

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

**DARYL SMITH v. SOUTHERN STATES ELECTRICAL AND PLUMBING AND
TRI-STATE STEEL**

**Direct Appeal from the Circuit Court for Franklin, County
No. 16,578, Hon. Jeffrey F. Stewart, Chancellor**

**No. M2003-02909-WC-R3-CV - Mailed: March 3, 2005
Filed: April 5, 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 Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. Daryl Smith received a serious injury to his right knee as a result of a work-related accident in 1993 when he was employed by Tri-State Steel. Mr. Smith was awarded compensation for his permanent partial disability to his lower right extremity which included lifetime medical benefits for this right knee injury. In January of 2000, Mr. Smith fell, striking his right kneecap at a construction site while in the course and scope of his employment with Southern States Electrical and Plumbing. Following emergency room care, Mr. Smith was treated by a series of doctors who were furnished by his employer's workers' compensation carrier and who provided conservative care which failed to provide relief for his knee injury. Ultimately he was released by the company doctor to return to work without restrictions or impairment. Mr. Smith continued to have difficulty in walking, standing and working on his knee and ultimately sought medical treatment at his own expense with Dr. Richard Fishbein. Dr. Fishbein performed two additional surgeries that ultimately repaired a torn cartilage and damage to the anterior cruciate ligament of the right knee.

Dr. Fishbein attributed this surgical repair to the fall which occurred during Mr. Smith's employment with Southern States. However, the trial court found that this treatment was related to the original knee injury and was the responsibility of Tri-State Steel under the provisions of Tenn. Code Ann. § 50-6-204. The trial court found that there was no compensable injury as a result of the January 2000 fall and awarded nothing to Mr. Smith. The court ordered Tri-State to pay for the medical care as a part of their obligation to provide future medical benefits for the 1993 injury. Tri-State perfected this appeal. Although Dr. Fishbein found that Mr. Smith had an additional 10 to 12 % more impairment to his right extremity as a result of the 2000 fall, Mr. Smith failed to perfect an appeal of the dismissal of his claim against Southern States. Therefore, this appeal is limited to determining which of the two former employers will be responsible for the medical care that Mr. Smith received and any future care that may be necessitated because of this work-related incident. We find that the proof fails to preponderate in favor of the trial court's decision and reverse.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded.

J. S. (Steve) Daniel, SR. J. delivered the opinion of the Court, in which William M. Barker, J., and Jerry Scott, SR. J., joined.

Fred B. Hunt, Jr. and William L. Abernathy, Jr., Shelbyville, TN, for appellant Tri-State Steel.

Jerre M. Hood, Winchester, TN, for appellee, Daryl Smith.

D. Andrew Saulters, Nashville, TN, for appellee, Southern States Electrical and Plumbing.

OPINION

I. Facts and Procedural History

Mr. Daryl Smith was 31 years of age at the time of trial. He has a 10th grade education and has been in construction type work for most of his adult life. In 1993, Mr. Smith tore his right anterior crucial ligament (ACL) while working for Tri-State Steel. This was a work-related injury for which Mr. Smith underwent two ACL reconstruction surgeries in which cartilage and screws were placed in his knee. In addition to the two ACL surgeries, Smith had three arthroscopic surgeries to the right knee as a part of the treatment process before the 1993 knee injury was repaired. Ultimately, the Plaintiff was assessed a 15% permanent partial impairment rating and his claim was settled for 45% vocational disability to his right leg, plus future medical care for his work-related injury.

On January 5, 2000, while employed by Southern States Electrical and Plumbing, Mr. Smith tripped, fell and struck his right knee on the corner of a concrete form. Mr. Smith was treated in the emergency room on the day of the fall and on or about January 11, 2000, saw Dr. William Ledbetter. Dr. Ledbetter was a physician provided by Mr. Smith's employer, Southern States. Dr. Ledbetter provided conservative treatment for a period of time and the knee did not improve. Dr. Ledbetter then referred Mr. Smith to Dr. James Rungee as he, Ledbetter, did not perform surgery and he anticipated that arthroscopic examination would be necessary to determine the source of Mr. Smith's continuing problem. Dr. Rungee examined Plaintiff on February 2, 2002 and ordered an MRI and bone scan. Dr. Rungee did not elect to perform an arthroscopic procedure to determine the source of Mr. Smith's knee problem. He elected to rely on an MRI, x-ray and bone scan test in reaching his conclusion. From this examination, Dr. Rungee opined that the Plaintiff's previous ACL repair from the 1993 injury was intact and that there were no tears in the knee. Dr. Rungee concluded that Mr. Smith had not been injured as a result of the January 5, 2000 fall and that any medical care that was necessary was related to the 1993 ACL reconstruction.

However, Mr. Smith continued to complain of discomfort and exhibited limitations in his

ability to bend his knee sufficient to rejoin the labor workforce. When Dr. Rungee's care failed to provide relief for Mr. Smith's knee, he sought a second opinion because of these continued problems. Initially Mr. Smith was to have an arthroscopic examination of the knee for this second opinion. However, Dr. Rogers, who had been scheduled to render a second opinion, was not available for this examination and Dr. McInnis rendered a second opinion on March 23, 2000. Dr. McInnis briefly reviewed the prior medical records and assessed Mr. Smith with the same diagnosis as Dr. Rungee. Dr. McInnis found no evidence that Mr. Smith had aggravated the 1993 ACL reconstruction. Dr. McInnis referred Mr. Smith back to Dr. Rungee, who released him on April 19, 2000 without restrictions or permanent impairment.

