

**NOT DESIGNATED FOR PUBLICATION** **COURT OF APPEALS  
FIFTH CIRCUIT**

JAMES BERGERON

VERSUS

VENTURE TRANSPORT AND LWCC

FILED DEC 30 2002  
NO. 02-CA-796

*Order of the Court*  
FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE OFFICE OF WORKERS' COMPENSATION  
DISTRICT "09", STATE OF LOUISIANA  
NO. 01-03165,  
HONORABLE GLYNN F. VOISIN, JUDGE PRESIDING

**DECEMBER 30, 2002**

**THOMAS F. DALEY  
JUDGE**

Panel composed of Judges Thomas F. Daley,  
Marion F. Edwards, and Susan M. Chehardy

SAMMIE M. HENRY

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**AFFIRMED**

T.D.  
S.M.C.

The plaintiff has appealed the workers' compensation hearing officer's decision finding he was not entitled to temporary total disability, he is not entitled to supplemental earnings benefits, he is not entitled to future medical benefits, and the defendant was not arbitrary and capricious in denying his claim.

**FACTS:**

The plaintiff, James Bergeron, was employed by the defendant, Venture Transport, as a truck driver. On September 5, 2000, he was injured in the course and scope of his employment when the load of pipes he was hauling struck the rear of the truck cab when he stopped suddenly to avoid another vehicle. Mr. Bergeron was treated at Terrebonne General Medical Center emergency room and then followed up with two physicians. When these physicians recommended he return to work, he reported for the required DOTD physical. He did not pass the DOTD physical and sought further medical treatment that was denied. His benefits were terminated and he filed a disputed claim for compensation.

At trial, the parties stipulated that plaintiff received compensation benefits from September 5, 2000 until January 23, 2001. They also stipulated that he had a second accident on March 14, 2001, unrelated to his employment.

Mr. Bergeron testified that he injured a muscle in his shoulder just prior to the September 5, 2000 accident and had passed a DOTD physical on September 4, 2000. He testified that he felt immediate burning and a pop at the time of the accident. He reported the accident to defendant's Houston office. Mr. Bergeron's wife picked him up at the accident site and brought him to the emergency room. X-rays were taken and he was given a prescription for pain medication. He was told to follow up with an orthopedist, Dr. A. Delmar Walker, Jr. Mr. Bergeron testified that Dr. Walker prescribed pain medications, muscle relaxants, and physical therapy. Plaintiff testified that when Dr. Walker stated he could return to work, Dr. Walker referred him for a second opinion with another orthopedist, Dr. Kinnard. Plaintiff testified that after two visits, Dr. Kinnard released plaintiff to return to work without restrictions. Mr. Bergeron stated that he spoke with the terminal manager at Venture who told him to go get a DOTD physical prior to returning to work. Plaintiff explained that he went to Dr. Dantin for this physical and he did not pass the physical because he still had back problems. Plaintiff stated that the back problems consisted of pain, burning, and numbness in his legs. Plaintiff further testified that when he informed defendant that he did not pass the required physical examination, defendant did not offer any other positions. He explained that he had a meeting with Linda Trahan from Venture for a job analysis. He was informed that there was a dispatcher job available, but that job was not offered to him. On the advice of defendant, he returned to Dr. Walker who stated there was nothing he could offer him. Plaintiff returned to Dr. Kinnard who also stated he had nothing to offer. Plaintiff then sought treatment from Dr. Pribil, a

neurosurgeon. Dr. Pribil prescribed a back brace and medications. Dr. Pribil then referred plaintiff to a physiatrist, Dr. Collips.

Mr. Bergeron testified that he moved to Mississippi because he could not pay the rent on his home in Louisiana. He had a Mississippi Medicare card and sought treatment from several physicians in Mississippi. These included Drs. Musial and Goel who stated that plaintiff needed a neurosurgeon, Dr. Pennebaker, Dr. Folse, Dr. Patterson, and Dr. Ahmed. Mr. Bergeron testified that the defendants did not pay for treatment by these physicians, although he had not been released by them to return to work.

Mr. Bergeron testified that he has burning and numbness in both of his legs if he sits or stands for too long. He testified that his legs get numb and he falls, needing someone to help him up. Mr. Bergeron testified that this started after the September accident and has not stopped. He testified that he had no new problems from the March 14, 2001 accident, and that his injury was the same as prior to this accident.

Mr. Bergeron testified that he underwent a nerve block and it wore off. He went to get a second nerve block, and at that time he had "no feeling" from the waist down so he did not have the second nerve block. At the time of trial, Mr. Bergeron was still under the care of Dr. Pennebaker.

The deposition of Dr. Walker was admitted into evidence. Dr. Walker testified that when he first examined plaintiff on September 8, 2000, plaintiff complained of low back pain radiating to his upper back and right leg, and numbness in the right leg to the ankle. Dr. Walker noted that plaintiff had decreased sensation in the right leg, moderately decreased range of motion and a negative straight leg raising test. Dr. Walker explained that if there is nerve root irritation, there should be pain below the calf when the legs are raised. He

diagnosed muscular strain in the low back and referred Mr. Bergeron to physical therapy.

Dr. Walker next examined plaintiff on October 2, 2000 at which time plaintiff stated there was no improvement in his symptoms. Dr. Walker noted negative straight leg raising. Dr. Walker testified that he felt there was some emotional overlay or exaggeration of plaintiff's symptoms at this time, but ordered an MRI. The MRI of the lumbar spine was performed on October 17, 2000 and indicated there was mild to moderate desiccation of the fifth lumbar disc. Dr. Walker explained that this is a sign of degenerative disc disease and that it was unrelated to the accident. Dr. Walker testified that there was no evidence of disc protrusion or other abnormalities. On October 19, 2000, plaintiff returned to Dr. Walker's office. Dr. Walker testified that plaintiff still complained of pain although there were no neurological abnormalities in his examination. Dr. Walker suggested Mr. Bergeron remain on light duty for three more weeks and obtain a second opinion.

Dr. Walker testified that he referred plaintiff to Dr. Kinnard. Dr. Kinnard examined plaintiff on October 20, 2000 and diagnosed muscular strain. He recommended that plaintiff return to work without restrictions.

Dr. Walker testified that he was notified by defendant that plaintiff failed the DOTD physical. Plaintiff returned to his office on November 9, 2000. Dr. Walker explained that he did not want to be "put in the middle" between Dr. Dantin and defendant so he refused to see plaintiff. Dr. Walker testified that he would not have expected plaintiff to have difficulty performing the range of motion for the DOTD physical. He further explained that the range of motion is voluntary so if the patient does not cooperate, the results are not accurate. Dr. Walker testified that plaintiff had a moderate soft tissue strain that should have resolved in six to eight weeks.

On cross-examination, Dr. Walker admitted that on the first office visit, plaintiff had asymmetrical reflexes, which is a sign of nerve root irritation. He further testified that it was possible that the trauma from the accident could have aggravated or exacerbated the degenerative disc disease.

The deposition of Dr. Kirk Dantin was introduced into evidence. Dr. Dantin testified that he examined plaintiff for a DOTD physical on October 23, 2000 at the request of defendant. He testified that the only abnormality in plaintiff's examination was when he requested plaintiff perform flexion and extension of his spine. Plaintiff stated that he was unable to do so secondary to pain. He encouraged plaintiff to try harder to perform some range of motion, but plaintiff stated that he could not do so. Dr. Dantin explained that plaintiff could not pass the physical on this basis because a driver needs range of motion and strength in his trunk. Therefore, he could not certify plaintiff as qualified to operate a commercial vehicle. Dr. Dantin explained that the negative MRI had no bearing on his decision to fail plaintiff on the physical because the purpose of the physical was to determine whether plaintiff was able to operate a commercial vehicle.

Dr. Dantin testified that he did not recall anything about plaintiff that would have made him suspicious that plaintiff was not motivated to properly perform the exam. He testified that it was impossible to say whether or not plaintiff could not or would not perform the required range of motion in his spine.

The deposition of Dr. James Pennebaker, who is board certified in internal medicine and rheumatology, was admitted into evidence. Dr. Pennebaker testified that he first examined plaintiff on April 2001. He testified that plaintiff complained of low back pain and numbness in his legs. Dr. Pennebaker testified that plaintiff told him these complaints began after the September 5, 2000 accident. Dr. Pennebaker testified that plaintiff's straight leg test was negative bilaterally and that plaintiff had normal strength and normal reflexes. He requested plaintiff

have an MRI. The MRI of April 12, 2001 indicated there was disc desiccation at the fifth lumbar vertebrae. He explained that this is the first stage of degenerative disc disease. Dr. Pennebaker testified that the MRI also showed facet joints in the low back with arthritis. Dr. Pennebaker testified that plaintiff and plaintiff's father told him plaintiff's legs would give out when he walked. He testified that he referred plaintiff for lumbar steroid injections. When plaintiff went to have the second injection, plaintiff had no sensation from the waist down. Dr. Pennebaker admitted that there were no objective finding for plaintiff's complaints, but explained that he believed plaintiff's complaints and did not think that plaintiff was malingering. He explained that plaintiff has a sincere desire to return to work and had become frustrated and depressed because he has not been able to do so. Dr. Pennebaker referred plaintiff for an EMG and nerve conduction study. These tests were normal.

In an effort to relieve plaintiff's pain, Dr. Pennebaker prescribed Oxycontin and a TENS unit. He prescribed a wheelchair for plaintiff because of plaintiff's reports of falling.

Dr. Pennebaker explained that he felt it is important to rule out a conversion reaction. He explained that a conversion reaction is a physiologic state that cannot be explained by any injury or anatomical problem and although it may be psychological in nature, it is real to the patient.

On cross-examination, Dr. Pennebaker testified that plaintiff told him that his condition got worse after the March 2001 accident. Dr. Pennebaker admitted that the findings on plaintiff's examination were inconsistent and the complaints of numbness are not based on any anatomical distribution.

Numerous medical records were introduced into evidence. The MRI report for the lumbar spine dated October 17, 2000 stated there was "mild to moderate desiccation of the L5-S1 disc, otherwise normal study." A report from Dr. Pribil, a

neurosurgeon, diagnoses plaintiff as having lumbar disc herniation at L5-S1, disc space collapse, and central disc herniation. Dr. Pribil recommended a thoracic MIR, EMG/NCS, and a back brace. The EMG report dated December 15, 2000 states “this electrophysiologic study reveals no evidence of acute or chronic neuropathy, radiculopathy, or myopathy. A report by Dr. Pribil dated January 9, 2001 states that he suspects plaintiff’s pain is muscular in origin so he referred plaintiff to a muscular specialist, Dr. Caly, a physiatrist in Mississippi. Dr. Pribil discharged plaintiff from his care. The MRI of the lumbar spine dated April 12, 2001 states there is “L5-S1 disc desiccation without loss of disc height or other lesion and L4-5 bilateral facet degeneration, mild.” The EMG/nerve conduction study report dated August 10, 2001 states “this is a normal EMG/NCS on both lower extremities.”

At the conclusion of trial, the trial judge took the matter under advisement.

He then rendered judgment finding:

1. plaintiff failed to carry his burden of proving disability by clear and convincing evidence, therefore, he is not entitled to temporary total disability for the accident of September 5, 2000;
2. plaintiff failed to carry his burden of proving by a preponderance of the evidence that he is unable to earn 90% of his pre-injury wages, therefore, he is not entitled to supplemental earnings benefits;
3. plaintiff is not entitled to future medical treatment;
4. defendant was not arbitrary and capricious in denying plaintiff’s compensation claim.

At the request of plaintiff, the trial judge issued written Reasons for Judgment. In these reasons, the trial court listed numerous findings of fact based on the medical evidence. The trial judge concluded:

In this case, the claimant was released to return to his regular duty by Dr. Kinnard, Dr. Walker agreed with that release. Dr. Pribil also discharged the claimant once the diagnostic test returned with negative results and nothing to substantiate his complaints. Dr.



Dantin, in his deposition, stated the only significant thing about the physical was when the claimant was asked to demonstrate a basic range of motion with his spine. According to Dr. Dantin's report, the claimant could not demonstrate range of motion, and that is why he failed the physical. Dr Pennybaker stated in his deposition that the claimant was capable of sedentary work. However, Dr Pennybaker saw the claimant after the March 11, 2001 automobile accident. Dr. Pennybaker conceded that he and the other doctors, that the claimant had seen, could not find anything to substantiate his complaints.

The claimant must introduce objective medical evidence. The claimant had at least three MRIs performed and two EMGs. The lumbar MRIs were essentially normal, except for desiccation of the L5-S1 disc. The thoracic MRI showed a spur at T4 and a small bulge at T6-7. There was nothing of any surgical consequence. The EMGs were also normal.

Aside from the claimant's subjective complaints, there is no objective medical evidence that he was not capable of engaging in gainful employment. Every diagnostic test given to the claimant showed nothing to substantiate his complaints.

The trial judge concluded that plaintiff failed to carry his burden of proving disability by clear and convincing evidence. The trial judge further concluded, based on plaintiff's release by Drs. Walker, Kinnard, and Pribil, that there was no lost earning capacity and plaintiff was not entitled to supplemental earning benefits.

In his first Assignment of Error, plaintiff contends the trial court erred in failing to give plaintiff the presumption of causation. Specifically, plaintiff argues that since plaintiff passed a DOTD physical on September 4, 2000, was involved in an accident on September 5, 2000, suffered an injury and was disabled, he is entitled to a presumption that the accident caused the disability.

In workers' compensation cases, disability is presumed to be the result of the work-related accident if the claimant was in good health prior to the accident, and is disabled after the accident. Winfield v. Jiffy Lube, 2001-0341 (La.App. 1 Cir. 3/28/01), 813 So.2d 428. This presumption is afforded to plaintiff when sufficient medical evidence is introduced to show a reasonable possibility of a causal connection between the disability and the work-related accident. LeBlanc v. Cajun

Painting Inc., 94-1609, (La.App. 1 Cir.4/7/95), 654 So.2d 800, writ denied, 95-1706, 95-1655 (La.10/27/95), 661 So.2d 1349. Where there is sufficient proof of an accident and resulting disability, without an intervening cause, it is presumed that the accident caused the disability. Winfield, supra. The determinations by the workers' compensation judge as to whether the claimant's testimony is credible and whether the claimant has met his burden of proof are factual determinations and will not be disturbed upon review in the absence of manifest error or unless clearly wrong. Id.

In the case at bar, there was testimony from Dr. Walker and a report from Dr. Kinnard that plaintiff sustained a muscular injury and was able to return to work without restrictions. Dr. Dantin testified that plaintiff failed the DOTD physical because he could not perform the range of motion portion of the examination. Dr. Dantin explained that plaintiff's failure to perform the range of motion was based on plaintiff's subjective complaints of pain in attempting these movements. While Dr. Walker testified that there was no reason why plaintiff could not perform the required range of motion, Dr. Dantin testified that it was impossible to determine whether plaintiff could not or would not perform these movements. Plaintiff urges this Court to rely on the testimony of Dr. Pennebaker that plaintiff may have developed a conversion reaction to support his position. However, the medical records did not indicate that a diagnosis of a conversion reaction was made; this was only a statement made by Dr. Pennebaker as a possible explanation of plaintiff's symptoms. Obviously, the trial judge chose to believe the testimony of Dr. Walker. Additionally, there were no objective medical tests to explain plaintiff's complaints. When there are two permissible views of the testimony, the factfinders' choice cannot be manifestly erroneous. We find that the trial judge's ruling that plaintiff failed to carry his burden of proving he was disabled as a result of the September 5, 2000 accident is supported by the record.

In his second Assignment of Error, the plaintiff argues the trial judge erred in failing to award benefits to plaintiff because the testimony established that plaintiff was suffering from a conversion reaction. We disagree.

R.S. 23:1021(7)(c) requires that mental injury or illness must be demonstrated by clear and convincing evidence. Subsection (d) provides that a mental injury or illness is not compensable unless it is diagnosed by a licensed psychiatrist or psychologist. Dr. Pennebaker was the only physician to suggest the existence of a conversion reaction. Dr. Pennebaker did not testify that plaintiff was suffering from a conversion reaction; rather, he testified that he felt it was important that a conversion reaction be ruled out. Dr. Pennebaker explained that this is a psychiatric disorder and that he was going to refer plaintiff to a psychiatrist. There was insufficient evidence to prove the existence of a conversion reaction. Accordingly, we see no error in the trial court's failure to award benefits.

In his third Assignment of Error, plaintiff argues the trial judge erred in failing to find the defendants arbitrary and capricious. Plaintiff's argument is based on the entry into LWCC's adjuster's notebook that the adjuster told plaintiff that she was closing the file because his diagnosis was back strain and back strains do not last five months. We note that this entry was made after defendant received Dr Pribil's report stating that the MRI did not show anything to explain plaintiff's pain. Dr. Pribil did refer plaintiff to a physiatrist, Dr. Callip, in Mississippi.

The trial court did not err in finding defendant was not arbitrary and capricious in denying plaintiff's compensation benefits. Two physicians of plaintiff's choice had released plaintiff to return to work without restrictions. Dr. Pribil, another physician of plaintiff's choice, stated that the diagnostic tests did not explain plaintiff's continued complaints of pain.

In order for this Court to reverse the trial court's factual finding, we must find from the record that a reasonable factual basis does not exist for the finding of the trial court. Mart v. Hill, 505 So.2d 1120 (La.1987). If the findings are reasonable, in light of the entire record, an appellate court may not reverse even though the appellate court is convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. When these factual findings are based on the credibility of witnesses, the trial court's decision to credit one witness's testimony over that of another must be given "great deference" by the appellate court. Rosell v. ESCO, 549 So.2d 840, 844 (La.1989). In the presence of conflicting testimony, reasonable evaluations of credibility and reasonable inferences of fact may not be disturbed upon review, although the appellate court may feel that its own evaluations and inferences are as reasonable. Id.

The trial judge in this case was presented with conflicting testimony. Plaintiff testified that he continued to have pain and numbness that caused his legs to give out, causing him to fall. Drs. Walker and Kinnard could find no reason for plaintiff's continued complaints and opined that plaintiff could return to work without restrictions. Dr. Dantin testified that plaintiff was unable to perform the required range of motion to pass the DOTD physical based on plaintiff's subjective complaints of pain. Dr. Pribil could not explain plaintiff's complaints of pain based on the diagnostic studies. Dr. Pennebaker testified there were no identifiable medical conditions to explain plaintiff's legs giving out, numbness, and burning. Thus, the record contains a reasonable factual basis for the trial court's judgment. Accordingly, the judgment of the trial court is affirmed.

**AFFIRMED**



EDWARD A. DUFRESNE, JR.  
CHIEF JUDGE

SOL GOTHARD  
JAMES L. CANNELLA  
THOMAS F. DALEY  
MARION F. EDWARDS  
SUSAN M. CHEARDY  
CLARENCE E. McMANUS  
WALTER J. ROTHSCHILD

JUDGES

# Court of Appeal

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CLERK OF COURT

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## CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY DECEMBER 30, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

PETER J. FITZGERALD, JR.  
CLERK OF COURT

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