

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 2064

SIDNEY DeBLANC, III

VERSUS

ALBERTSONS, L.L.C.

CONSOLIDATED WITH

NO. 2013 CA 2065

ALBERTSONS, L.L.C.

VERSUS

SIDNEY DeBLANC, III

Judgment Rendered: JUN 17 2015

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On Appeal from the
Office of Workers' Compensation District 6
In and for the Parish of St. Tammany
State of Louisiana
Trial Court Numbers 12-01578 c/w 12-02828

Honorable Gwendolyn F. Thompson, Judge Presiding

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* * * * *

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McCleendon, J. dissents in part and assigns reasons.

*TMT
c/wm*

HIGGINBOTHAM, J.

In this workers' compensation case, the employer appeals a judgment in favor of the employee. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Sidney J. DeBlanc, III, was employed as a produce clerk by Albertsons, L.L.C. (Albertsons) on December 28, 2009, when he alleges that at 11:30 p.m., he injured his back while lifting a box of apples. Benefits were paid, and on March 8, 2012, Albertsons filed a disputed claim for compensation with the Office of Workers' Compensation (OWC). Albertsons questioned whether DeBlanc injured his back while in the course and scope of his employment and whether recommended back surgery was related to his employment at Albertsons. On April 26, 2012, DeBlanc filed his own disputed claim against Albertsons, asserting that requested surgery and treatment were not approved by Albertsons. An initial request to consolidate the cases was denied, but on the day of trial the two matters were consolidated. The parties stipulated that DeBlanc's average weekly wage was \$409.71; that DeBlanc's workers' compensation rate for temporary total disability (TTD) benefits was \$273.15; and that benefits were paid through August 29, 2012. After the introduction of medical records and the testimony of DeBlanc, the OWC requested post-trial memoranda and took the matter under advisement.

On May 7, 2013, the OWC signed a judgment, finding that DeBlanc proved by a preponderance of the evidence that he was involved in an accident on December 28, 2009, that arose out of and was in the course and scope of his employment with Albertsons. The OWC also determined that DeBlanc proved by a preponderance of the evidence that the accident had a causal relation to DeBlanc's disability. Specifically, the OWC found that DeBlanc suffered an aggravation injury of the lumbar spine at L4-5 and that because of said aggravation, DeBlanc was unable to perform his pre-accident work duties. The OWC further determined that the injury

to the lumbar spine was to the extent that DeBlanc was in need of lumbar surgery at L4-5. The OWC concluded that DeBlanc was entitled to TTD benefits and all requested medical treatment and expenses, including the recommended lumbar surgery. All costs were assessed to Albertsons.

Albertsons appealed, contending that the OWC erred in finding that DeBlanc met his burden of proof that an accident occurred while he was in the course and scope of his employment; that the accident had a causal relation to DeBlanc's disability; that DeBlanc is entitled to receive TTD benefits from August 29, 2012, forward; that DeBlanc's lumbar spine was aggravated as a result of the accident; that DeBlanc is entitled to receive medical benefits; and that Albertsons should be assessed with all costs.

DISCUSSION

The workers' compensation laws provide coverage to an employee for personal injury by accident arising out of and in the course of employment. See La. R.S. 23:1031(A). An employee must prove the chain of causation required by the workers' compensation statutory scheme. He must establish by a preponderance of the evidence that the accident was work-related, that the accident caused the injury, and that the injury caused the disability. **Hirstius v. Tropicare Service, LLC**, 2011-1080 (La. App. 1st Cir. 12/21/11), 80 So.3d 1215, 1216; **Magee v. Abek, Inc.**, 2004-2554 (La. App. 1st Cir. 4/28/06), 934 So.2d 800, 806, writ denied, 2006-1876 (La. 10/27/06), 939 So.2d 1287. Even if the employee suffered from a pre-existing medical condition, he may still meet his burden of proof of causation if he proves that the accident aggravated, accelerated, or combined with the pre-existing condition to produce a compensable disability. **Magee**, 934 So.2d at 806-07. Thus, a pre-existing condition does not prevent recovery through workers' compensation, because an employer takes the employee as they find him. **Bailey v. Jefferson**

Parish Gov't., 2013-905 (La. 5/14/14), 142 So.3d 95, 101, writ denied, 2014-1170 (La. 9/19/14), 149 So.3d 245.