At the time of his release, Mr. Smith was physically unable to bear weight on his right leg and was unable to return to work. He ultimately was discharged for failing to return to his job duties. Mr. Smith consistently complained of pain and knee limitations but was desirous of being reemployed. In an effort to regain employability, he worked hard on his own to gain sufficient leg strength such that he might be able to be reemployed. He ultimately worked for a period of time as a brick mason but with much discomfort. He experienced episodes of his knee locking and on other occasions, falling because of his knee buckling. August of 2001 Mr. Smith went to the emergency room for right knee pain and swelling following an incident in which he was carrying one of his children up some steps and his knee buckled.

Ultimately, Mr. Smith was seen by Dr. Richard Fishbein in April of 2002 regarding the pain and limited use of his right knee. Mr. Smith underwent two arthroscopic surgeries by Dr. Fishbein at his own expense. These surgeries were in April and June of 2003. Dr. Fishbein in these surgeries repaired a torn cartilage and treated Mr. Smith's underlying degenerative arthritic condition. These surgical procedures resolved the pain and afforded a return to the degree of activity that Mr. Smith had enjoyed prior to the January 2000 fall.

It is unrefuted that prior to the fall of January 2000, Mr. Smith had been asymptomatic in his right knee and was regularly employed without pain. Following the fall in January 2000, he was symptomatic and unable to bear weight on his right leg. Dr. Richard Fishbein's arthroscopic examination revealed a torn cartilage, damage to the anterior cruciate ligament and underlying arthritic disease, which he directly attributed to the January 2000 fall when he testified that the problems that he observed during the arthroscopic surgery were either "aggravated or was caused by the accident," of 2000.

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. Presley v. Bennett, 860 S. W.2d 857, 859 (Tenn. 1993). 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. Cooper v. INA, 884 S. W.2d 446, 451 (Tenn. 1994), Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989).

III. Analysis

When medical testimony is presented by deposition, this court is able to make its own independent assessment of medical proof to determine where the preponderance of the evidence lies. Where all of the medical proof was taken by deposition or was documentary, so that all impressions of weight or credibility must be drawn from the contents thereof and not from the appearance of the witnesses or oral testimony at trial, we have no obligation to defer to the trial court's determination because they are not based on the credibility or the weighing of oral testimony. Where the proof is presented in this fashion, this court is able to make its own independent assessment of that medical proof. Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989).

In workers' compensation claims the Plaintiff has the burden of proof under the provisions of Tenn. Code Ann. § 50-6-102(12). The worker must prove that he or she was disabled and unable to work due to a compensable work-related injury and that there is a casual connection between the injury and the inability to work. The burden is on the Plaintiff to prove these elements by a preponderance of the evidence as in any case. The phrase "arise out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. Reeser v. Yellow Freight System, Inc. 938 S.W.2d 690, 692 (Tenn. 1997). Although causation cannot be based on speculation or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury when there is lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. Id. It is well-settled that a Plaintiff in a workers' compensation case has the burden of proving every element of this case by a preponderance of the evidence. Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992). Medical causation and permanency of an injury must be established in most cases by the expert medical testimony. Thomas v. Aetna Life and Cas. Co. 812 S.W.2d 278, 283 (Tenn. 1991).

It is without question that Mr. Smith suffered a work-related fall on January 5, 2000 while in the employ of Southern States Electrical and Plumbing. His fall occurred within the scope and course of his employment and was properly reported. Southern States, both implicitly and explicitly, accepted responsibility for this work-related injury by providing medical care in the form of Drs. Ledbetter, Rungee and McInnis. In addition, at the commencement of the proceedings in the trial court, Southern States' representative conceded that Tri-State was entitled to be dismissed from the action in response to Tri-State's preliminary Motion for Summary Judgment on the date of the trial. However, the trial court overruled this motion. Regardless of

these inconsistent positions, the medical proof and the consistent complaint of Mr.

Smith preponderates in finding that his most recent right knee injury was proximately caused by a compensable work-related accident while in the employ of Southern States.

We reverse the trial court's decision in this case and find that Mr. Smith suffered a compensable injury as a result of the January 5, 2000 fall while in the employ of Southern States Electrical. Mr. Smith did not appeal the trial court's determination, therefore, our determination is limited to which of the two previous employers would be responsible for his past and future medical care. We conclude that Southern States Electrical is responsible for the medical care afforded to Mr. Smith by Dr. Fishbein under the provisions of Tenn. Code Ann. § 50-6-204 as well as any future care necessitated by this injury. Southern States will be responsible for the medical expenses incurred by Mr. Smith for the services provided for Dr. Richard E. Fishbein in the sum of \$8,410.00 together with any and all other expenses associated with the surgery and medical care which were provided. This cause is remanded to the trial court to conduct a hearing a make a determination of the exact amount of those expenses and to enter an order consistent with this opinion. Cost of this appeal is assessed against Southern States Electrical.

J. S. DANIEL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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OCTOBER 27, 2004 SESSION

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No. 16,578

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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 Southern States Electrical, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM