

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

JEROME DOUGLAS v. LEDIC REALTY SERVICE ET AL.

**Appeal from the Chancery Court for Shelby County
No. CH-10-1341-1 Walter L. Evans, Chancellor**

**No. W2012-00345-SC-WCM-WC - Mailed December 6, 2012;
Filed February 13, 2013**

An employee alleged that he sustained a compensable injury to his lower back. His employer denied his workers' compensation claim. At trial, the employee failed to present expert medical testimony. At the conclusion of the employee's case, the trial court granted the employer's motion for involuntary dismissal pursuant to Tennessee Rule of Civil Procedure 41.02(2) because the employee did not present any expert medical testimony. The employee has appealed. 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**

JANICE M. HOLDER, J., delivered the opinion of the Court, in which DONALD E. PARISH, SP. J., and TONY A. CHILDRESS, SP. J., joined.

Jerome Douglas, Memphis, Tennessee, pro se

M. Dean Norris, Memphis, Tennessee, for the appellees, Ledic Realty Service and Liberty Mutual Group

MEMORANDUM OPINION

Factual and Procedural Background

Ledic Realty Services ("Ledic") employed Jerome Douglas as a maintenance worker from June 2007 through July 2008. His job involved preparing empty apartments for occupancy. Mr. Douglas frequently was required to move appliances in performing his job.

Mr. Douglas alleged that he injured his back on May 21, 2008, while moving appliances in the course of his employment.

Mr. Douglas reported the injury to Dorcas Patton, Ledic's assistant property manager. Ms. Patton reported the injury to Ledic's property manager, Katie Knight. Mr. Douglas sought treatment at the emergency room after reporting his injury. He was later contacted by a representative of Ledic's workers' compensation insurer, and he informed the representative that he injured his back moving a refrigerator for Ledic. Mr. Douglas was referred to Concentra Medical Centers for treatment and was placed on light duty. He was terminated on July 31, 2008, however, because Ledic lost the contract to manage the properties at which Mr. Douglas had worked and because he had failed to fill out a leave of absence form. Ledic's workers' compensation insurer denied further medical benefits, and Mr. Douglas sought and received medical treatment from a physician of his choosing.

Mr. Douglas filed a complaint in the Chancery Court for Shelby County for workers' compensation benefits on July 26, 2010, and a trial was held on November 7, 2011. The trial court approved Mr. Douglas' request to file his case on a pauper's oath, and Mr. Douglas represented himself throughout the trial. Prior to trial, Mr. Douglas served trial subpoenas for several of his treating physicians. On the day of trial, attorneys appeared on behalf of those physicians and moved to quash the subpoenas pursuant to Tennessee Code Annotated section 24-9-101 (a)(6) (Supp. 2011).

The trial court granted the motions to quash the subpoenas, explaining to Mr. Douglas that practicing physicians are exempt from being subpoenaed to testify at trial but may be subpoenaed to testify by deposition. See Tenn. R. Civ. P. 30.01, 32.01. The trial court informed Mr. Douglas that depositions of the physicians would be required if Mr. Douglas believed their testimony was crucial to his case. When questioned by the trial court, Mr. Douglas stated that he wished to proceed to trial despite the trial court's ruling.

Mr. Douglas presented several witnesses and testified on his own behalf. During cross-examination, Mr. Douglas appeared to acknowledge that he sought medical treatment for back pain prior to May 21, 2008. He testified that he sought employment after being terminated by Ledic but that he was unable to work. He agreed that one of the doctors who treated him, Dr. Owen Tabor, had released him with no permanent restrictions.

Ms. Patton testified that she was an assistant property manager for Ledic in May 2008. She confirmed that Mr. Douglas reported an injury to her on May 27, 2008, and that she had informed Ms. Knight of Mr. Douglas' communication. Ms. Patton believed that Ms. Knight did not complete an injury report. Ms. Patton also testified that Mr. Douglas returned to work on approximately June 18, 2008. He was assigned to work with another employee but

was sent home due to back pain. During cross-examination, Ms. Patton testified that Mr. Douglas had complained of back pain for approximately two months prior to reporting his injury.

At the close of Mr. Douglas' proof, Ledic moved for involuntary dismissal pursuant to Tennessee Rule of Civil Procedure 41.02(2). The trial court granted Ledic's motion after finding that Mr. Douglas had failed to provide expert medical evidence and had therefore failed to sustain his burden of proof regarding causation and permanency of his injury. Judgment was entered accordingly, and Mr. Douglas appealed. This appeal has been referred to a Special Workers' Compensation Appeals Panel for a report of findings of fact and conclusions of law. See Tenn. Sup. Ct. R. 51, § 1.

Analysis

In his various filings before this Panel, Mr. Douglas has made accusations of misconduct by Ledic's attorney and court personnel and has questioned the accuracy of the trial transcript. He has also complained about the trial court's denial of certain motions made after the filing of this appeal.

As the appellant in this case, Mr. Douglas has the burden of providing a record on appeal. See Tenn. R. App. P. 24. Mr. Douglas did not file a transcript or submit a statement of the evidence and instead relied on the transcript filed by Ledic. Mr. Douglas has presented no competent evidence that the record is incorrect and should not be heard to complain about the transcript prepared by Ledic when he failed to prepare a record on appeal. Cf. State v. Ballard, 855 S.W.2d 577, 560-61 (Tenn. 1993) (citing State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983) and State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988)) (stating that an incomplete record prevents an a court from reaching the merits of an issue on appeal).

Mr. Douglas also filed a number of motions with the trial court after he filed his notice of appeal, including a motion to compel and a motion to continue. An appeal is properly perfected when a party files a notice of appeal and a bond for costs unless exempted by statute. Spann v. Abraham, 36 S.W.3d 452, 461 (Tenn. Ct. App. 1999); see also Tenn. R. App. P. 6(a). Mr. Douglas perfected his appeal by filing a notice of appeal and an affidavit of indigency on February 13, 2012. The legal effect of a properly perfected appeal is to remove jurisdiction from the trial court and to vest jurisdiction in the appellate court.¹ See Spann, 36 S.W.3d at 461. The trial court therefore had no jurisdiction to hear Mr. Douglas' motions after the notice of appeal was filed.

¹ A trial court, however, retains jurisdiction to hear motions filed pursuant to Tennessee Rules of Civil Procedure 50.02, 52.02, 59.02, and 59.04. See Tenn. R. App. P. 4(e); see also Tenn. R. App. P. 4(b).

Dismissal of Mr. Douglas Claim

The determinative issue before us is whether the trial court erred by finding that Mr. Douglas failed to sustain his burden of proof. We review the trial court's determination on issues of fact de novo on the record accompanied by a presumption of correctness unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). A trial court's conclusions of law, however, are reviewed de novo on the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Mr. Douglas presumably intended to present proof of causation and the extent of his injury through the testimony of the doctors he subpoenaed to appear at trial. Tennessee Code Annotated section 24-9-101(a)(6), however, exempts practicing physicians from being subpoenaed to testify at trial but permits practicing physicians to be subpoenaed to testify by deposition. The trial court granted the physicians' motions to quash the subpoenas to testify at trial. In its ruling, the trial court stated that Mr. Douglas indicated that he was prepared to go to trial without assistance of counsel following the court's ruling quashing the subpoenas for the physicians' attendance at trial. The trial court's ruling clearly stated the law that applies to workers' compensation cases and described Mr. Douglas' burden of proof, including the proof required as to the issues of causation and permanency. The trial court then ruled:

The Court has listened very carefully to the testimony presented by Mr. Douglas and his witnesses. It is in dispute as to when Mr. Douglas sustained what he has characterized as a back injury.

The Court is satisfied that Mr. Douglas in his job worked with Ledic, was a one-man show in the sense that he was – had the responsibility as a maintenance man to carry appliances and equipment in the two facilities that he worked in on a – without the help and assistance of others.

And at some point during that employment time, he sustained a back injury. But there's proof and evidence in the record that Mr. Douglas may have sustained this injury prior to the May 21st date that he indicated the injury had occurred.

The Court is satisfied that Mr. Douglas was probably injured as a result of his work with Ledic. But based upon the workers' compensation statute, it must be found by a preponderance of the evidence as to when that injury occurred and was the defendant and the defendant [sic] agents duly notified

that . . . Mr. Douglas sustained an injury that medically related back to the date of the incident that created the injury.

In this case there's no proof in the record to show that the backache or the back pain that Mr. Douglas is or was suffering from is causally related to the incident on May the 21st.

There's no stipulation in the record on either side as to what Mr. Douglas was making or what his salary and/or wage rate was at the time of the alleged injury or any proof as to what, if any, compensation Mr. Douglas would receive if it was found that his work-related injury – that his pain was related to the incident on May – May the 21st. The Court cannot speculate as to the relationship. It must be proven by competent proof and evidence.

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In a nutshell, the Court has no proof, no medical proof that the back injury which Mr. Douglas is complaining of was caused by his employment on the job.

Mr. Douglas chose to proceed to a trial of his case after the motions to quash had been granted. We are mindful that the appellant represented himself at trial and was undoubtedly unfamiliar with the procedures used to present medical evidence.

Self-represented litigants assume the burden of complying with the complex and sometimes technical procedures of the court. Irvin v. City of Clarksville, 767 S.W.2d 649, 652 (Tenn. Ct. App. 1988). Although conducting a trial with an inexperienced litigant can be difficult, trial courts should be understanding of the difficulties encountered by a litigant with no experience or formal training. Irvin, 767 S.W.2d at 651-52.

Nonetheless, trial courts may not excuse self-represented parties from complying with the same substantive and procedural rules that represented parties are expected to observe. Edmundson v. Pratt, 945 S.W.2d 754, 755 (Tenn. Ct. App. 1996) (dismissing a late-filed appeal of a self-represented litigant). It is appropriate, however, for the trial court to provide self-represented parties with some latitude to ensure that the trial continues on a level playing field. Irvin, 767 S.W.2d at 652 (citing Childs v. Duckworth, 705 F.2d 915, 922 (7th Cir. 1983)) (observing that parties who choose to represent themselves are entitled to fair and equal treatment). Throughout the trial of this case, the trial court provided considerable latitude to Mr. Douglas, permitting testimony and evidence to be introduced over the many objections made by opposing counsel.

It is possible that medical evidence to support Mr. Douglas' claim existed and that Mr. Douglas may have succeeded in deposing physicians in advance of his trial had he been aware that these physicians were not subject to subpoena for trial. Mr. Douglas, however, did not present expert medical testimony as to the causation and permanency of his injury after the trial court quashed the subpoenas to compel the physicians to testify at trial. Except in the most obvious cases, causation and permanency in a workers' compensation case must be proven by expert medical testimony. Arias v. Duro Std. Prods. Co., 303 S.W.3d 256, 264 (Tenn. 2010).

The lay testimony presented at the trial of this matter was sufficient to permit the trial court to determine that Mr. Douglas injured his back in the course of his employment and that he properly reported the injury to Ledic. However, there was no expert medical evidence presented by Mr. Douglas regarding the existence or extent of any permanent impairment, the reasonableness and necessity of any medical treatment received by Mr. Douglas, or the potential need for future medical treatment.² Mr. Douglas, therefore, failed to sustain his burden of proof. We therefore affirm the trial court's dismissal of Mr. Douglas' complaint pursuant to Tennessee Rule of Civil Procedure 41.02(2).

Court Costs

In its order dismissing Mr. Douglas' claim, the trial court taxed court costs to Ledic. Ledic asserts that this decision was erroneous because it was the prevailing party in the case. It relies on Tennessee Rule of Civil Procedure 54.04(1) which provides, in pertinent part, "Costs included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs" Tennessee Code Annotated section 20-12-101 (2009) similarly states, "The successful party in all civil actions is entitled to full costs, unless otherwise directed by law or by a court of record, for which judgment shall be rendered."

The Panel acknowledges that court costs are customarily taxed to the losing party in a civil action. See Gouge v. McInturff, 92 S.W.2d 198, 199 (Tenn. 1936). Both Tennessee Rule of Civil Procedure 54.04(1) and Tennessee Code Annotated section 20-12-101 grant the trial court the discretion to depart from that custom. Tennessee Code Annotated section

² This voluminous record contains medical reports and information from Methodist Hospital, Dr. Tenny R. Jackson, Concentra Medical Centers, Leonard A. Hayden, and others, as well as letters and emails sent and received by Mr. Douglas. Although these documents were accepted for filing by the Chancery Court Clerk on March 23, 2012, such filing does not constitute evidence admitted in the trial of the case. See In re Bernard T., 319 S.W.3d 586, 591 n.3 (Tenn. 2010) (citing UT Med. Grp., Inc. v. Vogt, 235 S.W.3d 110, 122 (Tenn. 2007)). We also observe that at the time Mr. Douglas filed these documents with the trial court, the trial court had lost jurisdiction over the case by virtue of Mr. Douglas' appeal.

20-12-119(b) (2009) authorizes the trial court “to apportion the cost between the litigants, as in the presiding judge’s opinion the equities of the case demand.” A trial court’s decision concerning costs is therefore reviewed on an abuse of discretion standard. See Perdue v. Green Branch Min. Co., 837 S.W.2d 56, 60 (Tenn. 1992).

A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical or unreasonable decision, or bases its decision on a clearly erroneous assessment of the evidence. Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 524 (Tenn. 2010). When reviewing a lower court’s discretionary decision, an appellate court should determine whether the factual basis for the decision is properly supported by evidence in the record, whether the trial court identified and applied the appropriate legal principles, and whether the trial court’s decision is within the range of acceptable alternative dispositions. Lee Med., Inc., 312 S.W.3d at 524.

Although the trial court did not make any findings or otherwise explain its decision to deviate from the customary practice of taxing costs against the losing party, the applicable rules permit the trial court the discretion to tax the prevailing party. See Tenn. Code Ann. § 20-12-101; Tenn. R. Civ. P. 54.04(1). Mr. Douglas was indigent and was self-represented, and the outcome of his case turned on his lack of knowledge of the applicable legal rules. Under these circumstances, we cannot say that the trial court abused its discretion by taxing the prevailing party.

Despite our conclusion that the trial court did not abuse its discretion by assessing costs against the prevailing party, we see no reason to depart from the usual practice of taxing costs on appeal to the party losing on appeal. See Tenn. R. App. P. 40(a). We therefore conclude that costs on appeal should be assessed against Mr. Douglas.

Frivolous Appeal

Ledic also requests that this Panel find this appeal frivolous and award it attorneys’ fees and expenses pursuant to Tennessee Code Annotated section 27-1-122 (2000). Our Supreme Court has stated that “imposing a penalty for a frivolous appeal is a remedy which is to be used only in obvious cases of frivolity and should not be asserted lightly or granted unless clearly applicable.” Henderson v. SAIA, Inc., 318 S.W.3d 328, 342 (Tenn. 2010). We find that this case does not warrant the imposition of sanctions.

Conclusion

The judgment of the trial court is affirmed. Costs of this appeal are taxed to Jerome Douglas, for which execution may issue if necessary.

JANICE M. HOLDER, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JEROME DOUGLAS v. LEDIC REALTY SERVICE ET AL.

**Chancery Court for Shelby County
No. CH101341**

No. W2012-00345-SC-WCM-WC - Filed February 13, 2013

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Jerome Douglas 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.

Costs are assessed to Jerome Douglas, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Janice M. Holder, J., not participating