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

JOHNNIE BREWSTER v. AMERICAN RESIDENTIAL SERVICES, INC. and ZURICH AMERICA INSURANCE COMPANY

Direct Appeal from the Chancery Court of Rutherford County
No. 03-6746WC, Hon. Robert E. Corlew, III, Chancellor

No. M2004-00236-WC-R3-CV - Mailed: March 22, 2005
Filed - April 22, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The trial court found that the employee had suffered a compensable injury to his left knee and awarded permanent partial disability benefits of forty percent for the left lower extremity, but denied recovery for the employee's back injury. The employee contends that the evidence preponderates against the trial court's conclusion that his back injury was not compensable. For the reasons set forth below, we reverse the holding of the trial court and remand for a determination of permanent partial disability benefits.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Chancery Court Reversed.

JERRY SCOTT, SR. J., delivered the opinion of the court in which WILLIAM M. BARKER, J., joined. J. S. (STEVE) DANIEL, SR. J., filed a dissenting opinion.

Larry R. McElhaney, Arena & McElhaney PLLC, Nashville, Tennessee, for the appellant, Johnnie Brewster.

Clancy J. Covert, Luther-Anderson, PLLP, Chattanooga, TN, for the appellees, American Residential Services, Inc. and Zurich America Insurance Company.

MEMORANDUM OPINION

The employee-appellant, Johnnie Brewster, initiated this civil action to recover workers' compensation benefits for work-related injuries to his left knee and low back. The trial court found that Mr. Brewster had suffered a compensable injury to his left knee and awarded permanent partial disability benefits of forty percent for the left lower extremity. However, the trial court found that Mr. Brewster failed to carry the burden of proof on the issue of causation with regard to his back injury, and denied recovery. Mr.

Brewster challenges the trial court's findings only on the issue of compensability of the back injury, contending that the evidence presented at trial preponderates in favor of an award.

At the time of trial, Mr. Brewster, a resident of Rutherford County, was thirty-six years old and had worked as a plumber since the age of fourteen. His education consists of a high school diploma, two years of college, majoring in photography, and a vocational certificate for plumbing. On July 25, 2002, while working as a plumber for American Residential Services, Inc., Mr. Brewster was underneath an apartment building when the water-soaked ground caved in, causing him to fall slightly over eleven feet to the bottom of a deep hole. Unable to get out, he was finally able to reach a supervisor at his employer's business, who responded. The supervisor and another worker extricated Mr. Brewster from the hole. Mr. Brewster testified that he landed on his left leg and fell backward, hitting his back on a concrete podium post. He was first taken to a walk-in medical clinic and then to Centennial Hospital, where his knee and neck were x-rayed, and his knee was stabilized. Subsequently, Mr. Brewster was provided a panel of healthcare providers from which he selected Dr. Joseph Wieck, an orthopedic surgeon.

On July 31, 2002, Mr. Brewster was initially treated by Dr. Wieck, who diagnosed a non-displaced tibial plateau fracture, and recorded the patient's "complaints of some mild low back pain that has gotten worse since that time and a popping in his right shoulder." (Deposition of Dr. Wieck, Exhibit 2). During the course of treatment, Dr. Wieck saw Mr. Brewster five more times: August 7, 2002, September 9, 2002, October 11, 2002, October 28, 2002, and November 18, 2002. Dr. Wieck testified that at the September office visit Mr. Brewster complained of low back pain, and that these complaints continued at the October 11 visit.[1] At trial, Mr. Brewster testified that prior to his fall he had never experienced back pain, nor had he ever been treated for any back problems.

When Mr. Brewster continued to complain of back pain, Dr. Wieck ordered an MRI scan of the affected area. At the October 28 visit, with the benefit of the MRI scan, Dr. Wieck determined that the patient suffered from spinal stenosis with some lateral recessed stenosis, although there was later testimony that the MRI scan was of extremely

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[1] "Q. When was the next time you saw Mr. Brewster, Doctor?
A. He returned on September 9, 2002.
Q. What were his complaints on that date?
A. At that time he came back for follow-up of his knee and as well of his back. He was complaining of some low back pain at that time."
(Deposition of Dr. Wieck, p. 9, ll. 15-21).

"Q. [W]hen was the next time you saw him?
A. He returned then on October 11.
Q. What were his complaints at that time, Doctor?
A. At that time he returned mostly because of his back hurting. . . . But he was complaining of more and more severe back pain, including pain that was radiating down the front of his leg with numbness in the front part of his leg when he stands for extended periods."
(Deposition of Dr. Wieck, pp. 10-11, ll. 18-4).

poor quality. Dr. Wieck opined that although the cause of stenosis may be either degenerative or traumatic, in Mr. Brewster's case it was a degenerative arthritic condition of the spine.[2]

On November 18, 2002, Dr. Wieck concluded that Mr. Brewster had reached maximum medical improvement for the knee-related injury and further reached the conclusion that the back problems were degenerative in nature and not related to the fall. However, at this visit Dr. Wieck noted that Mr. Brewster's "back continues to give him trouble with pain in his legs as before." Furthermore, Dr. Wieck released Mr. Brewster to full work from the standpoint of his knee, but kept him at "limited duty with regard to his back," and discussed with him the possibility of an epidural steroid injection. (Deposition of Dr. Wieck, Exhibit 2).

When asked his opinion of the cause of Mr. Brewster's back complaints, Dr. Wieck testified that "[h]is initial back complaints when he came to see me and the pain that he continued to have also appeared to be directly related to the fall that he sustained." (Deposition of Dr. Wieck, p. 16, ll. 13-16). However, upon further questioning Dr. Wieck testified that "[t]here is no evidence that the spinal stenosis . . . which you can see on the MRI, is related to the fall that he had." (Deposition of Dr. Wieck, p.17, ll. 1-4). Yet, upon cross-examination, Dr. Wieck went on to testify that Mr. Brewster suffered a lumbar strain resulting from the fall, sufficient to cause asymptomatic stenosis to become symptomatic.[3]

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[2] "Q. Is stenosis a degenerative or traumatic diagnosis or cause, Doctor?
A. Well, it can be either. . . . In this particular case the stenosis appeared to be the result of degenerative facet disease which is basically arthritis of the spine."
(Deposition of Dr. Wieck, p. 13, ll. 13-25).

[3] "Q. [D]id Mr. Brewster suffer a real injury to his back in that fall?
A. Yes.
Q. And what was the real injury?
A. I believe that he had a lumbar strain that occurred when he fell, and that was our diagnosis earlier on in his treatment.
Q. Now, what caused the lumbar strain?
A. The fall.
Q. And what particularly about the fall would have caused the lumbar strain, the trauma of striking the ground?
A. Striking the ground or twisting as he fell or hitting something on the way down. I mean, it's hard to know, but the fall basically.
Q. And there's no doubt that you attribute that to the fall?
A. Yes.
Q. And that's a work-related condition?
A. Yes.
Q. . . . [I]s the type of fall that he described sufficient to cause the asymptomatic . . . stenosis in his back to become symptomatic?
A. Yes.
Q. And is that your opinion to a reasonable degree of medical certainty?
A. Yes."
(Deposition of Dr. Wieck, pp. 23-4, ll. 1-9).

On the issue of whether Mr. Brewster's lumbar strain was a permanent condition, Dr. Wieck testified that although he did not expect it to be permanent, it could be and that he could not state to a reasonable degree of medical certainty that it was not a permanent condition. Likewise, Dr. Wieck's testimony is equivocal on the issue of whether the fall resulted in Mr. Brewster's sustaining an anatomical change resulting in radicular symptoms and whether the fall advanced his arthritic condition.[4]

On March 5, 2003, Mr. Brewster was examined by Dr. Walter Wheelhouse for the purpose of an independent medical evaluation. Based on the history provided by the patient, Dr. Wheelhouse concluded that Mr. Brewster's back pain was related to the fall.[5] Dr. Wheelhouse further testified that the trauma of the fall exacerbated Mr. Brewster's underlying degenerative disk disease, causing the asymptomatic condition to become symptomatic.[6] Additionally, Dr. Wheelhouse opined that Mr. Brewster would have permanent restrictions on bending, stooping, lifting, turning, prolonged standing or walking, kneeling, and crawling.

Appellate review of workers' compensation cases is *de novo* upon the record of the trial court, with a presumption of correctness of the trial court's findings of fact, unless the evidence preponderates against those findings. Tenn. Code Ann. § 50-6-225(e)(2). To determine where the preponderance of the evidence lies, the reviewing

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[4] "Q. . . . [T]o go from not having any radicular symptoms to having symptoms, there must be an anatomical change or some type of compression has to start?
A. Yes.
Q. Okay. And is it your testimony that nothing happened in the fall which served as a catalyst to get Mr. Brewster's anatomical change moving in that direction?
A. Correct. There's no evidence that the fall in any way worsened his stenosis.
Q. Okay. Is there evidence that it didn't?
A. No.
Q. Okay. Can you state to a reasonable degree of medical certainty that the fall did not advance the stenosis?
A. I would say that, yes, because there's no evidence that it did.
Q. But you just said there's no evidence that it didn't either?
A. That's correct."
(Deposition of Dr. Wieck, pp. 26-7, ll. 14-9).

[5] "Q. What is your opinion to a reasonable degree of medical certainty as to the cause of Mr. Brewster's back injury . . . ?
A. His injury at work on July 25, 2002, in which he struck his back against a concrete support.
Q. Doctor, why do you say that his back injury is caused from the fall . . .?
A. Because of the history that I took of Mr. Brewster. He was a reliable historian, and . . . his history fit with his injury that he demonstrated."
(Deposition of Dr. Wheelhouse, pp. 14-5, ll. 23-14).

[6] "Q. Doctor, had Mr. Brewster not fallen . . . would his underlying degenerative disk disease had caused him problems at that time without the fall?
A. Not likely, no, sir.
Q. Why do you say that?
A. Because he was asymptomatic before the work injury on July 25, 2002, and he became acutely symptomatic and remained symptomatic following that injury, and was treated by Dr. Wieck and myself for his back following the fall."
(Deposition of Dr. Wheelhouse, pp. 16-17, ll. 25-12).

court is required to conduct an independent examination of the record. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991). The standard governing appellate review of findings of fact by a trial court requires this Panel to weigh in more depth, the factual findings and conclusions of the trial court in workers' compensation cases. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988). We are not bound by the trial court's factual findings, but rather examine those findings independently to determine where the preponderance of the evidence lies. Collins v. Howmet Corp., 970 S.W.2d 941, 943 (Tenn. 1998). However, where the issues involve expert medical testimony which is contained in the record by deposition, as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676-77 (Tenn. 1991). In such cases, this Panel may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

In order to recover benefits under the Tennessee's Workers' Compensation Act, an employee must prove that he or she has suffered an injury arising out of and in the course of employment. Tenn. Code Ann. § 50-6-102(12). An injury occurs in the course of one's employment if it occurs while an employee is performing a duty he was employed to do. Williams v. Preferred Development Corp., 452 S.W.2d 344, 345 (Tenn. 1970). An accidental injury arises out of one's employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Hendrix v. Franklin State Bank, 290 S.W. 30 (Tenn. 1926). Any reasonable doubt as to whether an injury arose out of the employment is to be resolved in favor of the employee. Hall v. Auburntown Indus., Inc., 684 S.W.2d 614, 617 (Tenn. 1985).

Causation and permanency of a work-related injury must be shown in most cases by expert medical evidence. Seay v. Town of Greeneville, 587 S.W.2d 381, 383 (Tenn. 1979). Medical proof that the injury was caused in the course of the employee's work must not be speculative or so uncertain regarding the cause of the injury that attributing it to the plaintiff's employment would be an arbitrary determination or a mere possibility. Patterson v. Tucker Steel Co., 584 S.W.2d 792, 794 (Tenn. 1979). However, the trial judge may properly predicate an award on medical testimony to the effect that a given accident "could be" the cause of the plaintiff's injury when he also has before him lay testimony from which it may be reasonably inferred that the accident in fact was the cause of the injury. Chapman v. Employers Ins. Co., 627 S.W.2d 122, 123 (Tenn. 1978).

If equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may be drawn by the trial court. Patterson, 584 S.W.2d at 794. When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman, 803 S.W.2d at 676.

It is well-settled that an employer takes an employee as he finds him, with his pre-existing defects and diseases. Rogers v. Shaw, 813 S.W.2d 397, 399 (Tenn. 1991). An employer is responsible for workers compensation benefits, even though the claimant may have been suffering from a serious pre-existing condition or disability, if employment causes an actual progression or aggravation of the prior disabling condition or disease which produces increased pain that is disabling. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). To be compensable, the pre-existing condition must be advanced, or there must be anatomical changes in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. Sweat v. Superior Industries, 966 S.W.2d 31, 33 (Tenn. 1998). The aggravation of a pre-existing condition is not compensable if it results only in *increased* pain or other symptoms caused by the underlying condition. Cunningham v. Goodyear, 811 S.W.2d 888, 890 (Tenn. 1991). (emphasis added). When there has been no prior pain, however, pain is considered a disabling injury, compensable when occurring as a result of a work-related injury. Talley v. Virginia Ins. Reciprocal, 775 S .W.2d 587, 592 (Tenn. 1989). In Green v. Atrium Memorial Surgery Center, 2000 LEXIS 571 (Tenn. Workers' Comp. Panel 2000), the worker had suffered a back injury as the result of a motorcycle accident. The pain soon resolved, and she continued to be pain-free for a year and a half. She subsequently fell at work, twisting her back, and again began experiencing back pain which radiated into her leg. The Panel awarded benefits, holding that the worker's preexisting condition was advanced or accelerated, as she was experiencing no pain prior to the accident at work, but following the incident, suffered debilitating pain. Id. at *7.

In view of the foregoing, we find that the evidence supports a causal connection between Mr. Brewster's injury and his employment**.** The testimony of Mr. Brewster at trial, coupled with the medical testimony of both Dr. Wieck and Dr. Wheelhouse, establishes that his underlying anatomical condition was advanced or exacerbated by the eleven foot fall. There was uncontroverted testimony that prior to the accident Mr. Brewster had experienced no back pain. However, following the incident at work in July 2002, his preexisting stenosis became symptomatic, resulting in disabling pain.

Regarding the medical evidence presented by deposition, Dr. Wieck's testimony concerning causation and permanency was equivocal as to both the knee and the back. As to the knee, Dr. Wieck never testified as to any degree of disability, but only testified that "he would qualify for an impairment." In his November 18, 2002, notes he wrote that Mr. Brewster "would retain no permanent impairment from the standpoint of his knee based on the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition." However, the trial judge found that Mr. Brewster had a ten percent anatomical impairment to the knee based on Dr. Wheelhouse's testimony and awarded Mr. Brewster a forty percent vocational disability apportioned to the left leg. As to the back, Dr. Wieck also testified that Mr. Brewster had no anatomical impairment.

Dr. Wheelhouse, on the other hand, testified unequivocally as to both injuries. He found that due to the knee injury, Mr. Brewster suffers a ten percent impairment of his left lower extremity, which calculates to a four percent disability to the whole person. He found that due to the back injury, Mr. Brewster has an eight percent anatomical impairment to the whole person. Strangely, the trial judge found no anatomical

impairment or vocational disability due to the back injury; although the same doctor upon whom he relied for the finding of the permanent impairment from the knee injury found that the worker also had an anatomical impairment to his back due to the fall.

In his memorandum opinion, the trial judge found that Mr. Brewster failed to carry the burden of proof that there was a causal connection between the back pain and the fall, primarily because of "the length of time following the Plaintiff's injury before symptoms of pain manifested themselves." The trial judge went on to note that the worker "mentioned his back problems initially in presenting his history to Dr. Wieck, yet the evidence shows that the Plaintiff's symptoms changed dramatically over the next several months." The judge went on to note that "initially . . . the Plaintiff's back was of virtually no concern, albeit because of the issues concerning the Plaintiff's knee," which remained the major issue for over two months and that "it was not until more than sixty days after the initial injury that the pain in Plaintiff's back manifested itself to an extent to demand significant treatment." Thus, the judge concluded that the "delay in treatment and the delay in manifestation of symptoms causes us to question whether the exacerbation of the Plaintiff's underlying condition is sufficiently work-related to cause it to be compensable."

Our examination of the scanty medical records exhibited to Dr. Wieck's deposition reveal that on July 31, 2000, when he first saw Mr. Brewster that his patient had "complaints of some low back pain that has gotten worse since that time and a popping in his right shoulder." At his next visit on August 7, 2002, Mr. Brewster's knee was the entire focus of the examination and treatment. On the next visit on September 9, 2002, Dr. Wieck noted that Mr. Brewster had "still some low back pain," and his treatment plan was to "begin him on some physical therapy to work aggressively on rehabilitating his knee as well as his back." Mr. Brewster was directed to follow up in six weeks.

At the October 11, 2002, visit, Dr. Wieck noted that "Mr. Brewster returns today mostly because of his back." He noted the his patient's knee was "getting significantly better," but he was "complaining of more and more severe back pain," with "pain that radiates down the front of his leg with numbness in the front part of his leg every night or when he stands for extended periods." He found that Mr. Brewster had a full range of motion of his back with no hard muscle spasm, normal reflexes, etc. He went on to "set him up for an MRI scan to evaluate him further." The October 18, 2002, MRI showed "mild to moderate facet joint degenerative changes at all levels." The radiologist noted that Mr. Brewster's history was that he had had low back pain and left leg numbness "for months."

On October 28, 2002, when Dr. Wieck next saw Mr. Brewster, he noted that the MRI was "of extremely poor quality," but that it appeared to demonstrate "spinal stenosis with some lateral recessed stenosis." He planned to "set him up for an epidural steroid injection as he is still having the radicular type symptoms." He went on to opine that there was "no evidence that this is specifically work-related."

At the last visit on the record before us on November 18, 2002, Dr. Wieck noted that Mr. Brewster's knee was doing well and "does not give him trouble. However, his back continues to give him trouble with pain in his legs as before." He noted that "he still has limited duty with regard to his back" and they were to proceed with the epidural steroid injection. He noted that Mr. Brewster retained "no permanent impairment from the standpoint of his knee" based on the AMA Guidelines, but made no such notation as to his back.

The Workers' Compensation Act is to be construed liberally in favor of the employee. Smith v. Tenn. Furniture Ind., Inc., 369 S.W.2d 721, 728 (Tenn. 1963). Any reasonable doubt concerning the cause of the injury should be resolved in favor of the employee. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 168 (Tenn.2002). In this case, the trial judge relied entirely on the findings of Dr. Wheelhouse as to the knee injury, but did not rely on his findings as to the back injury. In his opinion letter, the trial judge adopted Dr. Wheelhouse's opinion regarding the knee, but found that the evidence preponderated against Dr. Wheelhouse's unequivocal opinion that the fall exacerbated Mr. Brewster's preexisting back condition. There is no explanation in his opinion as to why he believed Dr. Wheelhouse as to the knee, but discounted his testimony entirely as to the back injury. We simply conclude from our examination of the depositions of the doctors and the medical records that Dr. Wheelhouse was more credible than Dr. Wieck as to both the knee and the back.

Consequently, we reverse the holding of the trial court and remand for a determination of the amount of permanent partial disability benefits due to the employee as a result of the back injury consistent with this opinion. Costs on appeal are taxed to the appellees, American Residential Services, Inc., and Zurich America Insurance Company.

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JERRY SCOTT, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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JOHNNIE BREWSTER V. AMERICAN RESIDENTIAL SERVICES, INC. AND ZURICH AMERICAN INSURANCE COMPANY

Direct Appeal from the Chancery Court for Rutherford County
No. 03-6746WC, Hon. Robert E. Corlew, III, Chancellor

No. M2004-00236-WC-R3-CV

DANIEL, Sr. J., **dissenting.**

The sole issue in this appeal is whether the Chancellor erred in finding the back injury was not caused by the work-related accident. In workers' compensation cases, appellate review is *de novo* upon the record, accompanied by a presumption that the findings of the trial court are correct, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2) and Stone v. City of McMinnville, 896 S.W.2d 548, 550 (Tenn. 1995). Under this standard, we must weigh the factual findings and conclusions of law made by the trial court, and we must conduct an independent examination to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial judge requires this panel to examine in depth the trial court's factual findings and conclusions. GAF Building Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). Conclusions in law are subject to a de novo review on appeal without any presumptions of correctness. Presley v. Bennett, 860 S. W.2d 857, 859 (Tenn. 1993). When medical testimony is presented by deposition, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cooper v. INA, 884 S. W.2d 446, 451 (Tenn. 1994), Landers v. Fireman's Fund Ins. Co., 775 S.W. 355, 356 (Tenn. 1989).

In workers' compensation suits the Plaintiff/Worker bears the burden of proving every element of the case by a preponderance of the evidence including the existence of the work-related injury by accident. Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587, 591 (Tenn. 1989). An injury must both "arise out of" as well as be "in the course of" employment to be compensable under workers' compensation. The phrase "in the course of" refers to the time, place, and circumstance and "arise out of" refers to cause or origin. An accidental injury arises out of and in the course and scope of the employment if it has a rational connection to the work or occurrence while the employee is engaged in the duties of the employment. Orman v. William Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

Except in the most obvious, simple and routine cases, the claimant in workers' compensation actions must establish by expert medical evidence the causal relationship between the claimed injury and disability and the employment activity. Masters v. Industrial Garments Mfg. Co., 595 S.W.2d 811, 812 (Tenn. 1980). "Although absolute certainty is not required for proof of causation . . . medical proof that the injury was caused in the course of the employee's work must not be speculative or so uncertain regarding the cause of the injury that attributing it to the Plaintiff's employment would be an arbitrary determination or a mere possibility. . . . If, however, equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn by the trial court under the case law." Tindall v. Waring Park Ass'n. 725 S.W.2d 935, 937 (Tenn. 1987).

The trial court concluded that the back injury was not related to the July 25, 2002 fall because of the delay of approximately two months in Mr. Brewster's complaint to Dr. Wieck of radiating back pain into his leg. The trial court also justified this conclusion based on Dr. Wieck's expert medical testimony that the back pain was not related to the fall at work and the evaluation of the trial witnesses that were presented in court. When a trial court has seen and heard the witnesses, especially when issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

A review of this record indicated that on July 25, 2002, Mr. Johnnie Brewster was an individual who stood 5 feet 10 inches tall and weighed 360 pounds. Mr. Brewster suffered a broken leg on this date as a result of a work-related fall. Immediately after the fall, Mr. Brewster suffered intense leg pain and he was taken from the scene by a co-employee for medical care, first to a walk-in clinic and later, to the emergency room at Centennial Hospital. After having his leg stabilized, Mr. Brewster was provided a list of doctors by the company for his follow-up care and he selected Dr. Joseph Wieck, an orthopedic surgeon. Dr. Wieck initially saw Mr. Brewster July 31, 2002 and recorded Mr. Brewster's complaints as swelling and pain in his left knee and leg. He also complained of "some mild low back pain . . . and popping in his right shoulder." Dr. Wieck concluded that Mr. Brewster had initially suffered a low back strain and treated Mr. Brewster for a tibial plateau fracture which ultimately resolved. During the course of this treatment, Dr. Wieck saw Mr. Brewster after the initial July 31, 2002 visit on August 7, 2002, September 9, 2002, October 11, 2002, October 28, 2002, and November 18, 2002. On his August 7th visit, Dr. Wieck noted no complaints about Mr. Brewster's lower back and only treated his leg-related injuries. On the September 9th doctor's visit, more than forty-five days after the fall, office notes reflect Mr. Brewster complained of "some low back pain." However, on the October 11, 2002 office visit, more than two and a half months after the work-related accident, Mr. Brewster had few complaints about his leg injury and complained more and more of severe back pain. On this occasion, for the first time, Mr. Brewster reported that "the pain radiated down the front of his legs with numbness in the front part of his legs every night and when he stood for extended periods of time." On this occasion, Dr. Wieck examined Mr. Brewster and found him to have a full range of motion of his back with no hard muscle spasms. Other

tests were negative, such as a straight leg-raise test, and he appeared to have normal strength, sensation and reflexes. Because of Mr. Brewster's complaints of pain and since there was no objective examination to reveal the source of the pain, Dr. Wieck ordered an MRI scan of the affected area of the back. On October 28, 2002, Mr. Brewer was once again examined by Dr. Wieck who had the benefit of the MRI scan. The MRI demonstrated that Mr. Brewster suffered from spinal stenosis with some lateral recessed stenosis. On this occasion Mr. Brewster continued to complain of back pain, however, there was no evidence of any disk or any other acute problem. On November 18th Dr. Wieck concluded that Mr. Brewster had reached maximum medical improvement for the knee-related injury and reached the conclusion that the back problems were degenerative in nature and were not related to the work-related fall. Dr. Wieck was not equivocal in his testimony in concluding that the back injury was not related to the fall. Asked by counsel in every variation possible, Dr. Wieck was emphatic that the fall was not the cause of Mr. Brewster's arthritic condition becoming symptomatic.[7]

The majority opinion rests medical causation on the theory that Dr. Wieck's testimony was equivocal, which cannot be reasonably concluded from my review of this record. My colleagues used Dr. Wheelhouse's independent medical examination and their conclusion that Dr. Wieck's testimony was equivocal to produce medical causation for symptoms that developed two and a half months after the July 25, 2002 work-related accident. In my review of this record, there is no showing of a rational connection to the work or occurrence as required by the law to make the employer liable for this back injury. I would affirm the trial court's conclusion that the Plaintiff failed to meet his burden of proof to prove that the back injury occurred within the course and scope of the

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"Q. Okay. And it is your testimony that nothing happened in the fall which served as a catalyst to get Mr. Brewster's anatomical change moving in that direction?
A. Correct. There's no evidence that the fall in any way worsened his stenosis.
Q. Okay. Can you state to a reasonable degree of medical certainty that the fall did not advance the stenosis?
A. I would state that, yes, because there's no evidence that it did. I would again say there's no evidence to a reasonable degree of medical certainty that the fall caused this stenosis to get worse. Any more than the normal history of the stenosis is to get worse.
Q. That's kind of the fact I want to get to, Dr. Wieck, is Mr. Brewester doesn't have a normal history of stenosis. He has an asymptomatic stenotic condition with a traumatic event and then pain.
Q. Is that correct?
A. No, actually it's not. I guess it's accurate because he did not have this radicular pain, then he had a traumatic event and then sometime after that he had radicular pain.
Q. How long after that?
A. The first time he complained of radicular symptoms to me was on October 11. And his fall was July 25, so that's two and a half months.
Q. Okay. So is it your testimony that his stenotic condition naturally progressed in two and a half months to the point that he had radicular symtoms?
A. You know, again, I don't know that. But that is – there's no evidence that that's not the case. There's no evidence that the fall caused it to progress. He didn't have a fracture, he didn't have a disc, he didn't have the things that would cause it to progress.
Q. What about just by history and clinical presentation?
A. By history he did not have radicular symptoms after he fell. So there's not evidence that that caused the radicular symptoms. I mean, there just isn't."
(Deposition of Dr. Wieck, p. 26, ll. 19-24, p. 27, ll. 2-6 and 13-22, p. 28, ll. 1-23).

employment and was the result of the July 25, 2002 accident. Therefore, I respectfully dissent.

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J. S. DANIEL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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OCTOBER 27, 2004 SESSION

JOHNNIE BREWSTER v. AMERICAN RESIDENTIAL SERVICES, INC. And ZURICH AMERICA INSURANCE COMPANY

Chancery Court for Rutherford County
No. 03-6746WC

No. M2004-00236-WC-R3-CV - Filed - April 22, 2005

JUDGMENT

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 appeals 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 the Appellees, American Residential Services, Inc., and Zurich America Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM