

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 19, 2011 Session

CEILDECK CORPORATION v. HERBERT IVEY

Appeal from the Chancery Court for Davidson County
No. 10-1639-III Ellen Hobbs Lyle, Chancellor

No. M2011-00096-WC-R3-WC - Mailed - October 13, 2011
Filed - November 15, 2011

This case involves a race to the courthouse after a Benefit Review Conference (“BRC”). The employee, a Dickson County resident, was allegedly injured in Davidson County during the course and scope of his employment. The employee and his employer unsuccessfully attempted to settle the employee’s claim at a BRC held on October 11, 2010; an impasse was declared at 10:27:19 a.m. Employee’s complaint was filed in the Chancery Court of Dickson County at 10:27 a.m. Employer’s complaint was filed in the Chancery Court of Davidson County at 10:28 a.m. The employee filed a motion to dismiss the employer’s Davidson County complaint based on the doctrine of prior suit pending. The trial court granted the motion, and the employer appealed.¹ We affirm the judgment of the trial court.

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

SHARON G. LEE, J., delivered the opinion of the Court, in which DONALD P. HARRIS, SR. J., and E. RILEY ANDERSON, Sp. J., joined.

J. Michael Morgan and Ryan N. Stringfellow, Nashville, Tennessee, for the appellant, Ceildeck Corporation.

Stanley A. Davis, Nashville, Tennessee, for the appellee, Herbert Ivey.

¹ Pursuant to Tennessee Supreme Court Rule 51, 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.

MEMORANDUM OPINION

Factual and Procedural Background

In January 2009, Herbert Ivey (“Employee”), a resident of Dickson County, allegedly sustained injuries in Davidson County in the course and scope of his employment with Ceildeck Corporation (“Employer”).

On October 11, 2010, the parties participated in a BRC. They were not able to settle the case, and a BRC impasse report was issued by a Worker’s Compensation Specialist at 10:27:19 a.m., stating “the [BRC] process is now deemed exhausted upon the issuance of this impasse report.” While the BRC was underway, each party had a representative waiting at a clerk’s office in different counties to file suit if the case did not settle. Venue was proper in either Dickson County, the county of Employee’s residence, or Davidson County, the county where the Employee was allegedly injured. Tenn. Code Ann. § 50-6-225(a)(2)(A) (2008).

Employee’s representative, Don Priest, filed a workers’ compensation complaint in the Dickson County Chancery Court. The Dickson County Clerk and Masters’ stamp on the complaint shows that it was filed at 10:27 a.m. Employer’s representative, Tracy Mitchell, filed a workers’ compensation complaint in the Davidson County Chancery Court. This complaint bears a Davidson County Chancery Court stamp showing that it was filed at 10:28 a.m.

Employee filed a motion to dismiss Employer’s Davidson County action, claiming that because his Dickson County complaint was filed before Employer’s complaint, Employer’s complaint was barred under the doctrine of prior suit pending. Employer opposed the motion, contending that, because the Dickson County complaint was recorded as having been filed at 10:27 a.m., it could have actually been filed before the impasse report was issued at 10:27:19 a.m. If it had been filed before 10:27:19 a.m., the Dickson County Chancery Court would not have acquired subject matter jurisdiction over the claim, because the administrative process would not have been exhausted as required by Tennessee Code Annotated sections 50-6-203(a)(1), 50-6-225(a)(1), and 50-6-225(a)(2)(A). Affidavits from Employee’s attorney and paralegal and Employer’s attorney were filed. The trial court granted Employee’s motion to dismiss, concluding that Employee’s suit was filed after the impasse report was issued and before Employer’s complaint was filed. Employer appeals.

Standard of Review

We are statutorily required to review the trial court's factual findings "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). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007).

