

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 27, 2012 Session

RUSSELL E. DOWNING, II v. DAY & ZIMMERMAN NPS, INC., ET AL.

**Appeal from the Circuit Court for Henry County
No. 3364 Donald E. Parish, Judge**

No. W2011-02455-WC-R3-WC - Mailed February 21, 2013; Filed March 26, 2013

An employee suffered multiple injuries in a work-related accident in November 2006 when a fan located in a boiler in which he was working suddenly deployed, causing him to lose his footing and fall. After providing medical treatment, the employer denied the employee's claim for workers' compensation benefits, and the employee sought additional medical treatment. The trial court found the claim to be compensable and awarded the employee permanent total disability benefits. The trial court imposed no liability on the Second Injury Fund. We affirm the trial court's judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Circuit Court Affirmed**

BEN H. CANTRELL, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and TONY A. CHILDRESS, SP. J., joined.

Raymond S. Leathers, Nashville, Tennessee, for the appellants, Day & Zimmerman NPS, Inc. and Zurich American Insurance Company.

Charles L. Hicks, Camden, Tennessee, for the appellee, Russell E. Downing, II.

Martha A. Campbell, Deputy Attorney General, Nashville, Tennessee, for the appellee, Abigail Hudgens, Administrator of the Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

Day & Zimmerman NPS, Inc. (“Day & Zimmerman”) performs maintenance, repairs, and modifications at power plants owned and operated by the Tennessee Valley Authority (TVA) in Tennessee. Day & Zimmerman employed Russell E. Downing, and on October 9, 2006, assigned him to work at TVA’s New Johnsonville, Tennessee, plant.

On November 1, 2006, Mr. Downing was repairing the inner or hot roof in a large duct above a boiler, which was shut down to enable Day & Zimmerman employees to perform the required work. A rectangular hole approximately four-and-one-half feet by five feet had been cut in the outer or cold roof of the duct for access. Approximately four feet below the opening are supports that hold the precipitators in the duct. The bottom of the duct, which contains an ash hopper, is approximately forty or fifty feet below the supports, and a large fan, approximately twelve-to-fourteen feet in diameter, is located at a ninety-degree angle at the end of the bottom section of the duct. The fan is required to be in the “off” position when the work is performed.

Mr. Downing was standing on the supports inside this hole. He was bent over with his upper body entirely inside the hole when the fan suddenly began to operate. The force created by the fan sucked the ear plugs he was wearing out of his ears and removed the welding helmet from his head. Mr. Downing lost his footing. His left side dropped below the supports on which he had been standing, and he slammed down on the supports. He landed on his hip, which may have hit one of the supports. After five to seven minutes of effort, he was able to crawl to a corner of the access hole, raise his shoulders above the hole, and roll out of the hole with the help of coworkers.

According to Mr. Downing, he requested medical treatment and was sent to first aid. After reporting the incident, Mr. Downing was permitted to go home. He did not return to work for approximately two days, and he could not perform any of his job duties upon his return to work. His last day of work was November 11, 2006. A report of Mr. Downing’s injury indicated that he had injured his hands, hip, shoulder, and back, and that he hurt all over.

On October 20, 2010, Mr. Downing filed a complaint for workers’ compensation benefits in the Circuit Court for Henry County. A trial was held on July 7, 2011. The trial court found that Mr. Downing was incapable of working at an occupation that would bring him income and that he was permanently and totally disabled pursuant to Tennessee Code Annotated section 50-6-207(4) (2008) as a result of the injuries he sustained on November 1, 2006. The trial court noted that Mr. Downing had limited education, had previously

performed heavy work, and was no longer able to engage in gainful employment. The trial court ordered that Mr. Downing receive permanent total benefits until he reaches the age of sixty-six and two months on October 10, 2021.

The trial court further found that the evidence failed to establish that Day & Zimmerman knew of Mr. Downing's prior disability and that the evidence did not reach the standard set forth in Tennessee Code Annotated section 50-6-208(a)(1) (2008). The trial court therefore imposed no liability on the Second Injury Fund.

Day & Zimmerman appealed. This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51.

At trial, the parties stipulated to the admissibility of Mr. Downing's medical records and introduced the deposition testimony of Drs. Thomas O'Brien and Richard Fishbein.

Mr. Downing was first referred to Dr. Richard Jackson, whose records were admitted by stipulation of the parties. Dr. Jackson examined Mr. Downing on November 13, 2006, and ordered an x-ray of his right wrist. Dr. Jackson's records from the examination reflect that Mr. Downing had wrist pain with a possible fracture, a left hip strain, and required an orthopedic consultation.

Day & Zimmerman subsequently provided Mr. Downing with a panel of physicians for treatment of his wrists. Mr. Downing selected Dr. Jane Siegel. Day & Zimmerman also provided Mr. Downing with a panel of physicians for treatment of his back from which he selected Dr. Daniel Burrus.

Mr. Downing first saw Dr. Siegel on December 6, 2006. Dr. Siegel's records were admitted by stipulation of the parties. According to Dr. Siegel's records, x-rays indicated no bony abnormalities on the left wrist and a large capitate cyst on the right wrist. Dr. Siegel's records further reflect that she was unsure at that time whether the changes observed were acute or chronic. Dr. Siegel ordered an MRI and follow-up. The report of Mr. Downing's December 13, 2006, MRI of the right wrist identified the large cystic lesion, noted "[n]o convincing evidence of fracture," and noted that this could represent a combination of sprain and gouty inflammatory thickening. An addendum to the MRI report indicated that the cyst also could be related to gouty arthritis or a gouty inflammatory process. The report of the MRI of the left wrist indicated a mild sprain. According to Dr. Siegel's subsequent January 9, 2007 office note, the MRIs "were read . . . basically as a combination of sprain and gouty inflammatory thickening." The left wrist was doing better clinically, but the right wrist continued to be "very swollen and painful."

Dr. Siegel treated Mr. Downing conservatively. When she released him on May 2, 2007, she noted that he had improved “a little bit” over his last visit and that she was not “doing much for him medically.” She further noted that Mr. Downing had “basically sprain and synovitis, overlying or exacerbating and underlying what appears to be gouty arthritis.” Dr. Siegel found that Mr. Downing could not grip anything more than about five pounds. She hoped his condition would “settle down” on the right as it had done on the left and allow Mr. Downing to return to meaningful work.

Dr. Siegel indicated that she would place Mr. Downing at maximum medical improvement (“MMI”), rate him, and see him back in three months. Dr. Siegel determined that Mr. Downing had a permanent partial anatomical impairment of 15% to the upper right extremity and 2% to the upper left extremity, for a combined permanent partial anatomical impairment of 10% to the body as a whole. She restricted Mr. Downing to occasional use of his right arm, no heavy gripping, and no lifting over five pounds. According to the C-32 that Dr. Siegel subsequently completed, she determined that Mr. Downing’s wrist injuries were work-related. Dr. Siegel last saw Mr. Downing on June 25, 2007, and noted that his left wrist had done “really well,” but that his right wrist was swollen and quite tender. She continued the same restrictions and recommended surgical treatment of the right wrist.

Mr. Downing saw Dr. Burrus for his back and left hip on December 13, 2006. Dr. Burrus’ records were admitted by stipulation of the parties. Dr. Burrus x-rayed Mr. Downing’s thoracic and lumbar spine. Dr. Burrus noted that Mr. Downing described pain in the interscapular region and lower back region and “a knife-like pain into his left hip,” as well as some occasional aching and cramping in his left lower extremity and some occasional tingling in his left leg. Dr. Burrus noted that Mr. Downing’s left hip was “a little bit irritable with internal and external rotation.” According to Dr. Burrus, the x-rays demonstrated moderate to significant degenerative changes in the thoracic and lumbar spine and no obvious evidence of a fracture. Dr. Burrus’ impression at that time was that Mr. Downing had a thoracic and lumbar sprain.

Dr. Burrus saw Mr. Downing again on January 9, 2007, and noted improvement in Mr. Downing’s back but continued irritation in his left hip. Additional x-rays of the left hip showed some underlying degenerative changes but no acute changes such as a fracture. According to Dr. Burrus, Mr. Downing likely had aggravated some degenerative changes in his left hip. Dr. Burrus recommended conservative treatment.

Dr. Burrus next saw Mr. Downing on February 6, 2007, at which time Mr. Downing noted improvement of his back but complained of “popping, catching, and grinding” in his left hip. Dr. Burrus recommended an MRI. The MRI showed mild osteoarthritis of the hip but, according to Dr. Burrus, nothing else specific. On February 16, 2007, Mr. Downing

reported to Dr. Burrus that his hip was feeling much better and that his back was better as well. Dr. Burrus released Mr. Downing without restrictions.

Following his release from Drs. Siegel and Burrus, Day & Zimmerman sent Mr. Downing to Dr. Thomas J. O'Brien, an orthopedic surgeon, for a second opinion. Dr. O'Brien's testimony was admitted by deposition and his medical records were admitted by stipulation of the parties. Dr. O'Brien saw Mr. Downing a single time on May 23, 2007. Dr. O'Brien concluded that Mr. Downing sustained wrist strains as a result of the November 1, 2006, incident and that he had a pre-existing superimposed arthritis in his right wrist, most likely secondary to mild gout. Dr. O'Brien did not think that Mr. Downing was a candidate for additional treatment for this condition. Dr. O'Brien stated that the November 1, 2006, work incident did not aggravate or accelerate the conditions in Mr. Downing's wrists or cause any actual advancement or progression of the underlying arthritic condition. Finding no structural or anatomic change in Mr. Downing's wrists, Dr. O'Brien also stated that Mr. Downing did not have any permanent impairment to his wrists. Dr. O'Brien drew similar conclusions about Mr. Downing's hips and back. Dr. O'Brien's opined that Mr. Downing did not need to be placed on any restrictions.

After receiving Dr. O'Brien's opinion, Day & Zimmeman denied Mr. Downing's claim and ceased all benefits. Mr. Downing thereafter sought medical treatment on his own.

On June 6, 2007, Dr. Grafton Thurman saw Mr. Downing for an independent medical evaluation on referral from Mr. Downing's attorney. Dr. Thurman's medical records were admitted by stipulation of the parties. Dr. Thurman concluded that Mr. Downing had seven diagnoses, each causally related to the November 1, 2006, incident. They were: 1) consistent severe right wrist strain; 2) persistent left wrist strain, less severe; 3) right shoulder strain of a persistent nature; 4) left shoulder strain; 5) left hip osteoarthritis that was activated by the work accident from being just degenerative changes into active degenerative disease; 6) lumbar spine degenerative changes that were activated by the injury of November 1, 2006; and, 7) cervical spine degenerative changes that were activated into full, active degenerative disease by the accident.

On August 29, 2007, Mr. Downing saw Dr. Douglas Weikert, an orthopedic surgeon, for a second opinion regarding his right wrist. Dr. Weikert's medical records were admitted by stipulation. Dr. Weikert concluded that Mr. Downing "appears to have a symptomatic right capitate cyst with degenerative changes in the mid carpal joint on the right wrist." According to Dr. Weikert's note, he discussed with Mr. Downing that the cyst was present before the November 1, 2006, injury, but because Mr. Downing denied any pain prior to that date, Dr. Weikert could not "rule out an aggravating injury to the right wrist with the pre-existing capitate cyst." Dr. Weikert concluded that surgery was appropriate.

Dr. Weikert performed surgery on Mr. Downing's right wrist on October 23, 2007. He followed Mr. Downing post-operatively through May 14, 2008. At that time, Dr. Weikert noted that Mr. Downing was stable but that Mr. Downing would likely not be able to return to work as a boilermaker because of his right wrist. Dr. Weikert also noted that Mr. Downing's left wrist was minimally symptomatic. Dr. Weikert placed Mr. Downing under restrictions, limiting his lifting to twenty pounds occasionally and ten pounds frequently and limiting his climbing because Mr. Downing could not grip significantly with his right arm.

Mr. Downing saw Dr. Paul Rummo, an orthopedist, for further evaluation of his left hip on September 4, 2007. Dr. Rummo's records were admitted by stipulation of the parties. Dr. Rummo's assessment at that time was left hip pain, osteoarthritis, possible labral tear, and possible lumbar radiculitis in the left lower extremity. Dr. Rummo ordered MRIs of the lumbar spine, hips, and pelvis and recommended physical therapy. He saw Mr. Downing again on September 17, 2007. After review of the MRIs, Dr. Rummo's assessment was left hip pain with unclear etiology and an asymptomatic L5-S1 herniated disk to the right. Dr. Rummo recommended continuing physical therapy.

On June 17, 2008, Mr. Downing saw Dr. Eugene F. Gulish, an orthopedic surgeon, on referral from Mr. Downing's personal physician. Dr. Gulish's medical records were admitted by stipulation of the parties. Although the primary purpose of the visit was an infection to Mr. Downing's right small finger, Mr. Downing also complained to Dr. Gulish of hip pain. With respect to Mr. Downing's hip, the doctor noted end stage osteoarthritis. Mr. Downing again saw Dr. Gulish regarding his left hip on July 29, 2008. According to Dr. Gulish's note from this visit, Mr. Downing needed a total left hip replacement. Dr. Gulish performed a total left hip arthroplasty on Mr. Downing on September 22, 2008. Dr. Gulish's pre-operative and post-operative diagnoses were "end stage osteoarthritis left hip."

Dr. Gulish continued to follow Mr. Downing post-operatively, and on November 12, 2009, determined that Mr. Downing had reached maximum medical improvement with respect to his hip. According to Dr. Gulish's report, Mr. Downing had a permanent partial anatomical impairment of 17% to the body as a whole attributable to the left hip. Dr. Gulish saw Mr. Downing on July 22, 2010, for the purpose of rating Mr. Downing with respect to his right wrist. According to Dr. Gulish's report, Mr. Downing had a permanent partial anatomical impairment of 17% to the body as a whole attributable to the right wrist. On April 29, 2011, Dr. Gulish completed a form C-32 and indicated that Mr. Downing reached MMI on November 12, 2009. In Dr. Gulish's opinion, Mr. Downing had a combined permanent partial anatomical impairment of 31% to the body as a whole attributable to his right wrist and left hip. Dr. Gulish indicated that Mr. Downing's wrist and hip injuries more probably than not arose out of his employment. He placed restrictions on Mr. Downing including maximum lifting of twenty pounds, frequent lifting of ten pounds, and no climbing, stooping, kneeling, crouching, crawling, or twisting.

On August 24, 2010, Dr. Richard Fishbein, an orthopedic surgeon, evaluated Mr. Downing at the request of Mr. Downing's attorney. Dr. Fishbein testified by deposition and his medical records were admitted by stipulation of the parties. Dr. Fishbein prepared a report of his evaluation and completed a Form C-32. He stated that Mr. Downing had "a wrist problem, a forearm problem, [and] a total hip replacement." Dr. Fishbein stated that Mr. Downing's hip replacement had "a fair result." As a result of the total hip replacement, Mr. Downing had "severe peroneal nerve dysfunction, which was documented by an EMG nerve conduction test." According to Dr. Fishbein, Mr. Downing had a 50% permanent partial anatomical impairment to the left hip and an additional 12% due to nerve damage to the peroneal nerve, as well as a 31% permanent partial anatomical impairment to the right upper extremity. Dr. Fishbein concluded that Mr. Downing had a total combined permanent partial anatomical impairment of 38% to the body as a whole as a result of the November 1, 2006, incident. Dr. Fishbein opined that Mr. Downing's right wrist and left hip injuries were not the result of pre-existing conditions and that the November 1, 2006, incident probably caused an acceleration or undue progression of those conditions. Dr. Fishbein stated that Mr. Downing was unable to work.

At trial, Mr. Downing testified that prior to November 1, 2006, he had experienced no difficulty performing his job, no difficulty with his daily activities, and no difficulty with his farming and cattle-raising activities. He acknowledged that he previously had minor issues with his back, hips, and joints and common everyday aches and pains. He further acknowledged that he previously had been told that he was getting older and that he would have some arthritis.

Mr. Downing testified that he has no motion in his right wrist since Dr. Weikert's surgery and can lift only five to six pounds. He has pain in his right hand, fingers, and arm, and swelling in his right arm. The pain in his right arm is a seven or eight on a scale of one to ten, and he has little use of his right arm now. Mr. Downing described his right arm as "destroyed." He stated that he also has swelling and pain in his left arm.

Mr. Downing testified that his back still gives him "a little trouble," and that he cannot squat, lift anything, or bend down. He has difficulty walking up stairs, cannot stand or sit for long periods of time, and can only walk limited distances and for a limited time.

Mr. Downing testified that in his present condition he cannot perform the requirements of a boilermaker, or any other work, but he conceded that he has not attempted to obtain any other employment. He also cannot engage in many of his outside activities, such as hunting, farming, and raising cattle. He stated that he had "to get rid of [his] four wheeler" because he cannot put his leg over it and instead rides a "side by side." He takes pain medication and medication for depression. Mr. Downing testified that his current problems arose from the November 1, 2006, incident.

Mr. Downing was cross-examined about previous injuries to his back and joints. In 1993 Mr. Downing was involved in an automobile accident giving rise to complaints regarding his neck, low back, hips, and legs. Medical reports from his accident were admitted by stipulation of the parties. Mr. Downing was diagnosed with a lumbar strain, and the strain was resolved within one month. He missed no work and was placed on no restrictions. He received a permanent partial impairment rating of 5-7% to the body as a whole.

In 2002, Mr. Downing suffered a work-related injury to his back while working for Day & Zimmerman. This injury was also diagnosed as a lumbar strain. The injury improved, and Mr. Downing received no permanent impairment rating as a result of this injury.

In 2003, Mr. Downing jumped off of a tractor and was treated for hip and pelvic pain. Medical records from his post-accident examination revealed degenerative joint disease, but Mr. Downing received no permanent impairment rating as a result of this injury, and no restrictions were imposed.

Mr. Downing's wife testified that, prior to November 1, 2006, Mr. Downing had no difficulty with his daily living activities, including farming and other outside activities.

Bob Williams, Day & Zimmerman's regional safety manager, testified at trial that Mr. Downing told him when he was hired for this job in October 2006 that he was taking prescription Lortab for back and joint pain. However, Mr. Downing had previously worked for Day & Zimmerman while using this prescription medication with no restrictions and with no accommodations requested. Mr. Downing never notified Day & Zimmerman of any requirement of his employment that he could not perform prior to the November 1, 2006, incident. Mr. Downing worked for Day & Zimmerman with no restrictions and no accommodations until the incident on November 1, 2006.

Mr. Downing was born August 10, 1955. He completed the tenth grade and attended but did not complete the eleventh grade. His primary occupation has been as a certified welder performing work through the Boilermakers' Union. Mr. Downing also operated a farm and raised cattle with his wife.

Standard of Review

The standard of review of issues of fact is "de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Causation

Day & Zimmerman contends that the trial court erred in concluding that the November 1, 2006, work incident caused permanent injury to Mr. Downing's left hip, right arm, and left arm. An employee bears the burden of proving each element of his cause of action in a workers' compensation case. Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992). An employee seeking to recover workers' compensation benefits must prove that his injury both arose out of and occurred in the course of his employment. Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598, 604 (Tenn. 2008); see also Tenn. Code Ann. § 50-6-102(12) (2008). The phrase "arising out of" refers to the cause or origin of the injury. Trosper, 273 S.W.3d at 604. "An injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury." Trosper, 273 S.W.3d at 604.

Other than in the most obvious cases, causation must be established by expert medical testimony. Trosper, 273 S.W.3d at 604. "Although absolute certainty is not required for proof of causation, medical proof that the injury was caused in the course of the employee's work must not be speculative or so uncertain regarding the cause of the injury that attributing it to the [employee's] employment would be an arbitrary determination or a mere possibility." Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 572 (alteration in original) (quoting Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987)). Reasonable doubt as to causation, however, must be resolved in favor of the employee. Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). Moreover, "the testimony of expert witnesses must be considered in conjunction with the testimony of an employee as a lay witness." Trosper, 273 S.W.3d at 604. "Benefits may properly be awarded upon medical testimony that shows the employment 'could or might have been the cause' of the employee's injury when there is lay testimony from which causation reasonably can be inferred." Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 679 (Tenn. 2005) (quoting Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004)).

An employer takes an employee as is and assumes responsibility for any work-related injury that might not affect an otherwise healthy individual but that aggravates a pre-existing condition. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008). An injury is compensable when the work injury advances the severity of a pre-existing condition or the employee suffers a new, distinct injury other than increased pain. Trosper, 273 S.W.3d at 607.

The trial court credited all of the live testimony at trial, which consisted of the testimony of Mr. Downing, Mr. Downing's wife, and Day & Zimmerman's Regional Safety

Manager. The trial court also considered the deposition testimony of Drs. O'Brien and Fishbein, Mr. Downing's medical records, and the form C-32s completed by Drs. Siegel and Gulish. The trial court found that Mr. Downing had sustained injuries to both wrists and to his left hip, with the main injury to Mr. Downing's right wrist and left hip, as a result of the November 1, 2006, work accident. The trial court found from the lay and expert testimony that Mr. Downing's November 1, 2006, work accident caused an actual progression of Mr. Downing's physical symptoms.

We conclude that the evidence does not preponderate against the finding of the trial court on the issue of causation. The lay testimony at trial, which the trial court credited, and the greater weight of the expert testimony and evidence was sufficient to support the trial court's conclusion that the November 1, 2006, work incident aggravated the pre-existing conditions in Mr. Downing's wrists and hip, resulting in compensable injuries. When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman, 272 S.W.3d at 571. The trial court appropriately credited the expert opinions of treating physician Dr. Gulish over those of Dr. O'Brien, particularly when considered in conjunction with the lay testimony and with the other expert opinions in this case. See Cunningham v. City of Savannah, No. W2010-02411-WC-R3-WC, 2012 WL 2126015, at *6 (Tenn. Workers' Comp. Panel Feb. 28, 2012).

Excessive Award

Day & Zimmerman also contends that the trial court erred in concluding that Mr. Downing was entitled to permanent total disability benefits. Tennessee Code Annotated section 50-6-207(4)(B) (2008) provides that an injured employee is totally disabled if the injury "totally incapacitates the employee from working at an occupation that brings the employee an income." We consider "the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability." Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535-36 (Tenn. 2006). In the absence of testimony from a vocational expert, we consider "an employee's own assessment of his or her overall physical condition, including the ability or inability to return to gainful employment." Hubble, 188 S.W.3d at 536.

The trial court afforded Dr. Gulish's opinions greater weight, as those of the treating physician, and found that Mr. Downing had sustained a permanent partial anatomical

impairment of 31% to the body as a whole¹ and that he was permanently and totally disabled pursuant to Tennessee Code Annotated section 50-6-207(4) (2008) as a result of the injuries he sustained on November 1, 2006. The trial court ordered that Mr. Downing receive permanent total benefits until he reaches the age of sixty-six and two months on October 10, 2021.

Mr. Downing has a limited education. His prior work experience is entirely of the heavy, physically demanding variety. According to Mr. Downing's testimony, as well as the greater weight of the medical evidence, his work injuries have caused Mr. Downing to be unable to perform the types of physical activities required in his prior job with Day & Zimmerman or in similar occupations. Further, according to Mr. Downing's testimony and that of his wife, his work injuries have caused severe limitations in his ability to engage in activities of daily living. There is no indication that Mr. Downing's condition is likely to improve. Based upon these factors, we conclude that the evidence in this record does not preponderate against the trial court's finding that Mr. Downing is permanently and totally disabled.

Second Injury Fund

Finally, Day & Zimmerman contends that the trial court erred in not apportioning a percentage of Mr. Downing's permanent total disability award to the Second Injury Fund. Based on Mr. Downing's date of injury, any liability of the Second injury Fund could only arise under Tennessee Code Annotated section 50-6-208(a). The Second Injury Fund is liable under this section if the employee had sustained a prior permanent physical disability of which the employer had actual knowledge at the time the employee was hired, or the employer retained the employee after the employer acquired such knowledge, and the employee thereafter became permanently and totally disabled through a compensable injury. "In the absence of a disability which even a layman would label as patent, the presumption would be that the employer was unaware of such pre-existing disability, and the employer would have to stand the burden of proving knowledge of such a condition at the time of hiring." E.I. Dupont De Nemours & Co. v. Friar, 404 S.W.2d 518, 522 (Tenn. 1996). If the employer fails to meet this burden, the employer will be solely responsible for the award of benefits. See Smith v. Fleeman's Transp., Inc., No. M2004-01709-WC-R3-CV, 2005 WL 2276892, at *4 (Tenn. Workers' Comp. Panel Sept. 20, 2005). In order to demonstrate actual knowledge, the employer must establish that it "recognize[d] that the employee's physical condition would detract from his or her competitiveness in the job market." Smith, 2005 WL 2276892, at *4 (citing E.I. Dupont De Nemours & Co., 404 S.W.2d at 522). When an employee performs his job without restrictions and without accommodations, an employer

¹ This anatomical impairment rating was limited to Mr. Downing's right wrist and left hip, and included no rating with respect to his left wrist or back.

will be unable to meet its burden of demonstrating actual knowledge. See Smith, 2005 WL 2276892, at *4.

We conclude that the evidence does not preponderate against the trial court's finding that the evidence failed to establish that Day & Zimmerman had actual knowledge of Mr. Downing's pre-existing permanent disability at the time it hired or retained him. Mr. Downing was hired by Day & Zimmerman in October 2006, without restrictions. Mr. Downing performed his job without any accommodations until the November 1, 2006, work accident. The evidence at trial failed to establish that Day & Zimmerman had any knowledge of Mr. Downing's prior 1993 automobile accident and injury. Although Mr. Downing previously had experienced a 2002 work-related injury while working for Day & Zimmerman, his treating physician at that time assigned no permanent impairment and no permanent restrictions. The trial court found, Day & Zimmerman knew that Mr. Downing was taking Lortab for back and joint pain, but the evidence did not establish a permanent disability of which Day & Zimmerman had knowledge. Again, Mr. Downing was hired without restrictions and required no accommodations. He had previously worked for Day & Zimmerman under similar circumstances.

Conclusion

The judgement of the trial court is affirmed. Costs of this appeal are taxed to Day & Zimmerman NPS, Inc. and Zurich American Insurance Co., and their surety, for which execution may issue if necessary.

BEN H. CANTRELL, SENIOR JUDGE

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

RUSSELL E. DOWNING, II v. DAY & ZIMMERMAN NPS, INC., ET AL.

**Circuit Court for Henry County
No. 3364**

No. W2011-02455-WC-R3-WC - Filed March 26, 2013

JUDGMENT ORDER

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 appears 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 on appeal are taxed to the Appellants, Day & Zimmerman, NPS, Inc., and Zurich American Insurance Company, and their surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM