

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(January 19, 1999 Session)

FILED

April 7, 1999

**Cecil W. Crowson
Appellate Court Clerk**

GERALD DEWAYNE SHARP,)	LAWRENCE CIRCUIT
)	
Plaintiff-Appellant,)	Hon. Robert L. Jones,
)	Judge.
v.)	
)	No. 01S01-9802-CH-00030
SHARP TRANSPORT, INC.,)	
)	
Defendant-Appellee.)	

For Appellant:

David D. Peluso
Hohenwald, Tennessee

For Appellee:

Elaine M. Youngblood
Nashville, Tennessee

MEMORANDUM OPINION

Members of Panel:

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

AFFIRMED
Judge

Loser,

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. Fairly stated, the issue is whether the employee's increased permanent medical impairment was causally related to an injury occurring in October, 1994. As discussed below, the panel has concluded the judgment should be affirmed.

The action was initiated by the employee or claimant, Gerald DeWayne Sharp, to recover workers' compensation benefits for an injury alleged to have occurred on October 19, 1994. After a trial on the merits on January 16, 1998, the trial judge found that the claimant had "failed to establish by a preponderance of the evidence that the October, 1994, on-the-job incident bore any causal relationship to the back surgery performed on the plaintiff in June, 1995" and "that the preponderance of the evidence establishes that the plaintiff's back condition, including the June, 1995 surgery, are all the result of a prior back injury occurring in 1990, and are not the result of the on-the-job incident of October, 1994." Accordingly, the claim was disallowed. 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).

In April of 1990, while working for a different employer, the claimant fell from a loading dock and injured his back. Corrective disc surgery was performed by Doctor Wilburn, who continued to follow the progress of his recovery. The pain from the injury persisted and, in January of 1991, the pain became sharper and radiated into the lower right leg. X-rays in June of the same year revealed narrowing and degenerative changes at the surgical site. Dr. Wilburn diagnosed post laminectomy syndrome with nerve root irritation and in December, 1991, the doctor assigned an impairment rating of fifteen percent to the body from the injury and consequent surgery. On December 20, 1991, he was awarded permanent partial disability benefits based on thirty-two percent to the body as a whole and lifetime medical benefits.

In October of 1992, the claimant began working for the present employer, Sharp Transport, Inc. Sixteen months later, he advised Dr. Wilburn that he had experienced intermittent symptoms since the 1990 surgery and fairly constant low backache as well as sharp pain in the right hip and cramping in the right calf. Dr. Wilburn advised him not to drive a truck. In September of 1994, the claimant related to the doctor increasing pain over the past couple of weeks in his low back and hip, as well as behind his right knee and into his right calf. Medical treatment was provided by the previous employer's insurer.

An MRI revealed arthritis in the area of the earlier surgery and broad based disc protrusion. Dr. Wilburn attributed the changes to the 1990 surgery and noted the claimant may have aggravated his back on October 19, 1994, but that he did not have a new injury. In June of 1995, additional surgery was performed to relieve recurrent pain from the earlier injury. Again the former employer's insurer paid the medical expenses upon receipt of the surgeon's

report. Following the surgery, Dr. Wilburn increased his medical impairment rating by two percent.

Unless admitted by the employer, the employee or claimant has the burden of proving, by competent evidence, every essential element of his claim. Oster v. Yates, 845 S.W.2d 215 (Tenn. 1992). The claimant must prove that he is an employee, that he suffered an injury by accident, and that such injury by accident arose out of and in the course of his employment by the employer. In order to establish that an injury was one arising out of the employment, the cause of the injury must be proved. Hill v. Royal Ins. Co., 937 S.W.2d 873 (Tenn. 1996). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Thomas v. Aetna Life and Cas. Ins. Co., 812 S.W.2d 278 (Tenn. 1991).

The employer takes the employee with all preexisting 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 preexisting conditions; Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996); but if work aggravates a preexisting condition merely by increasing pain, there is no injury by accident. Sweat v. Superior Industries, Inc., 966 S.W.2d 31, 32 (Tenn. 1998). 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. Id.

For the above reasons, the evidence fails to preponderate against the trial judge's findings. The judgment of the trial court is affirmed. Costs on appeal are taxed to the plaintiff.

Joe C. Loser, Jr., Special Judge

CONCUR:

Adolpho A. Birch, Jr., Associate Justice

James L. Weatherford, Senior Judge

IN THE SUPREME OF TENNESSEE

AT NASHVILLE

<i>GERALD DEWAYNE SHARP</i>	}	<i>LAWRENCE CIRCUIT</i>
	}	<i>No. Below 7643 95</i>
<i>Plaintiff/Appellant</i>	}	
	}	<i>Hon. Robert L. Jones</i>
vs.	}	FILED
	}	<i>No. 01S01-9802-CH-00030</i>
<i>SHARP TRANSPORT, INC.</i>	}	April 7, 1999
	}	Cecil W. Crowson
<i>Defendant/Appellee</i>	}	Appellate Court Clerk

AFFIRMED

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, for which execution may issue if necessary.

IT IS SO ORDERED on April 7, 1999.

PER CURIAM