The appropriate standard of review to be applied to the OWC's findings of fact is manifest error or clearly wrong. **Dean v. Southmark Constr.**, 2003-1051 (La. 7/6/04), 879 So.2d 112, 117. Where there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. **Id.** The court of appeal may not reverse the findings of the OWC even when convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Id.**

The employee's testimony alone may be sufficient to discharge his burden of proof, provided two elements are satisfied: (1) no other evidence discredits or casts serious doubt upon the employee's version of the incident; and (2) the employee's testimony is corroborated by the circumstances following the alleged incident. **Bruno v. Harbert International Inc.**, 593 So.2d 357, 361 (La. 1992); **Vargas v. Petrin Corporation**, 2012-1212 (La. App. 1st Cir. 3/22/13), 115 So.3d 483, 487. Corroboration of the employee's testimony may be provided by medical evidence. **Ardoin v. Firestone Polymers, L.L.C.**, 2010-0245 (La. 1/19/11), 56 So.3d 215, 219. The fact finder's determinations as to whether the employee's testimony is credible and whether he has discharged his burden of proof are factual determinations that should not be disturbed on appellate review unless clearly wrong or manifestly erroneous. **Id.** If the OWC's findings are reasonable in light of the record reviewed in its entirety, the appellate court may not reverse. **Id.** Further, the rule that questions of credibility are for the fact finder applies also to the evaluation of expert testimony. **Magee**, 934 So.2d at 807.

In this appeal, the threshold issue presented is whether the OWC's factual finding that DeBlanc proved by a preponderance of the evidence that he sustained a

work-related injury was manifestly erroneous. Albertsons contends that DeBlanc has a long history of back injuries. It asserts that there is no objective evidence in the record that DeBlanc's condition was aggravated by the alleged accident on December 28, 2009, and that it should not bear the burden of DeBlanc's prior back condition. It additionally argues that if DeBlanc needs surgery to repair his lower back, he was disabled before the accident at issue and the need for surgery has nothing to do with his employment at Albertsons.

On the evening of the accident, DeBlanc was working alone in the produce cooler at Albertsons. He testified:

About the time I was getting ready to get off about 11:30, I was in the produce room; and I was picking up a box of produce putting it on a cart. And all of a sudden, I noticed like very sharp pain in my back and a shooting pain down my leg. So I had a 15-minute break so I took that.

And by that time, it was time for me to get off. So I went home and went to sleep because it was ... 12 o'clock midnight. And I woke up the next morning and ... it was pretty much bad off. So I had to go the next day to make a claim at [Albertsons].

When asked on cross-examination if he told anyone at Albertsons about his back pain that night, DeBlanc responded that he did not. He also stated that he was off the next day, but added that he was never able to go back to work. He further clarified that his mother called in to report the accident. On redirect, DeBlanc testified that before the accident, "I could do my work with no problem and work 60 hours" per week. DeBlanc testified that his prior back problems were "manageable" so that he was able to do his job, but he has not been able to work since the December 2009 injury.

Two days after the alleged work accident, DeBlanc saw his primary physician, Dr. David Tran, on December 30, 2009. DeBlanc had already been seeing Dr. Tran at regular intervals for at least two years for his back pain, the last appointment being on December 2, 2009. While DeBlanc made no mention of a specific accident date

at the December 30th visit, Dr. Tran noted that DeBlanc “[a]ggravated his back pain; [l]ifting heavy things @ work” and that DeBlanc stated, “[t]hey pushed me to [the] limit.”

The record is replete with evidence of DeBlanc’s back problems prior to this accident. He was involved in a motor vehicle accident on June 6, 2001, when his car hydroplaned and hit a tree. An MRI scan performed in December 2001 revealed a broad-based disc bulge at L4-5 and a disc bulge at L5-S1. A myelogram in 2002 showed lateral recess stenosis at L4-5 with some nerve root impingement. In 2003, DeBlanc suffered a lifting accident while employed by Wal-Mart that injured his back and resulted in workers’ compensation benefits. In 2004, DeBlanc saw Dr. Paul van Deventer, an orthopedic surgeon, who believed that DeBlanc had significant findings of right-sided disc herniation and was a candidate for surgery. A lumbar MRI scan on January 16, 2004, demonstrated a right paracentral disc protrusion with facet and ligamentum hypertrophy producing spinal stenosis and right lateral recess stenosis with foraminal stenosis at L4-5. DeBlanc settled his workers’ compensation claim against Wal-Mart in 2005, but continued to receive treatment for his back injury. Another MRI scan, performed in December 2006, showed a broad-based disc bulge with a small annular tear at L4-5.¹

In 2008 and 2009, DeBlanc was having increased pain in his lower back and regularly filled prescriptions for pain medications. He suffered from depression and anxiety disorder, and he was also having trouble working. DeBlanc also reported increased social and financial stress. In the medical records for DeBlanc’s treating psychiatrist, Dr. James B. Denney, a pay stub from Rouse’s Supermarket for the week of May 14 through May 20, 2009, indicated that DeBlanc worked only 2.85 hours. DeBlanc indicated in a handwritten note, “I have been having trouble

¹ Also, in 2007, DeBlanc reported to his physical therapist, while being treated for lower back pain, that he injured himself at work “lifting a box of apples.”

working. Only a few hours then leaving.” Additionally, in a handwritten note to Dr. Denney, dated June 22, 2009, DeBlanc was requesting assistance in applying for disability status with the state and stated “I can’t work.” DeBlanc wrote a similar note to another treating physician, Dr. Susan Bryant of the North Institute of Lacombe, and stated that he could not work. He also included a copy of the same check stub from Rouse’s Supermarket for the week of May 14 through May 20, 2009, and one for the week of May 21 through May 27, 2009, showing that he worked 14.32 hours that week. The copy had the handwritten notation: “I’m having trouble working.”

Despite his back pain, DeBlanc began working for Albertsons in July 2009. On August 13, 2009, DeBlanc had a scheduled appointment with Dr. David Tran. They reviewed DeBlanc’s MRI scan of July 13, 2009, which showed “[s]mall, right sided asymmetric herniation with annular tearing at 5-1, resulting in contact impression on right S1 nerve roots as they cross 5-1 interspace. Transitional S1-S2 disc.”² Dr. Tran referred DeBlanc to a neurosurgeon, Dr. James Tran.

On August 31, 2009, DeBlanc again saw Dr. David Tran and continued to complain of low back pain that increased as the day went on. DeBlanc was prescribed medication and told to avoid heavy lifting. DeBlanc also saw Dr. James Tran on August 31, 2009. Dr. James Tran identified DeBlanc’s low back pain as “a chronic problem, with essentially constant pain.” Dr. James Tran reported: “He states that the current episode of pain started more than 5 years ago. The event which precipitated this pain was job-related repetitive lifting of stock. This occurred at work. Aggravating factors contributing to the back pain may be lifting.”

DeBlanc saw Dr. David Tran for a follow-up visit on October 5, 2009, for his neck and back pain. On October 19, 2009, DeBlanc called Dr. Tran’s office for a

² More than one doctor has indicated that DeBlanc has a transitional vertebra.

referral to Dr. Carl Walker at LSU for his back problems. DeBlanc saw Dr. David Tran again on November 3, 2009, complaining of low back pain and reporting that his back pain was worse in the cold weather.

DeBlanc saw his psychiatrist, Dr. Denney, on November 5, 2009. He complained that his back pain had increased over the past two weeks due to work and cold weather. DeBlanc also reported that his anxiety and stress were at high levels due to work and his chronic pain. He also stated that he was having trouble getting out of bed.

On December 2, 2009, DeBlanc saw Dr. David Tran, and on December 3, 2009, he saw Dr. Denney. DeBlanc reported that the cold weather had increased his pain and decreased his mobility. His depression had increased and he was having trouble sleeping due to his chronic pain. DeBlanc saw Dr. Denney again on December 23, 2009, and told him that his panic had increased, that he was having more crying spells, and that he had no interest or hope in life. He was still having trouble sleeping because of chronic pain.

After the alleged accident of December 28, 2009, Dr. David Tran referred DeBlanc to Dr. Louis J. Provenza, a neurosurgeon. Dr. Provenza saw DeBlanc regularly beginning on January 21, 2010.³ Dr. Provenza ordered another MRI scan, which was performed on February 1, 2010. The scan showed:

1. There is a transitional vertebra which will be designated, for the purposes of this dictation, as a partially sacralized L5 vertebra.
2. The lumbosacral disc space is narrowed. The L4-L5 and T11-T12 discs are desiccated.
3. There is a mild broad-based posterior protrusion of the L4-L5 disc with disc material extending to the level of the medial foramina bilaterally. There is also a tiny tear in the central inferior aspect of the posterior L4-L5 annulus.
4. There may be slight narrowing of the L4-L5 foramina bilaterally.

³ The record indicates that DeBlanc saw Dr. Provenza approximately thirty times between January 21, 2010 and January 6, 2012.

Dr. Provenza, in a letter dated August 27, 2012, to counsel for Albertsons, noted that DeBlanc had a “long history of lumbar pain as indicated by his medical records[,]” but “[f]ollowing each episode ... he was able to return to work. After his injury of 12/28/09 he has not been able to return to work.” Dr. Provenza concluded that DeBlanc sustained a “significant injury” in the work accident on December 28, 2009. He reported that he had reviewed DeBlanc’s MRI scans of July 13, 2009, and February 1, 2010, as well as a lumbar discogram on May 24, 2010 and an EMG/NC study on April 12, 2010. Dr. Provenza noted that DeBlanc’s pre-injury lumbar MRI in July 2009 “reveals only a slight bulge at L4-5 with no foraminal stenosis[,]” while DeBlanc’s post-injury lumbar MRI in February 2010 revealed “broadbased posterior protrusion of the L4-5 disc with disc material extending to the level of the medial foramina bilaterally; [and] there was a tiny tear in the central inferior aspect of the posterior L4-5 annulus.” Dr. Provenza opined that DeBlanc was a candidate for surgical intervention at L4-5, and further explained:

This finding of progression of the changes at L4-5 and not at other levels over this interval strongly suggests that he had a significant injury at L4-5 during his most recent injury on 12-28-09. His inability to return to work also strongly suggests that his injury on 12-28-09 is significant.

Dr. Anthony S. Ioppolo, who conducted a second medical opinion, also believed that DeBlanc was a surgical candidate, but he opined that DeBlanc’s herniated disc preceded the accident. After going through DeBlanc’s medical history, Dr. Ioppolo stated:

I have reviewed the patient’s lumbar and cervical MRI scan performed on 7/13/09. ... The lumbar MRI scan shows a disc herniation with an annular tear at L4/5. I have also reviewed the lumbar MRI scan dated 2/1/10 and it also i[s] my opinion that it demonstrates a disc herniation with annular tear at the same level, L4/5.

This patient, as indicated by the records, has a long history of low back pain and has had multiple diagnostic studies that indicate a herniation and tear at L4/5 prior to the accident of 12/28/09.

* * *

In my opinion, therefore, this patient has had an L4/5 herniated disc with the tear for a long time preceding the accident of 12/28/09. I do not see where this accident has caused any different pathology. The patient was symptomatic from his back even as late as 7/13/09, which caused an MRI scan to be performed. This is only five months prior to the accident and it is only by the patient's history that the accident caused any increased pain.

The patient certainly could be considered a surgical candidate for a fusion at L4/5. I would not attribute this need however to the accident of 12/28/09.

Based on our review of the entire record, we find that there is a reasonable basis in the record to support the OWC's finding that DeBlanc met his burden of proving by a preponderance of the evidence that he sustained a compensable work-related aggravation injury to his back in an accident on December 28, 2009, resulting in disability and an inability to work. Although no reasons for judgment were issued, the OWC obviously accepted as true DeBlanc's uncontroverted testimony regarding the work-related accident and his inability to work after the accident, which was a new development. Additionally, the OWC apparently accepted Dr. Provenza's opinion over Dr. Ioppola's that DeBlanc's injury in the work-related accident was significant, such that he could no longer work due to the injury.

While the evidence shows that at times DeBlanc had trouble working due to back pain before the December 28, 2009 accident, it was uncontroverted that DeBlanc was always able to continue to work until that date. Dr. Provenza found the progression of change in DeBlanc's pre-injury and post-injury MRI lumbar scans between 2009 and 2010 to be significant, resulting in DeBlanc's inability to work. While the record contains conflicting expert testimony regarding the significance of the injury, Dr. Provenza's opinion supports the OWC's findings and decision. Further, both neurosurgeons agreed that DeBlanc was a candidate for a lumbar fusion surgery.

In light of the record viewed in its entirety, we are unable to conclude that the OWC's decision that DeBlanc sustained a compensable injury on December 28,

2009 is unsupported, unreasonable, or manifestly erroneous. The weighing of conflicting evidence and the determination of credibility as to both lay and expert testimony is for the fact finder. Furthermore, given the parties' stipulations at trial, we find no merit to any of Albertsons' assignments of error.

CONCLUSION

For the above and foregoing reasons, we affirm the OWC's factual determination that DeBlanc was injured as the result of an accident while in the course of and arising out of his employment with Albertsons. As such, DeBlanc was entitled to workers' compensation benefits as awarded by the OWC's judgment of May 7, 2013, which we hereby affirm. All costs of this appeal are assessed to Albertsons, L.L.C.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

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SIDNEY DeBLANC, III

VERSUS

ALBERTSONS, L.L.C.

McCLENDON, J., dissents in part.

I dissent to the extent that the majority finds that Mr. DeBlanc's recommended lumbar surgery is caused by the accident of December 28, 2009. The majority relies on the opinion of Dr. Provenza to support the OWC's conclusion regarding causation for the lumbar surgery. However, the factual basis for an expert opinion determines the credibility of the testimony. **Leard v. Schenker**, 06-1116 (La. 6/16/06), 931 So.2d 355, 357. I believe that the OWC manifestly erred in relying on the report of Dr. Provenza, who did not address the full medical history of Mr. DeBlanc. Dr. Provenza, in reaching his conclusion as to causation, appears to have only relied on the 2009 and 2010 MRI scans, a 2010 lumbar discogram, and a 2010 EMG/NC study. In contrast, Dr. Ioppolo, who addressed all of Mr. DeBlanc's medical records, reported:

This patient, as indicated by the records, has a long history of low back pain and has multiple diagnostic studies that indicate a herniation and tear at L4/5 prior to the accident of 12/28/09. He has had an MRI scan as far back as 12/5/01, which demonstrated an L4/5 disc protrusion. He had myelogram on 10/16/02 that also demonstrated a herniation at L4. He also had MRI scan on 1/16/04 showing pathology at L4. There is an opinion by Dr. Oppenheimer on 2/2/04 stating that the patient had an L4/5 herniated disc. There is an MRI scan on 12/08/06 also showing an L4 disc rupture with a tear. There is also an MRI scan on 7/13/09, which demonstrates the same thing although because of a counting issue is reported as L5/S1 instead of L4/5.

In my opinion, therefore, this patient has had an L4/5 herniated disc with the tear for a long time preceding the accident of 12/28/09. I do not see where this accident has caused any different pathology.

The record also established that surgery for Mr. DeBlanc's back was recommended as early as 2004 by Dr. Paul van Deventer.

Thus, while I may agree that Mr. DeBlanc suffered an aggravation to a pre-existing injury, I cannot agree that the aggravation caused the need for surgery. Accordingly, I must respectfully dissent in part.