Analysis

Under the doctrine of prior suit pending, the later-filed of two lawsuits is barred if (1) the lawsuits involve identical subject matter; (2) the lawsuits are between the same parties; (3) the earlier lawsuit is pending in a court with subject matter jurisdiction over the dispute; and (4) the earlier lawsuit is pending in a court having personal jurisdiction over the parties. West v. Vought Aircraft Indus., Inc., 256 S.W.3d 618, 623 (Tenn. 2008); Parris Roofing & Sheet Metal Co. v. Spurling, No. E2010-01530-WC-R3-WC, 2011 WL 2739516, at *2 (Tenn. Workers' Comp. Panel July 13, 2011). Employer concedes that the first, second, and fourth of these conditions were met, but contends that Employee failed to present sufficient proof that the third condition was satisfied because Employee failed to prove that the administrative process was exhausted when he filed his suit.

The BRC process must be exhausted before a workers' compensation action can be filed in court. Tenn. Code Ann. §§ 50-6-203(a)(1), 50-6-225(a)(1), and 50-6-225(a)(2)(A) (2008).² The trial court does not acquire subject matter jurisdiction over a workers'

² Tennessee Code Annotated section 50-6-203(a)(1) provides,

No claim for compensation under this chapter shall be filed with a court having jurisdiction to hear workers' compensation matters, as provided in § 50-6-225, until the parties have exhausted the benefit review conference process provided by the division of workers' compensation.

(continued...)

compensation claim until the administrative process is completed. S. Cellulose Prod., Inc. v. Defriese, No. E2008-00184-WC-R3-WC, 2009 WL 152313, at *6 (Tenn. Workers' Comp. Panel Jan. 22, 2009).³

It is not disputed that the BRC process was exhausted on October 11, 2010, at 10:27:19 a.m.⁴ The issue is: was Employee's complaint filed before or after the impasse

²(...continued)

Tennessee Code Annotated section 50-6-225(a)(1) provides,

Notwithstanding any provisions of this chapter to the contrary, in case of a dispute over or failure to agree upon compensation under this chapter, between the employer and employee or the dependent or dependents of the employee, the parties shall first submit the dispute to the benefit review conference provided by the division of workers' compensation.

Tennessee Code Annotated section 50-6-225(a)(2)(A) provides,

In the event the parties are unable to reach an agreement at the benefit review conference as to all issues related to the claim or the benefit review conference process is otherwise exhausted pursuant to rules promulgated by the commissioner, either party may file a civil action as provided in § 50-6-203 in the circuit or chancery court in the county in which the employee resides or in which the alleged injury occurred. In instances where the employee resides or in which the alleged injury occurs outside of the state, the complaint shall be filed in any county where the employer maintains an office.

³ As noted by the Tennessee Supreme Court in West, in providing that suit can be filed the instant the benefit review conference is concluded without settlement, the Workers' Compensation Law has increased the "frequency and fervor" of the process of racing to the courthouse to ensure the selection of the forum of choice. 256 S.W.3d at 622. The Court criticized this practice as follows:

We find this process of racing to the courthouse unseemly. It reflects attorneys' lack of confidence in the judiciary of this state to apply the Workers' Compensation Law in an evenhanded manner and demonstrates that lack of confidence to clients and the public at large. Furthermore, this process engages attorneys in the undignified spectacle of literally racing to secure perceived procedural advantages. Such gamesmanship does little to improve the image of attorneys in the eyes of the public.

⁴ Rule 0800-2-5-.09 of the Tennessee Comprehensive Rules and Regulations provides as follows:

(1) The Benefit Review Conference shall be deemed exhausted only upon occurrence of any of the following:

(continued...)

report was issued? We conclude that the evidence is sufficient to support the trial court's finding that the Employee's suit was filed after the impasse report was issued.

Affidavits signed by Employee's attorney and paralegal and Employer's attorney were filed by the parties. A trial court may, in its discretion, consider extrinsic evidence to determine when a lawsuit is filed if it is not evident from the face of the complaint. Parris Roofing & Sheet Metal Co., at *2. A trial court may also permit limited discovery or conduct an evidentiary hearing to resolve factual disputes as to the timing issue.

Employee filed an affidavit from his attorney, Ms. Davis, in which she stated that she attended the BRC and after receiving the impasse report, she called Don Priest by cell phone and told him to file the Complaint in the Dickson County Clerk's office, "which Mr. Priest did only after I notified him to file the Complaint" and "[w]e did not initiate filing nor file the complaint until the impasse report stamped 10:27:19 a.m. was in my hand and only after 10:27:19 a.m. was suit filed in the Dickson County Courthouse time-stamped 10:27 a.m." Employee also submitted an affidavit from Mr. Priest, stating "[a]fter 10:27:19 a.m., I received notice from Tara Davis, . . . that she had the impasse report in her hand and that I could file suit after 10:27:19 a.m. which I did." Employer submitted an affidavit from its attorney, J. Michael Morgan, in which he stated that he attended the BRC and upon receiving the impasse report, he immediately called Tracy Mitchell, a paralegal with his office who was waiting at the Davidson County Chancery Court's office to file a complaint. During this cell phone call, he instructed her to file the complaint.

Employer argues that, as a practical matter, Mr. Priest could not have been aware of the exact second that he "received notice" from Ms. Davis, that his affidavit on the subject is therefore untrustworthy, and that, combined with the absence of notation by the clerk of the precise second that the document was filed, the evidence was not sufficient to sustain Employee's burden. We disagree. In our view, the critical facts are that Ms. Davis notified Mr. Priest when she had the impasse report in hand, that Mr. Priest filed the complaint after he received notice from Ms. Davis, and that the time of filing noted by the clerk is consistent with that sequence of events. The clerk's notation complies with Tennessee Rule of Civil

⁴(...continued)

....

(c) Issuance of an impasse report signed and dated by a Workers Compensation Specialist.

....

(2) When a benefit Review Report is issued, such Report shall specify whether the Benefit Review Process is exhausted. The date and time noted on the Report issued by a Workers' Compensation Specialist shall determine when the Benefit Review Process is exhausted.

Procedure 5.06, which requires that the clerk “endorse upon every pleading and other papers filed with the clerk in an action the date and hour of the filing.” Notation of the second of filing was not required.

Employer, relying on Defriese, contends that Employee was required to submit evidence that the BRC clock and the Dickson County clerk’s clock were synchronized. In Defriese, a BRC was conducted and an impasse report was issued at 9:59:25 a.m. The parties raced to the courthouse. The employer filed a complaint that was time-stamped 9:59 a.m. The employee filed suit less than thirty minutes later. The employee moved to dismiss the employer’s complaint for lack of subject matter jurisdiction, alleging that the employer had not shown that it waited until after the benefit review conference was over to file its complaint. No proof was offered as to the timing issue; the trial court summarily denied the employee’s motion. The Panel determined that the record was not sufficiently developed to show whether there had been an exhaustion of administrative remedies before the state court suit was filed and remanded, noting that, among other things, there was no proof “as to whether the clocks at the Department of Labor and Workforce Development and the Hamilton County Circuit Court were perfectly coordinated, or whether the former was faster or the later slower.” Id., at *7. The Panel’s dicta regarding the clocks does not mandate proof of synchronization of the clerk’s clock and the BRC’s clock. The Panel was merely suggesting various items of proof the parties could have presented to the court on the issue.

Employer urges this Panel to adopt a bright line rule for trial courts to use in determining which party wins the race to the courthouse. We decline this invitation. It is for the legislature, not the courts, to amend the statute to stop or regulate the race to the courthouse in worker’s compensation cases.

The judgment of the trial court is affirmed. Costs are taxed to Ceildeck Corporation and its surety, for which execution may issue if necessary.

SHARON G. LEE, JUSTICE

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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 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 will be paid by Ceildeck Corporation and its surety, for which execution may issue if necessary.

PER CURIAM