appellate review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2).

Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Collins v. Howmet Corp., 970 S.W.2d 941 (Tenn. 1998). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Krick v. City of Lawrenceburg, 945 S.W.2d 709 (Tenn. 1997). In this case, the trial judge saw and heard the claimant and his supporting lay witnesses, but the medical evidence was by deposition.

The claimant is almost 60 years old with a degree in theology from the American Bible College Seminary. He is pastor of the Olive Branch Baptist Church. He has worked for TAC since 1965. He has had back pain since 1992, when he first saw Dr. Arendall. That year a lumbar laminectomy was performed. Dr. Arendall followed him until April of 1994, then released him without restrictions. He returned to work.

The undisputed lay proof is that on October 18, 1995, the claimant slipped and fell at work, suffering immediate and intense pain. He slipped and fell again at work on January 2, 1996. On both occasions, he was engaged in the duties he was employed to perform.

The only medical evidence introduced at trial was the deposition testimony of Dr. Arendall, which including the following relevant questions and answers:

....

Q. Have you seen Mr. Dillard in relation to work injuries on October 18 of '95 and January 2 of '96?

A. Yes, sir.

Q. A moment ago you mentioned a visit of November 8th, 1995; is that correct?

A. Yes, sir.

Q. Did you take a history at that time?

A. Yes, sir. The history he gave me was that he fell at work on 10-18-95. He was working on a machine at work, slipped and fell, and was wedged between the machine. He said he'd been stable and was not having any significant problems with his back and legs, but now he told me he was having severe back and bilateral leg pain with numbness and tingling. He was walking stooped forward and been to the emergency room, and he was sent back to my office for evaluation.

....

Q. Did you obtain from him a further history?

A. Yes, sir. He said that January 2nd, '96, he was loading upper panels, and the panel pulled and caused his back pain.

Q. Then the myelogram was performed?

A. Yes, sir.

Q. What was that finding?

A. He had stenosis from L3 through S1 bilaterally, and he underwent a decompressive lumbar laminectomy. He was in the hospital and then was discharged on January 20th with medication.

Q. What areas did the laminectomy cover?

A. L3, L4, L5 and S1.

Q. So this was an additional level from the '92 surgery?

A. Yes, sir.

Q. If you could, again, please state your diagnosis of Mr. Dillard?

A. He had a lumbar radiculopathy, which is pain due to nerve compression in his back, which was due to the stenosis that was aggravated by his two injuries.

Q. Let me go ahead and ask you this. Do you have an opinion within a reasonable degree of medical certainty as to the cause of Mr. Dillard's condition, which you have just diagnosed?

A. The cause of his symptoms, as he related by his history, was

the two events.

Q. When you say his injuries did aggravate his condition, were those the injuries of October 18, 1995 and January 2, 1996?

A. Yes, sir.

....

Q. At the time you felt that Mr. Dillard reached maximum medical improvement, do you have an opinion within a reasonable degree of medical certainty whether Mr. Dillard had a permanent impairment as a result of his work related injuries?

A. Yes, sir, he did. And based on the AMA Guide, Fourth Edition, page 110, table 72, his total impairment at that date was 25 percent to the body as a whole. Since he had previous surgery, I thought 10 percent would be preexisting for a resulting 15 percent impairment to the body.

Q. When you say resulting 15 percent impairment of the body, do you relate that to the injuries of October 18, 1995 and January 2, 1996?

A. Yes, sir.

As a result of the 1995 and 1996 injuries, the doctor has permanently restricted the claimant from bending, stooping, lifting over 25 pounds or standing or sitting in one position for more than 30 minutes; and he has advised the claimant to retire.

An injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability, if a work-connected accident can be fairly said to be a contributing cause of such injury. An employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483 (Tenn. 1997). The employer takes the employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the pre-existing conditions; Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996); but if work aggravates a pre-existing condition merely by increasing pain, there is no injury by accident. Townsend v. State, 826 S.W.2d 434 (Tenn. 1992). To be compensable, the preexisting condition must be advanced, there must be anatomical change in the preexisting condition, or the employment must cause an actual progression of the underlying disease. Sweat v. Superior Industries, Inc., 966 S.W.2d 31, 32-33 (Tenn. 1998).

The present case is clearly distinguishable from the cases upon which the employer relies. In Townsend, for example, there was no medical proof that the work related injury aggravated the employee's preexisting condition except by temporarily increasing the pain. In Cunningham v. Goodyear Tire and Rubber Co., 811 S.W.2d 888 (Tenn. 1991), there was no identifiable injury by accident; and in Boling v. Raytheon Co., 448 S.W.2d 405 (Tenn. 1969), the

medical proof was that the claimant's condition was merely temporary. In the present case, the uncontradicted medical proof is that the work related injury caused an actual progression of the preexisting condition and increased the extent of the employee's permanent impairment; and, as noted above, the trial judge found the claimant to be a credible witness.

From an application of the undisputed facts to the applicable principles of law, we are persuaded that the evidence preponderates against the findings of the trial court. The judgment is accordingly reversed and the case remanded to the Chancery Court for Davidson County. Costs on appeal are taxed to the defendant-appellee.

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Joe C. Loser, Jr., Special Judge

CONCUR:

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Adolpho A. Birch, Jr., Associate Justice

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James L. Weatherford, Senior Judge