IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 26, 2009 Session

WILLIAM DOWNEY v. GRIFFIN INDUSTRIES

Direct Appeal from the Chancery Court for Hamilton County
No. 08-0820 Frank W. Brown, III, Chancellor

No. E2009-00313-WC-R3-WC - Filed April 15, 2010
Mailed - January 21, 2010

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The trial court approved a settlement of this workers' compensation claim. The settlement was presented to the court by means of an affidavit executed by the employee and a telephone conference between the court and the employee. Approximately six weeks later, the employee petitioned to set aside the settlement under Tenn. Code Ann. § 50-6-206(a) and alternatively, Tenn. R. Civ. P. 60.02. The trial court dismissed the petition for relief from Judgment. The employee has appealed. We affirm the order dismissing the petition to set the settlement aside.

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

THOMAS R. FRIERSON, II, SP. J., delivered the opinion of the court, in which SHARON G. LEE, J., and JON KERRY BLACKWOOD, SR. J., joined.

Jeffrey P. Boyd, Jackson, Tennessee for the appellant, William Downey.

Stuart F. James, Chattanooga, Tennessee, for the appellee, Griffin Industries.

MEMORANDUM OPINION

Factual and Procedural Background

At the time of the filing of the instant action, William Downey was a resident of Weakley County, Tennessee. It is undisputed that he sustained a work-related injury to his left shoulder on November 1, 2006. The injury occurred in Campbell County, Tennessee. His employer, Griffin Industries ("Griffin"), is located in Cold Spring, Kentucky. The parties have stipulated that Mr. Downey's injury is compensable under the Act.

The employee's treating physician was Dr. Deborah St. Clair. She performed two surgical procedures on Mr. Downey's shoulder and subsequently released him on April 21, 2008. On July 21, 2008, Dr. St. Clair assigned a 4% permanent anatomical impairment to the body as a whole relating to Mr. Downey's injury. The parties have further stipulated that Mr. Downey experienced a meaningful return to work.

In connection with his claim for benefits, Mr. Downey was contacted by a representative of Griffin's workers' compensation insurer. Mr. Downey agreed to settle his claim based upon 4% permanent partial disability ("PPD") to the body as a whole, with future medical benefits to remain open. The insurer contacted counsel in Chattanooga to obtain approval of the settlement. There is no explanation concerning the reason for choice of counsel in that city. Counsel prepared settlement documents, including a petition, SD-1, decree and affidavit of Mr. Downey. These documents were sent to Mr. Downey to be signed and notarized. Mr. Downey executed the documents, had them notarized and returned them to counsel. The settlement was presented to the Chancery Court of Hamilton County on October 7, 2008. Mr. Downey, self represented, did not appear in person, but instead spoke to the trial court by telephone. The settlement was approved.

On November 24, 2008, Mr. Downey, by counsel, filed a "Petition for Relief from Judgment." The petition sought relief pursuant to Tenn. Code Ann. § 50-6-206(a) and alternatively under Tenn. R. Civ. P. 60.02. