NOT DESIGNATED FOR PUBLICATION

JOSEPH WALKER, III	*	**NO. 2001-CA-2361**
VERSUS	*	**COURT OF APPEAL**
KENNETH FREEMAN, GRIFFIN INDUSTRIES, INC., AND THE GREAT AMERICAN INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-1014, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge
* * * * * *
Judge David S. Gorbaty
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(Court composed of Judge Steven R. Plotkin, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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AFFIRMED

Kenneth Freeman, Griffin Industries, Inc., and American National Fire Insurance Company, defendants herein, appeal a judgment awarding Joseph Walker, III, damages. For the following reasons, we affirm.

FACTS:

On April 25, 1997, Joseph Walker, III, while driving his dump truck, was involved in a collision with a vacuum truck being driven by Kenneth Freeman. According to the police report, the road on which the accident occurred was too narrow for two large trucks to pass at the same time. The gravel road had no lane markings, and there were ditches to either side. Both vehicles relocated prior to the police arriving, but the investigating officer testified in her deposition that she stayed at the scene to observe other trucks using the road. Mr. Freeman told the officer that he slowed down to pass the oncoming traffic, Mr. Walker's vehicle, but the mirrors on the

trucks collided. Mr. Walker stated that he too slowed down, but could not avoid the mirrors colliding. Kirk Bennett, an eyewitness following Mr. Walker's truck, told the officer that he slowed to a stop after Mr. Freeman's truck struck Mr. Walker's truck. The police report indicates that the damage to both trucks was minor, and that neither driver was injured. Both drivers were cited for failure to yield.

DISCUSSION:

In their sole assignment of error, defendants claim that the trial court erred in relying on the opinion of Dr. Daniel Seltzer, whose opinion was based entirely on incompetent and misleading evidence. They claim that because Dr. Seltzer was not aware Dr. Ploger had treated Mr. Walker for back injuries since the last time Dr. Seltzer treated him, his opinion that this accident aggravated Mr. Walker's pre-existing injuries was flawed. Defendants argue that the true source of the aggravation of Mr. Walker's back injury was his continuing to drive his truck despite Dr. Ploger's advice to find another job. Therefore, Dr. Seltzer could not accurately relate the aggravation to the April 25, 1997, accident.

The record reveals that Mr. Walker has an extensive history of prior

accidents resulting in cervical and lumbar injuries. The trial court stated in reasons for judgment that it relied on the testimony of Dr. Seltzer, plaintiff's treating orthopedic physician, that the accident in question caused an aggravation of a pre-existing back injury.

Dr. Seltzer testified that he first treated Mr. Walker for a neck injury following an automobile accident in November of 1991. An MRI conducted at that time revealed a partial herniation at C3-4 and C4-5. Dr. Seltzer was also aware that Mr. Walker had reinjured his back in 1992 when he attempted to remove a lawn mower from his car trunk, and in 1993 while moving furniture. He saw Mr. Walker in October of 1993 about pain in his neck and lower back, and they discussed the possibility of additional testing.

Dr. Seltzer did not treat Mr. Walker again until May 1997, one month following the subject accident. Dr. Seltzer testified that Mr. Walker told him about another accident in which he was involved in 1994. Mr. Walker explained that he had injured his neck and back, and made a slow and gradual recovery.

The examination on May 23, 1997, revealed spasm in the cervical area, tenderness on either side of the neck, and loss of fifty percent range of

motion. The range of motion in Mr. Walker's shoulders, elbows, wrists and hands was normal. There was a decreased range of motion in the lumbar spine, with mild spasm on both sides. The neurological examination was normal. Dr. Seltzer diagnosed a sprain of the cervical and lumbar spine, and attributed the injuries to the April 25 accident.

Mr. Walker was treated conservatively with medications and was prescribed physical therapy, although the record reveals that Mr. Walker's attendance was sporadic. An August 1997 MRI revealed evidence of a partial herniation at L4-5, and some damage at L5-S1. In November of 1997, Dr. Seltzer changed Mr. Walker's pain medication to a non-narcotic. He continued the conservative treatment, and continued to recommend that Mr. Walker not lift or carry anything over ten pounds. At no time did Dr. Seltzer recommend that Mr. Walker not drive his dump truck; rather, he advised Mr. Walker to restrict his activities according to his pain level. He assigned a 15% whole body disability based on the partial herniation at L4-5.

Dr. Seltzer was asked by plaintiff's counsel to compare a 1995 MRI prescribed by another physician with the 1997 MRI. The doctor explained

that the comparison was difficult because the earlier MRI was fuzzy. However, Dr. Seltzer testified that the 1997 MRI revealed a more pronounced herniation at L4-5 than what appeared on the 1995 scan. Dr. Seltzer stated that he could reach no conclusion as to damage at L5-S1.

On cross-examination Dr. Seltzer admitted that he was not aware of a 1993 accident for which Mr. Walker was treated by Drs. Angelo and Culicchia. He was aware of the 1994 accident for which plaintiff was treated by Dr. Ploger, but did not review Dr. Ploger's records.

Dr. Ploger testified that he first saw Mr. Walker in January of 1995 following an October 1994 automobile accident. Mr. Walker told him that another physician whose name he could not recall had been treating him. That doctor had prescribed muscle relaxers, pain medication, heat, massage and electrical stimulation. At the time Dr. Ploger first saw plaintiff he was complaining of back pain with pain in his left leg. Dr. Ploger also reviewed an MRI and a radiologist's report in connection with the October 1994 accident. The report and scan indicated mild disc dehydration and herniation at L4-5 and L5/S1. Dr. Ploger discussed with Mr. Walker the possibility of having steroid injections, and cautioned him about his work as

a truck driver.

In March of 1995 Mr. Walker returned with continued complaints of back pain. He claimed that he was unable to drive his truck because of the severity of the pain. Dr. Ploger again suggested that Mr. Walker undergo an epidural steroid injection.

Mr. Walker received an injection on March 31, and returned to Dr. Ploger on May 2. He reported that the injection provided relief for about three weeks, and that his pain had lessened since the injection. Mr. Walker was working, but admitted that it increased his pain. Dr. Ploger recommended another injection, and told Mr. Walker not to work for three weeks following.

Although Mr. Walker had a second steroid injection on May 12, 1995, he did not return to Dr. Ploger until January 15, 1996. At that time he was still experiencing back and leg pain, and spasm, tenderness and decreased range of motion was noted on examination. Because Mr. Walker did obtain some relief from the steroid injections, Dr. Ploger recommended that he have a third injection.

After another injection on January 19, Mr. Walker returned to Dr.

Ploger on January 30. He still had spasms, tenderness and decreased range of motion. Dr. Ploger testified that he did not tell Mr. Walker that he could not work, but, rather, that if driving his truck was causing increased pain, perhaps Mr. Walker should look for other work.

On February 28, 1996, Mr. Walker complained of increased pain when working. Dr. Ploger again recommended changing jobs to something more sedentary, because he felt Mr. Walker would experience less symptoms. The doctor also recommended another injection. Mr. Walker did not return for another visit.

At trial Dr. Ploger explained that it was his opinion that if Mr. Walker continued to drive his truck, he would continue to have pain on and off.

Defendants refer to previous accidents in which Mr. Walker was involved, some dating as far back as 1986. However, any accident prior to October of 1994 is irrelevant because the trial court made the factual finding that the April 25, 1997, accident aggravated his pre-existing injury incurred in October of 1994. Dr. Seltzer compared the MRI taken subsequent to the 1994 accident with the MRI taken subsequent to the subject accident. In his expert opinion, the herniation to L4-5 was more pronounced in the 1997

scan, and he attributed this condition to the April 25, 1997, accident.

The only expert testimony offered by defendants to refute Dr. Seltzer's opinion was the deposition testimony of the radiologist who performed the 1997 MRI. After comparing the two scans, it was his opinion that there was no difference in the herniations observed.

Findings of credibility and reasonable inferences of fact should not be disturbed on review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *See Maranto v. Goodyear Tire & Rubber Co.*, 94-203, p. 7 (La. 02/2095), 650 So.2d 757, 762. In the face of conflicting testimony, an appellate court may not disturb reasonable credibility evaluations and reasonable factual inferences even if it feels that its own evaluations and inferences are as reasonable. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). Expert opinions are not controlling, and any weight given to such opinions by the trier of fact is dependent upon the expert's qualifications, experience, and studies upon which his testimony is based. *Moore v. Willis-Knighton Medical Center*, 31203, p. 6 (La.App. 2 Cir. 10/28/98), 720 So.2d 425, 429. When there are two permissible views of the evidence, the fact finder's choice between the two cannot be

manifestly erroneous or clearly wrong. *Rosell, supra*. An appellate court must go through a two-step process, based on the record as a whole, before it may reverse a factual conclusion: it must first determine that there is no factual basis for the trial court's conclusions, and then determine that the finding is clearly wrong. *Stobart v. State, through DOTD*, 617 So.2d 880 (La. 1993).

After reviewing the record in its entirety, we cannot say that the trial court was clearly wrong in relying on Dr. Seltzer's expert opinion that the subject accident aggravated Mr. Walker's pre-existing back injuries. Accordingly, we affirm the judgment of the trial court.

AFFIRMED