IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
October 28, 2013 Session

DENNIE STOUGH v. GOODYEAR TIRE AND RUBBER COMPANY ET AL.

Appeal from the Chancery Court for Obion County
No. 29256 W. Michael Maloan, Chancellor

No. W2012-02275-WC-R3-WC - Mailed March 11, 2014; Filed April 11, 2014

An employee sustained a compensable lower back injury, had surgery, returned to work, and settled his claim. Several months later, he re-injured his lower back. After several surgical procedures, he was unable to return to work. He filed this action for workers' compensation benefits against his employer and the Second Injury Fund. The trial court awarded permanent total disability benefits, apportioning 50% of the award to the employer and 50% to the Fund. The Fund has appealed, contending that the trial court erred by assigning any liability to it because the later injury rendered the employee totally disabled without regard to the first injury. We conclude that the trial court failed to provide the basis for its apportionment of liability between the Fund and the employer. We therefore reverse the trial court's judgment to that extent and remand the case for further consideration on this issue.

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

BEN H. CANTRELL, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and DONALD E. PARISH, SP. J., joined.

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

Randy M. Chism, Union City, Tennessee, for the appellee, Goodyear Tire and Rubber Company.

OPINION

Factual and Procedural Background

Dennie Stough was hired by the Goodyear Tire & Rubber Company ("Goodyear") as a mechanic in December 2000. His job consisted of repairing and maintaining gear boxes, sprockets, conveyor belts and performing general mechanical work. On September 25, 2006, he injured his lower back while pushing a conveyor belt. The injury was accepted as compensable. Mr. Stough was initially evaluated by Dr. Laverne Lovell, a neurosurgeon. Eventually, he came to be treated by Dr. Shawn McDonald, who performed a discectomy at the L4-5 level. In September 2007, Mr. Stough returned to work, without permanent restrictions or limitations, in the same job that he held prior to the injury. A settlement of his workers' compensation claim for that injury was approved by the Chancery Court for Obion County on December 5, 2007.

The injury at issue in this appeal occurred on February 18, 2008, when Mr. Stough bent over to remove a belt from a machine. As he stood up, he felt a "pop" in his lower back. He then began to experience a burning sensation in his legs and pain in his lower back. He reported the injury to Goodyear, and was referred again to Dr. McDonald, who recommended a lumbar fusion from the L3 to S1 levels of the spine. Mr. Stough sought a second opinion from Dr. Lovell, who performed an examination and agreed with Dr. McDonald's recommendation. Dr. McDonald performed the procedure but Mr. Stough did not improve. He was thereafter referred to Dr. Brian O'Shaughnessy, a neurosurgeon, who performed two additional spinal fusions. After those procedures, Mr. Stough's spine was fused from the T2 through S1 levels. He testified that these procedures did not relieve his symptoms. Mr. Stough was referred to a pain management clinic, and he did not return to work for Goodyear. A Benefit Review Conference was held on July 28, 2011, but the parties were unable to resolve their differences. Mr. Stough filed this action against Goodyear and the Second Injury Fund ("the Fund") in the Chancery Court for Obion County on August 1, 2011.

Mr. Stough testified that he was forty-one years old. He is a high school graduate and had "a little" vocational training in auto mechanics and auto body work. Prior to being hired by Goodyear, he had worked as a residential air conditioning repairman and had performed maintenance and repair of machinery in two factories. After the September 2006 injury, he returned to work with no permanent restrictions and was able to perform the same job he had previously held without modifications or accommodations. He worked for a short time after the February 2008 injury, but was unable to return to work after the surgeries performed by Drs. McDonald and O'Shaughnessy. He was eventually terminated by Goodyear because of his medical restrictions. After being released by Dr. O'Shaughnessy, he was referred to Dr.

Roy Schmidt for pain management, who prescribed pain medication and administered trigger point injections and nerve blocks. Dr. Schmidt referred Mr. Stough to the Rosomoff Clinic in Florida, a program that incorporated physical therapy, occupational therapy, acupuncture, and counseling. After a three-week program, Mr. Stough was able to function without pain medication for a time. However, Dr. Schmidt subsequently represcribed Lortab for Mr. Stough.

Mr. Stough went through the Rosomoff program a second time in April 2012. When he completed the program, his medication regimen consisted of valium and amitriptyline only, and he remained on that regimen at the time of the trial. He testified that he had constant pain in his back, which he described as averaging seven or eight on a scale of ten. His daily activities consisted of light housework and cooking. He was able to walk one-half to one mile per day. His pre-injury hobbies included building and driving race cars, hunting, and fishing. He had stopped working on and racing cars after the 2006 injury, but was able to continue with his other hobbies. After the second injury, his participation in all recreational activities was limited. He had difficulty sleeping due to his back pain.

Dr. Samuel Chung, a physiatrist, examined Mr. Stough at the request of his attorney, and his opinions were introduced into evidence via a Standard Form Medical Report For Industrial Injuries ("C-32"). Dr. Chung determined that Mr. Stough retained a 39% permanent impairment to the body as a whole from the February 2008 injury and resulting surgeries. He recommended that Mr. Stough "avoid prolonged walking, standing, stooping, squatting, bending, climbing, excessive flexion, extension, rotation of his thoracic and lumbar area." Dr. Chung further concluded that Mr. Stough "is unable to work in any heavy duty labor activity which includes lifting of 20 pounds or greater at this time."

Mr. Stough also introduced the deposition testimony of Dr. Robert Kennon, a vocational evaluator. Dr. Kennon administered intelligence and achievement tests to Mr. Stough, and the results of those tests revealed that he had average intelligence, was able to read at a ninth-grade level, and could perform math at a seventh-grade level. Dr. Kennon noted that Mr. Stough's work history consisted mainly of "more physically demanding material type handling work." In addition to Dr. Chung's evaluation, Dr. Kennon reviewed the medical records of Dr. O'Shaughnessy, which included a functional capacity evaluation ("FCE") performed on April 13, 2011. The FCE

> revealed that [Mr. Stough] was able to occasionally lift and carry 40 pounds, from the floor 40 pounds, to the shoulder 40 pounds. He could frequently engage in that work activity at 30 pounds for each of those and constantly at 20 pounds. That would place him in what would be classified as a light and

> medium work range. However, he was rated in non-material handling activities as only being able to sit at an occasional basis, stand and walk at an occasional basis, stand and reach at an occasional basis and perform low level activity and elevated activity at an occasional basis.

Dr. Kennon took account of both Dr. Chung's recommendations and the FCE results in his analysis. He determined that Mr. Stough had a vocational disability between 98.95% and 99.89%. He testified that current unemployment rates in Mr. Stough's home county, Obion County, and surrounding counties ranged from 12% to 17%. On cross-examination, he stated that Mr. Stough had the ability to learn the information necessary to perform a new job and might be suited to supervisory work in a factory based on his experience and capabilities. Dr. Kennon noted, however, that supervisory positions usually require knowledge and experience of the particular business and that Mr. Stough's limited field of experience was a barrier to obtaining these types of jobs. During questioning by the Fund, Dr. Kennon stated that his evaluation was based solely on the effects of the February 2008 injury.

Goodyear presented the deposition testimony of Dr. Lovell, who was the initial treating physician for the 2006 injury and also provided a surgical second opinion after the 2008 injury. At Goodyear's request, Dr. Lovell reviewed the medical records of Dr. McDonald and Dr. O'Shaughnessy. Dr. Lovell testified that an MRI he ordered in October 2006 showed significant, degenerative changes in Mr. Stough's spine, stating it "looked like someone who would be in their late fifties or even as old as seventy." He ordered a CT/Myelogram that showed spinal stenosis at L3-4, L4-5 and L5-S1. After reviewing that study, he recommended against surgery, ordered an FCE, and suggested that Mr. Stough seek a second opinion about future treatment. He explained that his "general feeling was that we had a patient with a spine that was better left untouched surgically and managed with work restrictions and maybe pain management." Mr. Stough chose not to have the FCE and sought treatment from Dr. McDonald. Dr. Lovell then discharged Mr. Stough from his care, assigning 0% impairment and imposing no work restrictions.

Mr. Stough returned to Dr. Lovell in April 2008 for a second opinion on the L3-S1 fusion proposed by Dr. McDonald to treat the February 2008 injury. Dr. Lovell agreed with Dr. McDonald's recommendation and explained that Mr. Stough:

> had an extremely degenerated and aged appearing spine for a 36 year old man. The surgical procedure that was done May of 2007 required removal of bone, ligament and probably even a little bit of the facet joints, which are stabilizing joints on either

> side of the spine. In addition to that the annulus or the covering of the disc was cut and disc material was removed. All of those anatomic features are part of the stabilization in the normal spine. When those are all surgically removed or weakened the patient is then placed in a situation for the much greater likelihood of going on to re-injure themselves and require additional surgery.
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> So, I guess in summary, the original surgery placed the patient at significant risk for future opposition and the requirement for fusion.
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> Once the door was opened and surgical intervention was performed on this patient, it then basically put him in a situation where basically Pandora was out of the box and in order to help the patient you had to go ahead and do the more aggressive definitive surgery of total decompression and fusion.

Dr. Lovell stated that the fusion of Mr. Stough's spine from T2 to S1 took away his range of motion in the lumbar and thoracic spine. Although he did not believe that the procedure rendered Mr. Stough unable to work, Dr. Lovell opined that Mr. Stough could not return to his previous job at Goodyear, stating that Mr. Stough "would have been better off not to have ever had surgery and just gone ahead and found a different line of work," because of the severity of the degenerative changes present in 2006.

Patsy Bramlett, a vocational evaluator, testified live at trial. She conducted a vocational analysis of Mr. Stough at Goodyear's request. Ms. Bramlett concluded that Mr. Stough sustained a vocational disability of 58% to 60% as a result of the 2008 injury. She had reviewed medical records and Dr. Kennon's written report but did not interview Mr. Stough. She relied on the results of Dr. Kennon's testing of Mr. Stough's intellectual capabilities, and her assessment of Mr. Stough's vocational disability was based on restrictions set out in a May 12, 2012 report from the Rosomoff Clinic. Ms. Bramlett testified that she understood the Rosomoff results to represent Mr. Stough's most recent medical restrictions. She also stated on cross-examination that she had reviewed Dr. Kennon's summary of Dr. Chung's findings but had not read Dr. Chung's report. Ms. Bramlett understood that Dr. Chung had recommended that Mr. Stough "avoid prolonged walking, standing, stooping, squatting, bending, climbing and excessive flexion, extension, or rotation of the thoracic or lumbar area." Ms. Bramlett agreed that if Dr. Chung had recommended that Mr. Stough "never do any climbing, never any balancing, stooping, kneeling, crouching, crawling or twisting[,]" a vocational disability rating based on those

limitations would be greater than 58% to 60%. During cross-examination by the Fund, she testified that her assumptions about Mr. Stough's restrictions were consistent with the language contained in Dr. Chung's June 7, 2011 report.

The trial court found from the bench that Mr. Stough was permanently and totally disabled, but reserved ruling on the apportionment of the award between Goodyear and the Fund. On September 26, 2012, the court issued a written judgment assigning 50% of the liability to Goodyear and 50% to the Fund. The Fund appealed, asserting that the second injury caused Mr. Stough to be permanently and totally disabled without regard to his prior injury and the trial court therefore erred by apportioning any liability to it. This case was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51.

Analysis

The standard of review of issues of fact in a workers' compensation case 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). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness's demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Foreman 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).

The apportionment of the award in this case is governed by Tennessee Code Annotated section 50-6-208(a)(1), which provides:

> 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 payments 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.

Our Supreme Court has directed that, when applying this section,

> [I]t is essential that the trial court determine the extent of disability resulting from the subsequent injury without consideration of the prior injury. In other words, the trial court must find 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) (internal citation omitted).

The Fund asserts that the evidence preponderates against the trial court's apportionment of liability. It argues that the later injury was "catastrophic" and would have resulted in permanent and total disability even if the first injury had not occurred. In such a circumstance, the employer would be liable for the entire award. See Hailey v. E.W. James & Sons, No. W2003-02499-WC-R3-WC, 2004 WL 2186604 (Tenn. Workers' Comp. Panel Sept. 21, 2004). In support of its position, the Fund contends that after the September 2006 injury and resulting surgery, Mr. Stough returned to the same job he previously held, without medical restrictions or limitations. Dr. Kennon testified that Mr. Stough had 0% vocational disability at that time. In contrast, the February 2008 injury led to three surgical procedures that fused Mr. Stough's spine from the T2 to S1 levels. These surgeries severely limited Mr. Stough's ability to bend, turn, stand, and walk. Mr. Stough was in constant pain, had difficulty sleeping, was unable to engage in his pre-injury recreational activities, and could not return to work for Goodyear.

In response to the Fund's position, Goodyear points to Dr. Lovell's testimony that the surgery performed as a result of the September 2006 injury weakened Mr. Stough's spine and increased the risk of a subsequent, more serious injury. Goodyear therefore argues that Mr. Stough's two back injuries cannot be completely separated for the analysis called for in Allen. We disagree. Tennessee Code Annotated 50-6-208(a)(1) explicitly *requires* the trial court to determine "the disability that would have resulted from the subsequent injury." As our Supreme Court has previously recognized, "[T]he trial court must find 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, 36 S.W.3d at 77.

In this case, however, the trial court made no such findings. Instead, the trial court's order merely apportions liability in equal shares to Goodyear and the Fund. Without the underlying basis on which the trial court reached this conclusion, we are unable to conduct a meaningful review of the issues presented. We therefore reverse the trial court's apportionment of liability and remand this case for a specific finding of fact regarding the extent of disability caused by the February 18, 2008 injury without consideration of the 2006 injury.

Conclusion

The portion of the judgment of the trial court apportioning liability between Goodyear and the Fund is reversed, and this case is remanded to the trial court for further determination of the extent of disability caused by Mr. Stough's February 18, 2008 injury without consideration of his 2006 back injury. The costs of this appeal are taxed equally to the appellant, the Second Injury Fund, and its surety, and the appellee, Goodyear Tire and Rubber Company, and its surety, for which execution may issue if necessary.

Ben H. Cantrell, Senior Judge.

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

DENNIE STOUGH v. GOODYEAR TIRE AND RUBBER COMPANY ET AL.

Chancery Court for Obion County
No. 29256

No. W2012-02275-WC-R3-WC - Filed April 11, 2014

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's 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 Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed equally to the Appellant, the Second Injury Fund, and its surety, and to the Appellee, Goodyear Tire and Rubber Company, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM