

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

November 22, 2002 Session

**ROBERT FOSTER v. MORROW TRUCKING, INC., ET AL.**

**Direct Appeal from the Circuit Court for Hardin County  
No. 3252 C. Creed McGinley, Judge**

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**No. W2002-00041-SC-WCM-CV - Mailed February 12, 2003; Filed May 22, 2003**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial judge found the plaintiff sustained a compensable injury to his back as a result of a fall. Further, the trial judge found the plaintiff had sustained a previous disabling condition by reason of diabetes and spondylolisthesis, which were non-work related conditions, and found that the current disability coupled with the pre-existing disabilities rendered the plaintiff totally and permanently disabled. The trial judge applied Tenn. Code Ann. § 50-6-208(a) and ordered the award to be compensation for a period of 842 weeks and 8 days. The defendant was ordered to pay 421 weeks and 4 days of the award and the Second Injury Fund was ordered to pay 421 weeks and 4 days of the award thereafter. The trial judge, however, failed to make specific findings of fact regarding the extent of disability the employee would have experienced without any preexisting disabilities. We therefore remand the case so that such a determination can be made.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Case Remanded**

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE C. LOSER, SP. J., joined.

Richard W. Mattson, Nashville, Tennessee, for appellants, Morrow Trucking, Inc. and Logistics Personnel Corporation.

Ricky L. Boren, Jackson, Tennessee, for appellee, Robert Foster.

Paul G. Summers, Attorney General and Reporter; E. Blaine Sprouse, Assistant Attorney General, for appellee, Second Injury Fund, State of Tennessee.

## MEMORANDUM OPINION

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 finding, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Stone v. City of McMinnville, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. See Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988).

### Facts

The plaintiff was forty-nine years of age at the time of this trial. He had completed nine years of school and does not have a GED. His work history is primarily labor-type jobs and truck driving.

At the time the plaintiff was hired by the defendant, he submitted a physical report to the defendant. In that report, the plaintiff reported that he had diabetes and was taking pills for it. The record reflects the plaintiff told the defendant at the time of the pre-hire interview that he had a significant diabetic problem. The plaintiff testified that to be able to drive a truck diabetics had to be controlled by medication but if the diabetic is controlled by insulin a person is prohibited by Department of Transportation [DOT] regulations from driving.

The plaintiff had been treated for back pain and diabetes prior to going to work for the defendant. According to his physician of many years, the plaintiff was diagnosed with diabetic peripheral neuropathy, a disease caused by uncontrolled diabetes, in June of 1997. The plaintiff began working for the defendant in October of 1999.

On or about November 4, 1999, as the plaintiff was descending from his truck to put fuel in the tank, he fell and struck the left side of his back on the concrete platform upon which the pumps sat. The plaintiff attempted to continue his assigned delivery route but was unable to do so and had to return to the drivers' terminal because of back pains. The plaintiff subsequently saw Dr. Michael Glover for treatment and Dr. Joseph C. Boals for evaluation.

The plaintiff testified that as a result of his back injury he was ultimately unable to drive a truck because his left leg became so weak he could not depress the clutch pedal on a truck.

### Medical Evidence

Dr. Y. N. Pakkala testified that he first started treating the plaintiff in 1993. The plaintiff complained of low back pain and was given medication. In March of 1994, the plaintiff again complained of back pain. Dr. Pakkala found a muscle spasm suggesting a sprain of the plaintiff's back. In April 1995, he diagnosed the plaintiff as being diabetic. Dr. Pakkala testified the plaintiff

did not follow recommendations for treatment of diabetes and in 1995 the condition appeared to be “out of control.” Dr. Pakkala advised the plaintiff he needed to take insulin to control the diabetes. The plaintiff refused to do so because he would be prohibited from driving a truck if he did.

In February of 1997, Dr. Pakkala again found the diabetes to be uncontrolled and in June of 1997 he diagnosed the plaintiff with diabetic peripheral neuropathy. The plaintiff at this time complained of numbness in his hand and pain and loss of sensation.

Dr. Pakkala further testified the plaintiff was seen eleven times by him from August of 1995 through November of 1999 and the plaintiff did not complain of back pain during those visits.

Dr. Pakkala testified that he was of the opinion that the plaintiff should not drive a truck because of the diabetic peripheral neuropathy.

Dr. J. Michael Glover, an orthopedic surgeon, testified that he saw the plaintiff on December 17, 1999, on referral from Dr. John Lay. The plaintiff reported he was having left leg pain, down the buttocks, thigh and knee. Dr. Glover determined the plaintiff had a pre-existing spondylolisthesis. The plaintiff reported no history of previous back problems.

On January 4, 2000, the plaintiff returned to Dr. Glover and stated that the left leg pain was gone. On January 25, 2000, the plaintiff reported his left leg pain was completely gone but that he was having pain in his right leg. An MRI was performed. Dr. Glover testified that from this MRI he could find no connection to the pain which the plaintiff reported and the injury of November of 1999.

Dr. Glover then had an EMG (nerve conduction test) performed which showed the plaintiff had severe bilateral diabetic peripheral neuropathy. He testified this disease could very well explain the pain and weakness the plaintiff suffered in his right leg. He found this was not connected to the injury.

Dr. Glover testified that he was of the opinion that the plaintiff had suffered no permanent impairment as a result of the injury of November of 1999. Dr. Glover reported this to plaintiff’s attorney.

Some eight days after this report, the plaintiff returned to Dr. Glover and reported his back was now hurting. In response to this report, Dr. Glover reassessed the plaintiff and determined that the plaintiff had a seven percent whole body impairment, the lowest impairment rating Dr. Glover could give under the guides. At that time, Dr. Glover did not know of the plaintiff’s previous back problems, nor his history of diabetes.

Dr. Glover was shown Dr. Pakkala’s records and testified these contradicted the plaintiff’s reports to him because at the time he made the finding of seven percent impairment he was not aware of the plaintiff’s prior complaint of back pain and his diabetic condition.

Dr. Joseph C. Boals, III an orthopedic surgeon, testified that he saw the plaintiff on September, 28, 2000, for purposes of evaluation. Dr. Boals testified the plaintiff's pre-existing spondylolisthesis was aggravated by the fall of November of 1999, and caused the condition to become symptomatic, and that the plaintiff would be limited in his ability to work.

Dr. Boals testified the plaintiff could only do sedentary work and that he should avoid prolonged standing, walking, climbing, stooping, twisting or bending of the torso. He further testified that the plaintiff should do no manual labor nor lift more than ten pounds.

Dr. Boals questioned the extent of the defendant's diabetic peripheral neuropathy and was of the opinion that the fall of November of 1999 did not affect this condition.

The trial court found that the plaintiff was totally and permanently disabled as a result of his preexisting disability, that the employer had knowledge of the preexisting disability, and that 50% of the award should be apportioned to the Second Injury Fund and 50% to the employer.

### **Discussion**

Although we are required to weigh the evidence in a case in depth to determine where the preponderance of the evidence lies, *see e.g., GAF Bldg. Materials v. George*, 47 S.W.3d 430, 432 (Tenn. 2001), we are required to make such evaluation within the confines of established rules in evaluating the propriety of the trial court's factual findings.

The defendants Morrow Trucking, Inc. and Logistics Personnel Corporation appeal the decision of the trial court first on the grounds that they contend that the preponderance of the evidence does not support the trial court's finding that the plaintiff's back strain injury permanently worsened his pre-existing spondylolisthesis.

The trial court determined from the deposition testimony of the examining physicians and from the live testimony of the plaintiff himself that the plaintiff had sustained an injury to his low back in the course and scope of his employment for the defendants, and that this injury combined with his preexisting disability, of which his employer was aware at the time of his hiring, to render him totally and permanently disabled. The trial record supports this finding, particularly the testimony of Drs. Boals and Glover. The defendants' argument on this issue is without merit.

The defendants next argue that the Second Injury Fund statute does not permit consideration of the plaintiff's preexisting diabetic peripheral neuropathy in combination with his on-the-job back strain injury because his employer had no knowledge that the plaintiff had a disabling preexisting condition. However, it is clear from the record that the plaintiff indeed notified his potential employer that he had diabetes. He testified live at trial that he notified the defendant employer of his condition by means of the medical form he filled out before being hired. This form was introduced at trial as an exhibit and is part of the record. The plaintiff

testified that he told the defendant employer that he was diabetic but that his condition was controlled by pills and he did not need to be on insulin. We are sensitive to the possibility that the plaintiff was not entirely forthcoming to his employer about the severity of his condition. However, the plaintiff testified at trial that he told his employer everything he knew at that time about his condition. He testified that he did not even know what diabetic peripheral neuropathy was. The trial judge concluded that the plaintiff was credible based upon his live testimony and determined that the notice the plaintiff gave his employer was calculated to let his employer know that there was a disability. Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. See Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). The trial judge's ruling on the credibility of the plaintiff is entitled to great deference, and, therefore, we decline to reverse this judgment.

The defendant employer contends that the Tennessee Supreme Court held in Green v. Combustion Engineering, Inc., 395 S.W.2d 810 (Tenn. 1965), that diabetes mellitus, or sugar diabetes, itself was not within the meaning of a previously sustained permanent disability for the purposes of the Second Injury Fund statute. The plaintiff here, however, does not suffer from only diabetes mellitus. As the medical testimony in this case established, the plaintiff's diabetes was probably uncontrolled and he suffered from diabetic peripheral neuropathy prior to working for the defendant employer. As the Court pointed out in Whiteside v. Morrison, Inc., 799 S.W.2d 213 (Tenn. 1990), the Second Injury Fund statute does not require the employer to be fully aware of all underlying medical causes of disability but merely requires that the employer be aware that such a disability exists. The statute also does not require that the disability restrict the employee's work. Here, we feel that the plaintiff's notification to his employer that he had diabetes and was on oral medication was sufficient notice of his preexisting disability.

The defendants argue third that in the alternative, if the combination of a pre-existing disability and the on-the-job back strain injury totally and permanently disabled the plaintiff, the trial judge erred by not limiting the employer's percentage of the award to the disability that would have resulted without the pre-existing condition. The defendants' argument on this point is well-taken. An employer's liability under section (a) of the Second Injury Fund statute, Tenn. Code Ann. § 50-6-208, is restricted to the disability that would have resulted from the on-the-job injury without any consideration of the previous disability. The trial judge in this case divided the liability equally between the employer and the Second Injury Fund, without comment as to what disability would have resulted with no pre-existing disability. Tenn. Code Ann. § 50-6-201(a)(1) explicitly requires that the trial court find what disability would have resulted if a person with no pre-existing disability, in the same position as the plaintiff, had suffered only the second injury. The Tennessee Supreme Court has remanded cases in the past for a specific finding of fact on this issue. See Allen v. City of Gatlinburg, 36 S.W.3d 73 (Tenn. 2001). On remand, the trial court should make a specific finding of fact regarding the percentage of disability that would have resulted from the plaintiff's November 1999 injury if he had not already had a pre-existing disability.

The defendants argue finally that in the alternative, any award for the back strain injury alone cannot be enhanced by the plaintiff's pre-existing diabetic peripheral neuropathy because the plaintiff's back strain injury did not aggravate his pre-existing diabetic peripheral neuropathy and because his misrepresentation to his employer about his diabetes being controlled by medication prevents him from recovering for any increase in his disability caused by the undisclosed pre-existing diabetic peripheral neuropathy. The defendants' argument as to the aggravation of the diabetic peripheral neuropathy is based on the assumption that the Second Injury Fund statute is not applicable in this case. As that statute *is* applicable in this case, the argument is without merit.

Turning to the defendants' misrepresentation claim, in order for an employee's misrepresentation to his employer to bar benefits, the employer must establish: that the employee knowingly and willfully made a false representation of his physical condition; that the employer relied upon that misrepresentation in making a decision to hire that employee; and that there was a causal relationship between the false representation and the work-related injury sustained by the employee. Brown v. Campbell County Bd. of Educ., 915 S.W.2d 407 (Tenn. 1995). While the plaintiff in this case may not have fully disclosed the extent of his diabetic problem, the record does not establish by a preponderance of the evidence that he knowingly and willfully made a false representation to the defendants. As the trial judge asserted in the opinion, the plaintiff appeared to have given as good an understanding as he had of his condition given his limited education and background. There is also no causal connection between the plaintiff's diabetic condition and the work-related injury. Thus the argument of misrepresentation is without merit.

We conclude that the trial court did not properly calculate its apportionment of benefits between the defendants pursuant to Tenn. Code Ann. § 50-6-208(a) because the trial court failed to make a specific finding of fact regarding the extent of disability caused by the plaintiff's second injury without consideration of his pre-existing disability. Therefore, this case is remanded to the trial court so that such a determination can be made. The costs of this appeal are taxed to the defendants equally.

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JOHN K. BYERS, SENIOR JUDGE

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**Circuit Court for Hardin County  
No. 3252**

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**No. W2002-00041-SC-WCM-CV - Filed May 22, 2003**

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**JUDGMENT ORDER**

This case is before the Court upon the motion for review filed by the Second Injury Fund and the motion for review filed by Morrow Trucking, Inc., and Logistics Personnel Corporation, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motions for review are not well-taken and are therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed equally to the defendants, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating