IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 27, 2010 Session

RICKY D. GARRETT v. WILLIAM DAVID BROWN, ET AL.

Appeal from the Circuit Court for Giles County
No. CC11085 Jim T. Hamilton, Judge

No. M2009-02592-WC-R3-WC - Mailed - February 11, 2011
Filed - March 15, 2011

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. Ricky D. Garrett ("Employee") was injured when he fell from the roof of a barn during the course and scope of his employment as a handyman for William David Brown ("Employer"), a farmer who carried worker's compensation insurance. Subsequently, Employee filed a complaint for worker's compensation benefits against Employer and Employer's insurance carrier. Employee also named the Second Injury Fund ("the Fund") as a defendant and alleged that the injury he sustained in the fall in combination with his pre-existing disabilities rendered him totally disabled. The trial court agreed that Employee was permanently and totally disabled as a result of the injury sustained in the fall combined with the pre-existing disabilities and awarded Employee full benefits with 40% liability for the award assigned to Employer and 60% assigned to the Fund. The Fund appealed, asserting, 1) that Employer does not meet the definition of "employer" for purposes of the Second Injury Fund statute; 2) that the proof is insufficient to show that Employer had knowledge of Employee's pre-existing disabilities; and 3) that the judgment awarded Employee was incorrectly apportioned between the Fund and the Employer. We affirm the judgment of the trial court.

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

JERRI S. BRYANT, SP. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and JON KERRY BLACKWOOD, SR. J., joined.

Robert E. Cooper, Jr., Attorney General & Reporter; Joshua Davis Baker, Assistant Attorney General, for the appellant, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

Richard T. Matthews, Columbia, Tennessee, for the appellee, Ricky D. Garrett.

Kenneth D. Veit and M. Neal Cope, Nashville, Tennessee, for the appellees, William David Brown and Granite State Insurance Company.

MEMORANDUM OPINION

Background

At some time in 1999, Employee was hired by Employer to work on Employer's farm as a handyman. Before going to work for Employer, Employee had suffered a back injury as the result of a motor vehicle accident and had also been diagnosed with colon cancer. Employee's job duties on the farm consisted of general farm maintenance work such as barn and fence repair and driving a tractor. On March 20, 2007, Employee fell from the roof of a barn while working for Employer and suffered compound fractures to the tibia and fibula of his left leg in the area of his ankle. The injury required three surgical procedures, two to install fixations with plates, pins, and screws and a third to remove the hardware. In February 2008, Employee's treating physician, Dr. Scott McCall, an orthopaedic surgeon, determined that Employee had reached maximum medical improvement and released him to return to work. He had prescribed Employee a leg brace which helped stabilize Employee's ankle but also caused some gait derangement, which in turn caused Employee to have increased back pain. After being released by Dr. McCall, Employee attempted to return to work for Employer but was unable to do so because of back and leg pain. He did not seek other employment and was unemployed at the time of trial. Standing for an hour and prolonged sitting both caused Employee pain, and he was unable to continue to drive a tractor because he was unable to push the clutch with his foot. Employee experienced daily pain in his leg and back and has taken up to three Lortab pain relievers per day. Although Dr. McCall placed various restrictions on Employee's activities in order to allow him to attempt to return to work, Dr. McCall opined that "it would be almost a bit of a miracle if he did return to manual labor work after this type of injury."

Although not required to do so, Employer had previously chosen to obtain workers' compensation insurance, which was in effect at the time of Employee's leg injury. Employee subsequently filed a workers' compensation complaint in the Circuit Court for Giles County against Employer, Employer's workers' compensation insurance carrier, Granite State Insurance Co. ("Granite State"), and Sue Ann Head in her official capacity as administrator of the Fund. The Fund was included as a defendant pursuant to

Tennessee Code Annotated section 50-6-208.[1] Employee alleged that before the March 2007 injury, Employee had "sustained previous and permanent work related disabilities, of which his employer was on notice" and that the March 2007 injury in combination with these disabilities had caused Employee to become totally disabled.

At trial, the court was presented with the testimony of Employee, Employee's wife, and Patsy Bramlett, a vocational rehabilitation consultant. Additional evidence included the deposition testimony of Dr. McCall and a medical report of Dr. David Gaw, an orthopedic surgeon who examined Employee.

Dr. McCall assigned a 15% anatomical impairment to the body as a whole due to the injury to Employee's leg. He opined that the brace he prescribed for Employee decreased the amount of pain and increased the function of the injured leg. However, he also thought that the alteration of gait caused by the brace exacerbated Employee's pre-existing back problems:

> I think the double upright brace tends to alter a person's gait a little bit. . . . And someone who gets used to kind of limping around like [Employee] does on the bad leg, on the fractured side, and you get it into the brace[,] it certainly will make the back worse.

Dr. Gaw, who examined Employee at the request of his attorney, opined in his medical report that Employee retained an anatomical impairment of 7% to the body as a whole due to the leg injury.

Ms. Bramlett opined that Employee was able to read, spell, and perform arithmetic at a kindergarten level and that, based upon the records and deposition of Dr. McCall and

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[1] Tennessee Code Annotated section 50-6-208(a)(1) (2008) sets forth conditions that must be met before an injured employee qualifies for payment from the Second Injury Fund as follows:

> If an employee has previously sustained a permanent physical disability from any cause or origin and becomes permanently and totally disabled through a subsequent injury, the employee shall be entitled to compensation from the employee's employer or the employer's insurance company only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation to which the employee may be entitled under this chapter from the employer or the employer's insurance company; provided, that, in addition to the compensation for a subsequent injury, and after completion of the payment for the subsequent injury, then the employee shall be paid the remainder of the compensation that would be due for the permanent total disability out of a special fund to be known as the second injury fund.

other medical information generated in the case, Employee is permanently and totally disabled. She attributed 60% of Employee's vocational disability to his pre-existing back problem.

After considering all of this evidence and arguments of counsel, the trial court awarded Employee workers' compensation benefits for 100% permanent and total disability with the award to cover 592 weeks. The court assigned Employer and Granite State responsibility for 40% (236.8 weeks) of this award and assigned the Fund responsibility for the remaining 60% (355.2 weeks), with benefits to paid at the rate of $113.43 per week. The trial court also awarded Employee 47 weeks of temporary total disability benefits. The Fund's subsequent motion to alter or amend the trial court's judgment was denied, and thereafter, the Fund timely filed its notice of appeal.

Issues

We are presented with the following three issues:

1) Whether Employer properly meets the definition of "employer" for purposes of the Second Injury Fund under Tennessee Code Annotated section 50-6-208.

2) Whether the trial court erred in finding that Employer had actual knowledge of Employee's pre-existing disabilities.

3) Whether the trial court erred in its apportionment of liability between Employer and the Fund.

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 findings unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). On issues of credibility and weight to be given testimony, considerable deference is given the trial court, which had the opportunity to observe the witnesses. Madden v. Holland Grp. of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony by deposition, determination of the weight and credibility of that evidence carries no presumption of correctness, and the reviewing court may draw its own conclusions with regard to those issues. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 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

Application of the Second Injury Fund Statute to Employer

The Fund contends that Employer did not meet the definition of an employer for purposes of the Second Injury Fund and therefore Employer is ineligible to receive contribution from the Fund to satisfy Employee's claim. The Fund asserts that the Second Injury Fund statute, Tenn. Code Ann. § 50-6-208, refers to "employer" throughout in setting forth the circumstances under which recovery from that fund is allowed. The Fund points to the definition of the term "employer" contained in Tennessee Code Annotated section 50-6-102(11) as a person or entity which uses "the services of not less than five (5) persons for pay." The Fund contends that the meaning of the language of section 50-6-102(11) is unambiguous and therefore must be enforced based upon its plain meaning in accord with the intent of the legislature, citing Freeman v. Marco Transp. Co., 27 S.W.3d 909, 911 (Tenn. 2000). Since it is undisputed that Employer did not have at least five employees, the Fund argues that Employer is not an employer for purposes of enforcing the Second Injury Fund statute. The Fund further notes that Tennessee Code Annotated section 50-6-106(4) provides that the Workers' Compensation Law does not apply to "[f]arm or agricultural laborers and employers of those laborers" and therefore, section 50-6-208 is not applicable to Employer, who is a farmer. The Fund contends that the combination of sections 50-6-102(11) and 50-6-106 (4) preclude Employer from receiving contribution from the Second Injury Fund. Finally, the Fund argues that Employer, who employed fewer than five employees, failed to file the statutory notice required by Tennessee Code Annotated section 50-6-106(5) which provides that "[i]n cases where fewer than five (5) persons are regularly employed, . . . the employer may accept this chapter by filing written notice of the acceptance with the division at least thirty (30) days before the happening of any accident or death." The Fund asserts that because Employer failed to file such notice, he does not meet the statutory definition of employer.

Employee and Employer argue that the issue of whether Employer meets the definition of employer for purposes of the statute has been waived because the issue was not raised by the Fund in the trial court and is raised for the first time in this appeal.

It is well settled that a party waives an issue on appeal that was not first raised at trial. Powell v. Cmty. Health Sys., Inc., 312 S.W.3d 496, 511 (Tenn. 2010); Black v. Blount, 938 S.W.2d 394, 403 (Tenn. 1996). Although an issue that is inherently not subject to waiver may be raised on appeal, Estate of Reagan v. Tennplasco, No. M2007-01427-WC-R3-WC, 2008 WL 2166003 at *2 (Tenn. Workers' Comp. Panel May 22, 2008), we do not deem the issue presently raised by the Fund to be such an issue. Accordingly, we conclude that by failing to raise the issue in the trial court, the Fund has

waived it in this appeal. Nevertheless, in our discretion, we have addressed the issue and conclude that Employer meets the definition of employer for purposes of the Second Injury Fund statute.

In support of this conclusion, we note the following language at Tennessee Code Annotated section 50-6-208(a)(2):

> To receive benefits from the second injury fund, the injured employee must be the employee *of an employer who has properly insured the employer's workers' compensation liability* or has qualified to operate this chapter 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 knowledge, but in all cases prior to the subsequent injury.

(Emphasis added). It is stipulated and uncontradicted that Employer obtained workers' compensation insurance prior to Employee's injury on March 20, 2007, which was in effect at the time of that injury, and thus, in the language of the subsection (a)(2) above, Employer is "an employer who has properly insured the employer's workers' compensation liability" and is therefore an employer for purposes of section 50-6-208.

Further, Employer's failure to file notice pursuant to Tennessee Code Annotated section 50-6-106(5) did not preclude him from being deemed an employer for purposes of the Second Injury Fund statute. We are guided to this conclusion by the Tennessee Supreme Court's decision in Commercial Ins. Co. v. Young, 354 S.W.2d 779 (Tenn. 1962). In that case, the proof showed that the employer had less than five employees, and therefore there was no presumption that the employer was subject to the terms of what was then termed the Workmen's Compensation Act and is now the Workers' Compensation Law. In Young, both the employer and its workers' compensation insurance carrier denied that they were operating under the Act. However, the employer admitted that it had procured a workers' compensation policy to take care of employees injured at work and that the policy was in effect on the date of trial. At the time of the Young opinion, Tennessee Code Annotated section 50-906, now section 50-6-106(5), provided that an employer with less than five employees could accept the provisions of the Act "by filing written notice thereof with the said division of workmen's compensation at least thirty (30) days before the happening of any accident or death." The employer had not filed the notice required by this section. However, the Supreme Court stated, "[s]urely we are not expected to hold that it is impossible for an employer to come

under coverage of the Act until thirty days have expired despite a desire to do so." Id. at 785. The Court ruled that the employer was in substantial compliance with the notice requirement because the employer had "secured an insurance policy, paid the premiums therefor, and considered itself bound by the provisions of the Act." Id. In so ruling, the Court noted that under Tennessee Code Annotated section 50-918, now section 50-6-116, the Worker's Compensation Act is "declared to be a remedial statute which shall be give an equitable construction by the courts."[2] Id. at 788. Similarly, applying an equitable construction in the instant matter, we hold that Employer's voluntary election to be bound by the Workers' Compensation Law overcomes the facts that at the time of Employee's injury Employer used the services of fewer than five employees and was a farmer. The Fund argues that section 50-6-208 should be strictly construed in accordance with Seiber where the Court indicated that the remedial, equitable construction required under section 50-6-116 does not apply to the construction of section 50-6-208, which "does not affect either the employee's eligibility for workers' compensation benefits or the amount of benefits to which the employee is entitled." Seiber, 284 S.W.3d at 300. While we agree that section 50-6-208 per se is subject to a stricter construction than the rest of the Workers' Compensation Law, the definition of employer for purposes of section 50-6-208 is not a definition unique to that section but rather derives from the definition of employer as it pertains to the Workers' Compensation Law in general, and the term must initially be construed in the context of the chapter as a whole, which is subject to the equitable and remedial construction compelled by section 50-6-116. In sum, we conclude that under the circumstances in this case, Employer qualifies as an employer under the Workers' Compensation Law and for purposes of enforcing the Second Injury Fund.

Employer's Knowledge of Employee's Pre-existing Disabilities

Tennessee Code Annotated section 50-6-208(a), by its terms, is applicable only when "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." Tenn. Code Ann. § 50-6-208(a)(2). The trial court found that Employer was "fully aware of [Employee's] conditions and disabilities and had accommodated his disabilities and retained [Employee] as an employee despite his

[2] Tennessee Code Annotated section 50-6-116 provides as follows:

> The rule of common law requiring strict construction of statutes in derogation of common law shall not be applicable to this chapter, but this chapter is declared to be a remedial statute, which shall be given an equitable construction by the courts, to the end that the objects and purposes of this chapter may be realized and attained.

disabilities." The Fund contends that Employer did not present sufficient evidence to show that Employer had actual knowledge of Employee's pre-existing conditions. We do not agree.

In Brown v. John Martin Const. Co., 642 S.W.2d 145, 147 (Tenn. 1982), we noted the purpose of the Second Injury Fund and the reason for the requirement that an employer have knowledge of the employee's pre-existing disabilities as follows:

> The statute encourages employers to hire handicapped persons by relieving an employer, who knowingly hires a handicapped person or retains an employee after discovering the employee has a physical impairment, of part of the liability for disability benefits. The statute seeks to reward the employer's humane gesture. But there can be no such humane gesture unless the employer acts with the knowledge that he is hiring or retaining the handicapped.

The Fund cites E.I. duPont de Nemours and Co. v. Friar, 404 S.W.2d 518 (Tenn. 1996), where the Court noted that the employer bears the burden of proving his or her awareness of a pre-existing disability unless it is one "which even a layman would label as patent," and that the employer must show that it "recognize[d] that the employee's physical condition would detract from his or her competitiveness in the job market." Id. at 522. The Fund asserts that there is little proof of the former and no proof of the latter and that there is in fact proof that Employee's pre-existing disability was not physically limiting. The Fund observes that Employer did not testify and therefore all the evidence attributing knowledge to him was either speculative or circumstantial and inadequate. The Fund also cites Smith v. Fleeman's Transp., Inc., No. M2004-01709-WC-R3-CV, 2005 WL 2276892 (Tenn. Workers' Comp. Panel Sept. 20, 2005), in which the Panel determined that it had not been shown that the employer was aware of the employee's pre-existing disabilities where the employer never provided any accommodations for employee's work, no physician ever assigned the employee work restrictions, and the employee performed his job as he would have without having prior injuries. Id. at *4. The Fund maintains that in the present case there is no evidence showing that a doctor had placed any work restrictions on Employee prior to his fall from the barn, that there is "only a scintilla of evidence that Employer had to accommodate Employee in any way," and that Employee "performed his job for [Employer] as though he had no prior disabilities."

At trial, Employer did not testify. Employee testified that before he began working for Employer in 1999, he was involved in a motor vehicle accident in which he injured his back, and he confirmed that he suffers from multilevel degenerative disk disease and a herniated disk. Employee testified that as a result of that injury he has had

to wear a back brace nearly all of the time, that he cannot pick up heavy objects, and that occasionally his back has gone out when he has turned a certain way or when he has bent over, and "it'd lay me down three or four days." He testified that the injury causes him constant pain, that he has received treatment at a pain clinic and that "[i]f it was nine or ten o'clock . . . in the morning and my back went out . . . I went to the house." Employee testified that Employer knew of his back condition and has accommodated him by allowing him to do lighter work that would not hurt his back. Employee also attested that he was diagnosed with colon cancer before going to work for Employer, that he had declined a doctor's offer of colon surgery, and that his colon problem has also caused him to miss work. Although he has never specifically told Employer that he has a colon problem, he has advised Employer that he could not come to work because of bleeding associated with that condition.

Employee's wife, Peggy Garrett, who also worked for Employer, testified and confirmed that Employer was aware of Employee's back problem and that Employer understood that from time to time Employee's back problem prevented him from working, and he did not make Employee work at those times. Employee's wife also testified that Employer's foreman was aware that Employee was diagnosed with colon cancer, that the foreman would tell Employer when Employee was not feeling well because of his colon problems, and that Employer would then allow Employee time off.

We conclude that the testimony of Employee and his wife was adequate to show that Employer was aware of Employee's pre-existing disabilities for purposes of triggering the Second Injury Fund. In Strong v. Ins. Co. of N. Am., 490 S.W.2d 162 (Tenn. 1973), the Tennessee Supreme Court found sufficient evidence that an employer had notice of the employee's disability for purposes of the Second Injury Fund where "[a]t one time during [the] employment, prior to the injury [that resulted in total disability], the employer placed this employee on lighter work due to the employee's physical impairment . . . [and] the employee testified on several occasions prior to [such] injury, he called to the attention of his employer his physical impairments." Id. at 164. The testimony of Employee and his wife show that Employer placed Employee on lighter duty because of his pre-existing disabilities and that those disabilities were called to Employer's attention, and the evidence does not preponderate to the contrary. Further, it is fairly and reasonably inferred from the fact that Employer was required to make accommodations for Employee's disabilities that his physical condition would detract from his or her competitiveness in the job market. While there was no evidence showing that a doctor had placed any work restrictions on Employee prior to his fall from the barn, we do not agree that such evidence was necessary to prove Employer's awareness of Employee's pre-existing disabilities.

In sum, the evidence does not preponderate against the trial court's conclusion that Employer was aware of Employee's pre-existing disabilities.

Apportionment of Liability

The Fund's final contention is that the trial court incorrectly apportioned liability by assigning 60% liability to the Fund and 40% liability to Employer.

As the Supreme Court has noted, in apportioning liability between an employer and the Second Injury Fund, the trial court must make a specific finding of fact as to "what disability would have resulted if a person with no preexisting disabilities, in the same position as the plaintiff, had suffered the second injury but not the first." Allen v. City of Gatlinburg, 36 S.W.3d 73, 77 (Tenn. 2001). Such a finding is necessary under Tennessee Code Annotated section 50-6-208(a), which provides that the injured "employee shall be entitled to compensation from the employee's employer . . . only for the disability that would have resulted from the subsequent injury, and the previous injury shall not be considered in estimating the compensation to which the employee may be entitled . . . from the employer or the employer's insurance company." The Fund argues that the evidence shows that the March 2007 injury was far more serious than the pre-existing back condition and asserts that before Employee fell from the barn he had no medical restrictions, was able to work full-time, and engaged in work that was physically demanding, such as building fences or repairing barn roofs.

The trial court ruled that the extent of occupational disability caused by the work injury without regard to the pre-existing conditions should be set at 40% based upon its finding that Employee "suffered significant pre-existing permanent physical disabilities, and considering his age, lack of education and limited occupational experience, that he was significantly occupationally disabled prior to the date of his work injury."

The record contains substantial evidence supporting the trial court's finding on this issue. Employee attested that he was fifty-five years old at the time of trial, has had no formal or informal education beyond the fourth grade, and does not hold a general equivalency diploma. His testimony also indicated that he was in his mid-forties when he incurred the injury to his back and was diagnosed with colon cancer. As to other job experience, Employee testified that prior to working for Employer, he had worked cutting down trees for several years, worked on the assembly line at a bicycle factory, as a flat-bed truck driver, a welder, and a mechanic. As previously noted, Employee testified that the injury to his back has caused him constant pain and has required him to obtain treatment at a pain clinic.

Dr. McCall testified that Employee's pre-existing back injury was "at least" as great a hindrance to Employee's returning to work as was his injured leg. He attested that "from the fracture that [Employee] had, the result that he got, if he had been a 30-year old male with no back trouble and no previous medical history, . . . no chronic pain component to . . . his back and other issues . . . he would have gone back to work." Dr. McCall further summarized his opinion, stating as follows:

> I just think he was a guy who could barely do a little bit of a work with some chronic back pain when he had the fall and broke his ankle. That it just tipped him over the edge and he was just unable to do it. And I just think it was a cumulative effect. Can I say it's 50/50, 60/40? I don't know. They are probably about equal.
>
> But I think he was a guy who was working with pain, obviously seeing a pain clinic. Probably having a hard time doing the job he had.

Ms. Bramlett testified that Employee had approximately 60% vocational disability prior to the March 2007 injury given the nature of work that Employee was qualified to perform.

Upon our careful review of the record, we conclude that the trial court's apportionment of 60% liability to the Second Injury Fund and 40% liability to Employer was well supported and proper, and the evidence does preponderate to the contrary. While Dr. McCall's testimony was somewhat equivocal, the trial court's apportionment was within the general range suggested by Dr. McCall. Further, the trial court's apportionment was precisely supported by Ms. Bramlett's testimony.

Conclusion

For the reasons stated herein, we hold that the trial court correctly concluded that the Second Injury Fund statute applies in this case, that Employer meets the definition of employer for purposes of the statute, that Employer was aware of Employee's pre-existing disabilities, and that liability was properly apportioned between the Fund and Employer. Accordingly, we affirm the judgment of the trial court. Costs are taxed to the Second Injury Fund.

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JERRI S. BRYANT, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
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Circuit Court for Giles County
No. CC11085

No. M2009-02592-WC-R3-WC - Filed - March 15, 2011

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 the Second Injury Fund, for which execution may issue if necessary.

PER CURIAM