

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

October 18, 2001 Session

DAVID BOLES v. KIRT T. LAMB d/b/a, LAMB OIL COMPANY

**Direct Appeal from the Circuit Court for Putnam County
No. 99-N0209 John A. Turnbull, Judge**

**No. M2001-01037-WC-R3-CV - Mailed - January 15, 2002
Filed - April 3, 2002**

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 drove a gas transport truck for eight years before he fell from the tanker following an inspection of it. After an initial onslaught of pain he resumed his duties. The day following, the pain returned, which he attributed to kidney stones. Three months later, a diagnosis of mid-back and low-back disc problems was made. Causation was vigorously disputed, since the plaintiff had a long history of pre-accident problems. Recovery was allowed. We affirm.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court
Affirmed**

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and HOWELL N. PEOPLES, SP. J., joined.

James H. Tucker, Jr., Nashville, Tennessee, for the appellant, Kirt T. Lamb d/b/a Lamb Oil Company.

Melaney G. Madewell, Cookeville, Tennessee, for the appellee, David Boles.

MEMORANDUM OPINION

The Accident

The plaintiff, 54 years old, and completed the eighth grade. He has driven trucks for most of his earning life. In 1990 he began employment with the defendant, driving a gasoline tanker from the Cookeville area to Nashville and return, two or three trips daily.

On September 3, 1998, the plaintiff testified that he fell off the rear of the tanker. Within minutes he was experiencing pain throughout his rib cage which soon subsided and he made three trips to Nashville that day without difficulty. The pain returned the following day and he sought treatment. He has not worked since September 4, 1998.

The medical people had difficulty in arriving at a diagnosis. It was initially suspected that kidney stones might be the problem, but appropriate testing revealed that he had no renal problems. He was referred to Dr. Craig Maltman, who is board certified in family medicine. Diagnostic studies revealed disc problems and the plaintiff was thereupon referred to Dr. Joseph Jestus, a neurosurgeon, who made a diagnosis of degenerative disc disease with multiple disc bulges, attributable to the accident of September 3, 1998. Surgery was not recommended because it could not be determined which specific disc herniation was symptomatic, and the plaintiff was referred back to Dr. Maltman.

The Pleadings

The complaint was filed June 10, 1999. Plaintiff alleged a back injury which partially or totally disabled him. The defendant denied that the plaintiff was injured by accident, and averred that he suffers from a pre-existing condition which was not aggravated by his employment.

The Judgment

The trial judge found that the plaintiff suffered an injury by accident as he described, resulting in a 10 percent anatomical impairment, to which would be applied a multiplier of six times, or 60 percent permanent partial disability. The defendant appeals, insisting that (1) the evidence preponderates against the finding that the injury arose out of employment, and (2) the evidence preponderates against an award of 60 percent.

Review is *de novo* on the record with a presumption the judgment is correct unless the evidence otherwise preponderates. Rule 13(d) T.R.A.P.

Medical Proof

The argument of the appellant is essentially derived from the testimony of Dr. Maltman. He saw the plaintiff on September 9, 1998 and took from him a medical history which revealed Type II diabetes, hypertension, depression, and pain in his right flank radiating to the front for which he had been seen in the emergency room five days earlier. He next saw the plaintiff on September 23, 1998 and ordered an MRI which revealed some lumbar disc problems for which therapy was recommended but was unsuccessful. He was thereupon referred to Dr. Jestus. The plaintiff returned to Dr. Maltman for treatment of diabetes, hypertension and back pain.

On three occasions Dr. Maltman signed an attending physician statement that the plaintiff's condition did not arise from his employment. He saw the plaintiff 21 times, and at no time did the plaintiff tell Dr. Maltman that he fell off a truck. When asked if "this patient's condition arose from

work,” Dr. Maltman replied “no.”

On cross-examination, Dr. Maltman conceded that the thoracic bulges are likely the source of the pain the plaintiff experiences, and that “it’s possible” the fall, if it occurred, caused the problem.

Dr. Maltman was not questioned about anatomical impairment.

Dr. Jestus saw the plaintiff on December 4, 1998 on the referral by Dr. Maltman. He testified that the plaintiff complained of low back pain. An MRI scan revealed degenerative disc disease, and multiple disc bulges in the lower and mid-thoracic region. He testified that the plaintiff told him about falling from the truck and that “all those symptoms could occurred as a result of his fall.”

The plaintiff was examined by Dr. David Gaw. He testified that the plaintiff’s condition is consistent with his description of falling off his truck, and that his low back pathology has resulted in 10 percent anatomical impairment.

Analysis

We observe at the outset that the claimant has the burden of proving every essential element of his claim. *Oster v. Yates*, 845 S.W.2d 215 (Tenn. 1992). This Court is required to examine in depth the trial court’s findings and conclusions, and must conduct an independent examination to determine where the preponderance of the evidence lies. *Galloway v. Memphis Drum Service*, 822 S.W.2d 584 (Tenn. 1991). Preponderant evidence is not to be determined by the application of reasonable doubt. *Oster v. Yates*, 845 S.W.2d 215 (Tenn. 1992). To do so would contravene the burden of proof standard. *Parker v. Ryder Truck Lines*, 591 S.W.2d 755 (Tenn. 1975) is authority for the principle that a mandated liberal construction of the workers’ compensation laws has reference *only* to the *coverage* afforded by the laws. It is worth repeating that a workers’ compensation case must be proved like any other lawsuit in a court of justice and that personal philosophy ought not to enter into the equation.

The appellant vigorously argues, in effect, that a finding of credibility is often improperly used to create or shore up an otherwise factually unsustainable claim. This may well be, but it is to be hoped that it is not the norm because predicative principles are involved. We have carefully studied this record and find no reason to disturb the findings of the trial judge.

We cannot find that the evidence preponderates against the finding of the trial judge that (1) the plaintiff was injured as he claims, (2) that he sustained injuries to his back as a result of falling from the truck and (3) that these injuries resulted in anatomical impairment. We do not necessarily disagree with the appellant’s argument that a finding of credibility should not *ipso facto* bestow invincibility upon the case; empiricism superimposed upon hindsight teaches this principle to one and all. It is obviously significant that the plaintiff’s failure to inform his treating physician that he had fallen from his truck raises, *prima facie*, a reasonable doubt as to the worthiness of his claim,

but the reason for his silence is more important than his silence. It is clear from the evidence that the plaintiff did not initially attribute his problems to his fall, because, owing to family history, he thought his pain was caused by kidney stones. No accurate, or final, diagnosis was made for three months. We attach no dispositive emphasis to the action of Dr. Maltman in advising the plaintiff's employer, or whomever, no less than three times, that plaintiff's condition was not work related. As Dr. Maltman essentially testified on cross-examination, he was not then in possession of all the facts. It should also be noted that a fellow employee, Mr. Savage, corroborated the testimony of the plaintiff concerning his fall and subsequent events; Mrs. Boles likewise offered corroborative testimony, as did Drs. Jestus and Gaw, although their views were dependent upon the veracity of the plaintiff.

Dr. Gaw assigned a 10 percent impairment to the plaintiff. He combined a 5 percent to the mid-back and 5 percent to the lower back. The evidence does not preponderate against the finding of the trial judge that the plaintiff retained a 10 percent anatomical impairment to his whole body. A multiplier of six was utilized, and we cannot find the evidence preponderates against the application of this multiplier. The plaintiff has limited skills and is effectively removed from the realistic job market.

The judgment is affirmed at the costs of the appellant, Kirt T. Lamb d/b/a Lamb Oil Company.

WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DAVID BOLES v. KIRT T. LAMB D/B/A LAMB OIL COMPANY

**Circuit Court for Putnam County
No. 99N0209**

No. M2001-01037-SC-WCM-CV - Filed - April 3, 2002

ORDER

This case is before the Court upon motion review filed by the appellant, Kirt T. Lamb d/b/a Lamb Oil Company, pursuant to Tenn. Code. Ann. § 50-6-225(e)(5)(B) the entire record, including the order of referral to the Special Workers' Compensation Appeal Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Kirt T. Lamb d/b/a Lamb Oil Company, for which execution may issue if necessary.

PER CURIAM