

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

**DONALD E. SMITH V. FLEEMAN'S TRANSPORT, INC. AND
TENNESSEE SECOND INJURY FUND**

**Direct Appeal from the Circuit Court for Lawrence County
No. 01-101WC, Hon. Jim T. Hamilton, Circuit Judge**

**No. M2004-01709-WC-R3-CV - Mailed: August 19, 2005
Filed - September 20, 2005**

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Panel, in compliance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. Donald E. Smith had suffered a number of injuries prior to and after his employment with Fleeman's Transport, Inc., but none of these incidents resulted in a disability impairment rating or job restrictions. On November 9, 2000, Mr. Smith suffered a work-related accident which caused him to be permanently and totally disabled. The trial court determined that Mr. Smith reached maximum medical improvement from his injuries on October 23, 2003, and based on the court's assessments of prior work injuries, apportioned the award of workers' compensation for the November 9, 2000 injury to both the employer and the State Second Injury Fund. Fleeman's appeal contends that the trial court erred in assigning the date of maximum medical improvement past the date of the employee's actual maximum recovery. The Second Injury Fund appeal contends that the trial court erred in assigning it any liability because the employer failed to establish actual knowledge of a prior disability. We find that the proof fails to preponderate against the judgment of the trial court on the date of maximum medical improvement and affirm this portion of the trial court's decision. We also find that Fleeman's Transport, Inc. did not establish actual knowledge of disability required for assigning liability to the Second Injury Fund. Consequently, we reverse the trial court's apportionment of liability for this work-related injury and modify that determination and assign all responsibility and liability for this work-related injury to Fleeman's Transport, Inc.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Circuit Court
Affirmed in part, Reversed in part and Modified in part.**

J. S. (Steve) Daniel, SR. J. delivered the opinion of the court, in which Frank Drowota, C.J., and John A. Turnbull, SP. J., joined.

Kenneth M. Switzer, Ruth, Howard, Tate & Sowell, Nashville, TN, for the appellant, Fleeman's Transport.

Ben Boston, Boston, Holt & Sockwell, PLLC, Lawrenceburg, TN, for the appellee, Donald E. Smith.

Richard M. Murrell, Assistant Attorney General, Nashville, TN, for appellee, Tennessee Second Injury Fund.

OPINION

I. Facts and Procedural History

Mr. Donald E. Smith was sixty years of age at the time of the trial of this cause. He is a high school graduate but he has no further vocational or educational training subsequent to his high school diploma. His employment history has consisted of labor intensive work on farms and in factories. Mr. Smith began working for Fleeman's Transport, Inc. in 1993. The work-related injury which is the subject of this appeal occurred November 9, 2000, when Mr. Smith slipped on ice while attempting to fuel his truck in Georgia and jarred his right knee. This exacerbation of his right knee problems resulted in a total knee replacement. This injury occurred within the scope and course of Mr. Smith's employment and it was properly reported.

Over the years Mr. Smith has suffered from a series of physical problems. He has had an eye problem since his youth, described as lazy eye, and in 1964 he had a knee injury requiring surgery that prevented him from entry into the United States Army. On two occasions he has suffered frost bite while working for Fleeman's. Fleeman's Transport, Inc. paid the medical bill for the frost bite injury but Mr. Smith did not make a workers' compensation claim or receive any disability benefits or work limitations for these injuries. In addition to the frost bite, Mr. Smith had surgery on his right wrist in 1999 and his left wrist in 2000. Mr. Smith discussed turning these injuries into workers' compensation claims but decided not to do so and used his wife's health insurance to pay for medical expenses associated with his injuries. Mr. Smith made no workers' compensation claim or received any disability ratings associated with the right and left wrist injuries. There were no work limitations imposed on Mr. Smith and he only informally talked about these injuries with Fleeman's. None of the injuries resulted in missed work or restrictions on the performance of his work duties. Mr. Smith chose driving routes that required less strength but Fleeman's did not formally adjust any of Mr. Smith's schedules. No proof exists to the effect that Fleeman's was informed that Mr. Smith had a permanent disability or lacked the ability to perform any of his job functions. Therefore, in this case, the facts established and the parties stipulated that Fleeman's had knowledge of Mr. Smith's prior injuries, however, they had no knowledge of any specific finding of permanent disability or job limitations prior to the November 9, 2000 injury.

After the November 9, 2000 injury, Mr. Smith saw Dr. A. Lee Hunter for treatment. Dr. Hunter was an approved health care provider who ultimately performed knee replacement surgery on November 29, 2000. After surgery, Dr. Hunter saw Mr. Smith regarding his knee on several occasions in January, February, and May of 2001. After the May visit, Mr. Smith saw Dr. Hunter on several occasions, but he did not discuss his right knee with Dr. Hunter again until January 10, 2002. During this January visit, Dr. Hunter suggested Mr. Smith return in six months for a repeat knee x-ray. While flexing his knee deeply in February 2002, Mr. Smith experienced acute symptoms of pain. This resulted in Mr. Smith making an unscheduled visit on

February 11, 2002 to Dr. Hunter for care. Dr. Hunter's medical records do not contain a clear statement of maximum medical improvement. The doctor testified that it did not make sense to him to assign maximum medical improvement before February 11, 2002. His reasoning is that even if the right knee was fairly asymptomatic between May and February, that fact did not deny that the knee replacement had not completely resolved. The only assessment and actual entry of an impairment appears in Dr. Hunter's records on October 23, 2003 in which he concludes that maximum medical improvement has been achieved.

Mr. Smith received temporary total disability payment of approximately \$6,393.00 while recovering from the knee replacement surgery. Thereafter, these temporary total disability payments were discontinued. Mr. Smith unsuccessfully attempted to return to work for Fleeman's. However, after two short truck runs in which he found it impossible physically to withstand the rigors of his job, Mr. Smith's return to work was deemed to be unsuccessful. The vocational expert testified that Mr. Smith is now 100% vocationally disabled, and the parties have stipulated that Mr. Smith is permanently and totally disabled.

II. Standard of Review

Review of the findings of fact made by the trial court is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record 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 of law are subject to a de novo review on appeal without any presumptions of correctness. Niziol v. Lockheed Martin Energy Systems, Inc., 8 S.W.3d 622, 624 (Tenn. 1999). 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. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

III. Analysis

Maximum Medical Improvement

The parties agree that Mr. Smith is permanently and totally disabled. Only two issues are raised by this appeal. Fleeman's challenges the court's determination of the date of maximum medical improvement. Eligibility for temporary total disability benefits terminates when the employee reaches maximum recovery. Roberson v. Loretto Casket Co., 772 S.W.2d 380, 383 (Tenn. 1986). Temporary total disability "refers to the injured employee's condition while disabled to work by his injury and until he recovers as far as the nature of his injury permits. . . ." Redmon v. McMinn County, 209 Tenn. 463, 354 S.W.2d 435 (1962). The purpose of temporary total disability payments is to insure that the employee receives compensation "for the period of time during which such injured employee suffers temporary total disability on account of the injury." Tenn. Code Ann. § 50-6-207(3)(A)(i). Thus the purpose served by such benefits is to allow for "the healing period during which the employee is totally prevented from working." Under the rule. . . the temporary total disability period is cut off when the workman has reached

its maximum recovery at which point either permanent total or permanent partial disability commences. . . .” Gluck Brothers, Inc. v. Coffey, 222 Tenn. 6, 13-14, 431 S.W.2d 756, 759 (1968).

Fleeman’s argues that Mr. Smith reached maximum medical improvement earlier than the date found by the trial court and that consequently its liability for temporary total disability payments should be reduced. In support of its position, Fleeman’s relies on the testimony of Dr. Hunter and certain passages of his deposition. Our independent review of the entirety of the testimony reveals that Dr. Hunter did not believe that Mr. Smith had reached his maximum medical recovery on January 10, 2002. Rather, Dr. Hunter believed that Mr. Smith’s February 11, 2002 report was of an ongoing problem with his right knee replacement healing process. Despite Dr. Hunter’s testimony that assigning maximum medical improvement after a significant period without pain might be possible, he specifically stated in his deposition that in this particular case, that did not make sense for him to do so. We conclude that a full review of Dr. Hunter’s deposition supports the trial court’s determination that the maximum medical improvement or recovery was obtained October 23, 2003. The trial court’s decision is affirmed as to the date of maximum medical improvement.

IV. Second Injury Fund Liability

The Second Injury Fund raises in its appeal, the sole issue as to its liability under the provisions of Tenn. Code Ann. § 50-6-208(a)(2). This section provides:

To receive benefits from the Second Injury Fund, the injured employee must be the employee of an employer who has properly insured such employer’s workers’ compensation liability or has qualified to operate under the Workers’ Compensation Law as a self-insurer, and the employer must establish that the employer had actual knowledge of the *permanent and preexisting disability* at the time that the employee was hired or at the time that the employee was retained in employment after the employer acquired such knowledge, but in all cases prior to the subsequent injury. (emphasis added by author)

Under this statute, the employer has the burden of establishing the actual knowledge of permanent and preexisting disability. E. I. Dupont De Nemours and Co. v. Friar, 404 S.W.2d 518, 522 (Tenn. 1996). In E. I. Dupont, this court indicated that the knowledge that must be established should be such that the employer recognizes that the employee’s physical condition would detract from his or her competitiveness in the job market. Id. at 522. We find the Fleeman’s has failed to prove that its knowledge of Mr. Smith’s prior injuries caused it to believe Mr. Smith was a less marketable employee.

As the court states in Scott v. Oshkosh B’Gosh, Inc., 100 S.W.3d 178, 183 (Tenn. 1995), “[t]he requirements for invoking subsection (a) are that at the time of the injury, the employee was working for an employer who had properly insured his workers’ compensation liability, and that the employee had actual knowledge of the permanent and preexisting physical impairment at the time the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge, but in all cases prior to the subsequent injury. If,

however, in addition to the above circumstances, the employee has received an award or awards under the Act for permanent disability to the body as a whole, and such award or awards total 100 percent, any permanent disability due from the fund for subsequent compensable injuries to the body as a whole will be paid under subsection (b).” Therefore the current case must fall within the ambit of subpart (a) of this code section because of the factual nature of the claim. This record fails to demonstrate that the employer has proven it “had actual knowledge of the permanent and preexisting physical impairment at the time that the employee was hired or at the time that employee was retained in employment after the employer acquired such knowledge.” In this case Fleeman’s never provided any accommodations for Mr. Smith’s work, no physician ever assigned Mr. Smith any work restrictions nor did Mr. Smith seek any accommodations from his employer. Rather, Mr. Smith performed his job as he would have without having any prior injuries. Under the guidelines set forth by the court as well as the purpose inherent in the Second Injury Fund legislation, these facts do not satisfy the actual knowledge requirement. Therefore, we find that the trial court erred in allocating any liability to the Second Injury Fund. This portion of the trial court’s determination is reversed and the trial court’s award of benefits for permanent partial disability for the right lower extremity is modified to order the employee, Fleeman’s to be solely responsible for the recovery which was ordered.

Therefore, after careful review of the record, this Panel affirms the trial court in part, reverses the trial court in part and modifies the trial court’s determination of liability. Costs of appeal are taxed against the appellant, Fleeman’s Transport, Inc.

J. S. DANIEL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JUNE 10, 2005 SESSION

**DONALD E. SMITH v. FLEEMAN'S TRANSPORT, INC. AND TENNESSEE
SECOND INJURY FUND**

**Circuit Court for Lawrence County
No. CC1109 01**

No. M2004-01709-WC-R3-CV - Filed - September 20, 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 Appellant, Fleeman's Transport, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM