IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 28, 2010 Session

FEDERATED RURAL ELECTRIC INSURANCE EXCHANGE, ET AL. v. WILLIAM R. HILL, ET AL.

Appeal from the Circuit Court for Davidson County
No. 05C1284 Barbara N. Haynes, Judge

No. M2009-01772-WC-R3-WC - Mailed - October 7, 2010

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. Employee suffered work-related injuries to his knees prior to 2003 and underwent numerous surgeries. He entered into two settlements that obligated Employer to pay all future medical expenses arising from those injuries. In 2004, Employee fell at home and reinjured his right knee. He sought workers' compensation benefits, claiming that the 2004 injury was a natural consequence of his prior compensable knee injuries. The trial court granted summary judgment to Employer, finding that Employee's injury was not a natural consequence of the prior on-the-job knee injuries. We affirm the judgment as to Employee's claims for permanent partial disability benefits, and certain temporary total disability benefits. We reverse as to Employee's claims for medical benefits and certain temporary total disability benefits because there are disputed material facts that could allow Employee to prove his 2004 injury was a natural consequence of his prior compensable knee injuries. We affirm the trial court's dismissal of several collateral issues raised by employee.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J., and WALTER C. KURTZ, SR. J., joined.

Clifford E. Wilson, Madisonville, Tennessee, for the appellant, William R. Hill.

W. Stuart Scott and Kerry M. Ewald, Nashville, Tennessee, for the appellees, Federated Rural Electric Insurance Exchange and Fort Loudon Electric Cooperative.

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

MEMORANDUM OPINION

Factual and Procedural Background

William Hill was employed by Fort Loudon Electric Cooperative ("Employer"). He suffered on-the-job injuries to his knees over the course of several years beginning in 1990. As a result of these injuries, Mr. Hill underwent a total of nine surgeries on both of his knees. In 2002, Dr. Stephen Weissfeld performed a left knee replacement and scheduled a right knee replacement. However, the right knee replacement was postponed by Mr. Hill as a result of problems he encountered in his recovery from the left knee replacement. In 1990 and 2003, the parties agreed to a court approved settlement under which Mr. Hill received permanent partial disability totaling 100% to the body as a whole. In addition to these court approved settlements, Mr. Hill and Employer signed a letter in which Employer agreed as follows:

> [T]hat in the future, if I [Mr. Hill] require surgery or medical care that would cause me to miss work due to this injury, to include but not limited to total knee replacement of my right knee or any additional after care on my left knee, that Federated Insurance Company[1] will treat this as a new injury. A new workers' compensation claim will be opened and I will receive temporary total disability compensation at the applicable rate.

After the left knee replacement, Mr. Hill was able to return to work for Employer.

While at home on November 29, 2004, Mr. Hill fell as he was rising from the toilet. The fall further injured his right knee. Mr. Hill testified by deposition that his right knee "gave way" as it had done many times since his on-the-job injuries. The fall caused him to land on his right knee. Employer initially treated this fall as compensable and paid for medical treatment as well as temporary total disability benefits.

Dr. Rick Parsons, an orthopaedic surgeon, treated Mr. Hill's 2004 knee injury. After imaging Mr. Hill with an MRI, Dr. Parsons performed arthroscopic surgery on Mr. Hill's

[1] Federated Insurance Company is insurer for Employer.

right knee on January 5, 2005. In February and again in March 2005, Dr. Parsons authorized Mr. Hill to return to work at his desk job. Dr. Parsons noted that Mr. Hill would ultimately need a right knee replacement.

On February 14, 2005, Mr. Hill returned to work. Lisa Lingerfelt and Chad Kirkpatrick, representatives of Employer, testified by deposition that Mr. Hill was given a desk job in a separate office with room to elevate his knee. Both representatives testified that Mr. Hill was unable to perform his work tasks and was unproductive. Mr. Hill told both representatives that he was unable to perform his job duties because he was experiencing pain in his leg as well as side effects from several medications. After one and one-half days, Employer allowed Mr. Hill to return home. Mr. Hill collected temporary disability benefits while he remained off work during March and April 2005. In April, while Mr. Hill was off work, Employer's insurer (Federated) employed an investigator to make a video recording of Mr. Hill's activities. The recording captured Mr. Hill building a barn on his property. The video also showed Mr. Hill climbing up and down a ladder, working on the roof and carrying lumber without any apparent difficulty. Employer confronted Mr. Hill with this video on May 2, 2005. On that date, Mr. Hill was fired and temporary disability benefits were terminated.

In light of his earlier opinion that Mr. Hill would need a knee replacement, Dr. Parsons was afforded an opportunity to view the video. After viewing the video, Dr. Parsons questioned the need for a knee replacement in light of the activities he observed Mr. Hill perform on the recording. However, Mr. Hill continued to complain of knee problems, pain and depression. Mr. Hill consulted with Dr. Michael Eilerman, an orthopedic surgeon. On December 8, 2005, Dr. Eilerman replaced Mr. Hill's right knee with an artificial joint.

On May 2, 2005, Employer filed suit against Employee, alleging workers' compensation fraud. Mr. Hill filed several counter complaints, in which he sought medical benefits under the workers' compensation law and the 2003 settlement agreement, temporary total disability benefits under the supplemental agreement of the parties, and permanent partial disability benefits from the Second Injury Fund. Mr. Hill also raised numerous tort claims including retaliatory discharge. The trial court dismissed Mr. Hill's counter complaints. On appeal, the Court of Appeals reversed the dismissal of Employee's retaliatory discharge claim, but otherwise affirmed the trial court. *Federated Rural Elec. Ins. Exch. v. William R. Hill*, No. M2005-02461-COA-R3-CV, 2007 WL 907717 (Tenn. Ct. App. Mar. 26, 2007). Employer then filed a motion for summary judgment, contending that the November 2004 injury did not occur in the course of Employee's job, and therefore was not compensable. Employer also moved for summary judgment on Mr. Hill's claim based upon retaliatory discharge. Mr. Hill filed a cross-motion for summary judgment on his workers' compensation claim, contending that the November 2004 injury was the direct result of his

earlier injuries. Consequently, Mr. Hill alleged that he was entitled to medical benefits under the worker's compensation law and the supplemental 2003 agreement, as well as temporary total disability benefits and the permanent partial disability benefits from the Second Injury Fund under the supplemental agreement. The trial court granted Mr. Hill's motion for summary judgment but found that Mr. Hill's 2004 injuries were not the natural consequence of the prior worker's compensation injury. Finding no disputed issues of material fact on this issue, summary judgment was granted in favor of Employer. Mr. Hill appealed from that judgment, and sought to have the retaliatory discharge and workers' compensation issues consolidated for hearing before the Supreme Court. That motion was denied. The workers' compensation issues were referred to this Panel in accordance with Tenn. R. Sup. Ct. 51. The case will be transferred to the Court of Appeals for consideration of the retaliatory discharge issues upon disposition of those claims.

Standard of Review

Rule 56 of the Tennessee Rules of Civil Procedure provides the applicable standard of review when a workers' compensation claim is decided on a motion for summary judgment. *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991). A motion for summary judgment should be granted only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. See Tenn. R. Civ. P. 56.04; *Penley v. Honda Motor Co., Ltd.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). "It is not enough for the moving party to challenge the nonmoving party to 'put up or shut up' or even to cast doubt on a party's ability to prove an element at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8 (Tenn. 2008). Instead, the moving party has the more difficult task of demonstrating "that the nonmoving party cannot establish an essential element of the claim at trial." *Id*. at 7. The appellate court must review the evidence in a light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. *Staples v. CBL & Assocs., Inc*., 15 S.W.3d 83, 89 (Tenn. 2000). The standard of review is de novo with no presumption of correctness attached to the trial court's conclusions. *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 337 (Tenn. 2005).

Analysis

1. *Summary Judgment Issues*

The parties have raised numerous issues in their briefs. However, based upon our review of the record, we find that the question presented by the parties' motions for summary judgment is whether or not the evidence presented in support of those motions establishes that there is no genuine issue of material fact as to Employee's right to relief, or lack thereof,

under the workers' compensation law, the 2003 settlement agreement, or the supplemental agreement.

Only injuries "arising out of and in the course of employment" are compensable under the workers' compensation statute. Tenn. Code Ann. § 50-6-103(a). The injury must both "arise out of" the employment and occur "in the course of" the employment and these requirements are distinct from one another. *See, e.g., Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 47 (Tenn. 2004). An injury arises out of employment if there is "a causal connection between the conditions under which the work is required to be performed and the resulting injury." Id. The injury occurs "in the course of" employment, if it occurred "while the employee was performing a duty he or she was employed to perform." *Id*.

It is clear that the trial court correctly found that Employee's November 29, 2004, injury did not occur during the course of his employment. The fall occurred at home while Mr. Hill was getting up from the toilet. Mr. Hill was not at work and was not performing any duty for his employer at the time of the accident. If the fall was a direct and natural consequence of the prior work injuries, then it could be said to have arisen from his employment, and he would be entitled to receive medical care for its consequences in accordance with Tenn. Code Ann. § 50-6-204 and the terms of the 2003 settlement. However, he would be precluded from receiving permanent disability benefits for any increase in his disability arising solely from the injuries which were the subject of the prior settlements. *Wilhelm v. Krogers*, 235 S.W.3d 122, 130 (Tenn. 2007).

The supplemental agreement of the parties to the 2003 settlement, which is in the form of a letter signed by Mr. Hill and a representative of Employer, states: "[t]hat in the future, if I [Employee] require surgery or medical care that would cause me to miss work due to [the] injury [which is the subject of the 2003 settlement] . . . a new workers' compensation claim will be opened for me at that time, and I will receive temporary total disability compensation at the applicable rate." Based upon this language, we conclude that Employer's liability for temporary disability benefits under the supplemental agreement is to be determined by the same standard applicable to its liability for medical benefits under the settlement agreement, and the workers' compensation law. Employer would be liable if the need for treatment or the period of temporary disability was a direct and natural consequence of the previous injuries.

The general rule is that a subsequent injury, whether in the form of an aggravation of the original injury or a new and distinct injury, may be compensable if it is the "direct and natural result" of a compensable injury. *Rogers v. Shaw*, 813 S.W.2d 397, 399-400 (Tenn. 1991) (quoting 1 *Larson's Workers' Compensation Law* § 13.11 (1990)). The rule, commonly referred to as the direct and natural consequences rule, has been stated as: "[w]hen the

primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment." 1 *Larson's Workers' Compensation Law* § 10 (2004). Thus, for example, an employee with a compensable back injury that caused involuntary spasms may recover for additional knee injuries caused by falling down the stairs during a spasm. *Carpenter v. Lear-Siegler Seating Corp.,* No. 03501-9201-CV-5, 1993 WL 52134 (Tenn. Mar. 1, 1993). The rationale for the rule is that the original compensable injury is deemed the "cause of the damage flowing from the subsequent" injury-producing event. *Revell v. McCaughan*, 39 S.W.2d 269, 271 (1931).

Mr. Hill argues that the evidence submitted in support of his motion for summary judgment establishes that there is no genuine issue that his November 2004 injuries arose from the injuries addressed in the 2003 settlement, and Employer is therefore liable for his medical care, specifically the right knee replacement surgery, in accordance with the terms of the settlement. For the same reason, he asserts that he is entitled to temporary disability benefits pursuant to the supplemental agreement. Employer, on the other hand, argues that the evidence submitted in support of its motion establishes that there is no genuine issue that Employee's injury at home was not a natural consequence of the prior injuries, or alternatively that the 2004 fall was an independent intervening cause which cuts off liability.

Employer supported its motion with an April 25, 2005 letter from Dr. Parsons to its insurer, which was included in a group of medical records exhibited to Employee's deposition. In that letter, Dr. Parsons described Mr. Hill's barn-building activities, as depicted in the video recordings. He then stated:

> I certainly do not feel like [Employee] is totally disabled to work, and given his documented physical activities, building a barn, it is difficult to imagine the patient having restrictions given the physical labor he did on an ongoing basis. . . . [T]here is no way to determine whether the non-work related activities or work-related activities aggravated his symptoms because it is well-documented . . . that patient has had multiple surgeries on both knees confirming [degenerative joint disease]. . . . I would also question the need for total knee replacement at this point, because of the patient's inconsistencies, subjective complaints and objective evidence of being able to work at a fairly high level with no evidence of giving away and working at heights with no indications of limitations.

Employer also supported its arguments with depositions of Employee's co-workers describing his actions and statements during his brief return to work, arguing, in effect, that the activities in the video recordings conflict with Mr. Hill's earlier behavior so completely

that any statement made by him or evidence based upon statements made by him are unworthy of belief.

In support of his position, Mr. Hill and his wife both testified in depositions that after his earlier compensable injuries, his knees would sometimes "give way" or "lock up" causing him to fall. Mr. Hill said that when he fell in the bathroom, his right knee "gave way" as it had done many times since his on-the-job injuries, causing him to land on his right knee on the floor.

In further support of his position, Employee submitted an affidavit from Dr. Weissfeld, who performed nine surgeries on Employee's knees prior to 2004. In that document, Dr. Weissfeld stated that he replaced Employee's left knee in 2002, and planned on replacing Employee's right knee at that time. Mr. Hill decided not to replace the right knee in 2002 because his recovery from replacing the left knee had been difficult. Dr. Weissfeld determined in 2002 that replacing Employee's right knee was his only avenue for permanent relief.

Mr. Hill produced an affidavit of Dr. Collier, his primary care doctor. Dr. Collier opined Employee's 2004 fall and further injury was a direct result of Employee's prior on-the-job injuries and follow-up surgeries. Dr. Collier based his opinion on Employee's reports about the accident and his symptoms, and on his own treatment of knee injuries. In addition, Mr. Hill relied on the affidavit of Dr. Eilerman who performed the knee replacement in December 2005. Dr. Eilerman stated that "it was evident that Mr. Hill's right knee was 'worn out' in layman terms . . . and that a total knee replacement would be required in order to give Mr. Hill maximum relief both in January 2005 as well as October 2005."

Summary judgment is appropriate only when there is no genuine issue of material fact. The material fact at issue here is whether or not there is a causal nexus between Mr. Hill's earlier injuries and his alleged need for right knee replacement surgery after his fall in November 2004. "In all but the most obvious cases, such as the loss of a limb or of an eye, medical causation and the permanency of an injury must be established by expert medical testimony." *Washington County Bd. of Ed. v. Hartley*, 517 S.W.2d 749, 751 (Tenn. 1974). We find that the medical evidence submitted by the parties created a genuine issue of material fact as to whether Mr. Hill's need for a right knee replacement was caused by his earlier compensable injuries. Dr. Collier opined that it was while Dr. Parsons questioned the need for a knee replacement. Dr. Weissfeld suggested that the right knee replacement could have been performed earlier. Dr. Eilerman opined that the right knee replacement was necessary because Mr. Hill's knee was "worn out." These opinions are expressed in the form of affidavits and medical records, rather than depositions. Thus their relative weight cannot be assessed, nor should they be in the context of a motion for summary judgment. We

therefore conclude that the trial court erred in granting summary judgment on the issue of whether or not Employer was liable for the cost of the right knee replacement.

We note that the trial court ruled in the alternative that Employer was not responsible for the cost of the right knee replacement because it was non-authorized care. It is true that Dr. Eilerman was not authorized by Employer as required by Tenn. Code Ann. § 50-6-204. However, an employer who denies liability for an injury claimed by an employee is in no position to insist upon the statutory provisions respecting the choosing of physicians. *CNA Ins. Co. v. Transou*, 614 S.W.2d 335, 337-38 (Tenn. 1981) (citing *Paristyle Beauty Salon, Inc. v. Chandler*, 207 Tenn. 587, 341 S.W.2d 731 (1960)). It is undisputed that Employer cut off all medical benefits on April 15, 2005 and that Employee's right knee replacement was performed after that date. Therefore, if the surgery was made necessary by the original compensable injuries, Employer cannot complain that Dr. Eilerman was not an authorized physician.

We conclude that the trial court correctly granted summary judgment to Employer concerning Employee's claim, pursuant to the supplemental agreement to the 2003 settlement, for temporary total disability benefits following his abortive return to work in February 2005. Dr. Parsons had released him to return to desk work at that time. Employer provided such work. Mr. Hill contended that he was unable to perform his job as a result of ongoing pain and the side-effects of several medications that he was taking. He testified in his deposition that he began working on the barn, which he had been planning for some time, later that month. The video recording of his activities was made over several days in the latter part of March 2005. The trial court found, and this Panel agrees, that those activities are not compatible with a conclusion that Employee was temporarily totally disabled during that time period. If, on remand, the trial court finds that Employer is liable for the right knee replacement surgery, then it would also be liable for temporary disability benefits from the date of surgery until Employee was able to engage in sedentary work. It would not, however, be liable for such benefits from February 14 until the date of surgery.

2. *Procedures of Trial Court in Granting Motion and Entry of Order*

Mr. Hill's brief states, and Employer's brief confirms, that after hearing the parties' motions for summary judgment, the trial court called Employer's counsel, informed him that he had prevailed, and asked him to draft an order. Employer's counsel drafted a 45-page opinion and submitted it to the court and to opposing counsel in accordance with Davidson County Local Rule 33. Employee did not file an alternative order, nor any objections to the proposed order. The trial court ultimately signed the order submitted by Employer, without modification. Employer argues that the phone call to Employer's counsel was an *ex parte*

contact between the trial court and counsel for one party, in violation of Tennessee Rules of the Supreme Court, R. 10, Cannon 3, B(7).[2]

Although the trial court should have notified Employee that Employer had prevailed, Mr. Hill was effectively notified when he received the proposed order from the Employer. Mr. Hill's failure to object to the proposed order is not excused by the trial court's failure to notify him. Additionally, any harm Mr. Hill suffered in regard to his workers' compensation claim has been remedied by our reversal of the trial court's grant of summary judgment.

Although it is not the best practice, Rule 52 of the Tennessee Rules of Civil Procedure allows one party to draft proposed findings for the court. The Supreme Court has held:

> We agree that the preparation of findings and conclusions is a high judicial function. We are committed to the requirement that the trial court's findings and conclusions be its own. However, we are also aware that the thorough preparation of suggested findings and conclusions by able counsel can be of great assistance to the trial court. In an effort to strike a balance between these considerations, we hold that although it is improper for the trial court to require counsel to prepare findings, it is permissible and indeed sometimes desirable for the trial court to permit counsel for any party to submit proposed findings and conclusions. Findings prepared by the trial judge which represent his independent labor are preferable, however we do not disapprove of party-prepared findings. . . . We wish to point out that before adopting findings prepared by counsel, the trial judge should carefully examine them to establish that they accurately reflect his views and conclusions, and not those of counsel. He should also ascertain that they adequately dispose of all material issues, and to assure that matters not a proper part of the determination have not been included.

Delevan-Delta Corp. v. Roberts, 611 S.W.2d 51, 52-3 (Tenn. 1981).

The pitfalls of adopting *in toto* lengthy findings and conclusions submitted by a party are evident in the order at issue here. The order includes the following finding: "The Court

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[2]"A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications made to the judge outside or the presence of the parties concerning a pending or impending proceeding."

finds that the activities of the Defendant on the videotape are fraudulent." The inclusion of this finding was erroneous, since Employer's fraud claim was not raised in either motion for summary judgment and was not argued by either party. However, it amounts to dicta, because the order states in its conclusion: "The issues relative to Mr. Hill's fraud were not before this Court on motion for summary judgment and the Court, therefore, does not address these issues specifically at this time."

3. *Venue*

In his answer in the trial court, and his brief before this Panel, Employee contends that Davidson County is not a proper venue for this action. We disagree. The terms of the 2003 settlement agreement, and the supplemental agreement entered into at the same time, provided the basis for virtually all of the claims made by both parties. That agreement was approved by the Circuit Court of Davidson County, and venue properly lies in that court.

We note that Employee has raised several additional issues in his brief. Most of these concern the evidence considered by the trial court in connection with the motions for summary judgment. Our reversal of the entry of summary judgment renders those considerations moot.

Conclusion

The order of the trial court is modified as follows: The dismissal of Employee's claim for medical benefits under the workers' compensation law, and the 2003 settlement agreement, is reversed. The dismissal of Employee's claim against the Second Injury Fund for permanent partial disability benefits is affirmed. The dismissal of Employee's claim for temporary total disability benefits from February 14, 2004 until the date of his surgery is affirmed. The dismissal of Employee's claim for temporary disability benefits for other periods is vacated. The denial of Employee's motion for summary judgment is affirmed. The appeal is transferred to the Court of Appeals for consideration of Employee's appeal concerning the dismissal of his retaliatory discharge claim. After the Court of Appeals acts on that appeal, the workers' compensation claim will be remanded to the trial court for further proceedings consistent with this opinion. Costs are taxed to the appellees, Federated Rural Electric Insurance Exchange and Fort Loudon Electric Cooperative, and their sureties, for which execution may issue if necessary.

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JON KERRY BLACKWOOD, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FEDERATED RURAL ELECTRIC INSURANCE EXCHANGE ET AL. v. WILLIAM R. HILL

Circuit Court for Davidson County
No. 05C1284

No. M2009-01772-SC-WCM-WC - Filed - December 21, 2010

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by William R. Hill pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

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

The workers' compensation portion of this appeal is concluded. Costs are assessed to Federated Rural Electric Insurance Exchange and Fort Loudon Electric Cooperative and their sureties, for which execution may issue if necessary.

Pursuant to this Court's order of January 7, 2010, the wrongful discharge portion of this appeal is transferred to the Court of Appeals.

It is so ORDERED.

PER CURIAM

William C. Koch, Jr., J., not participating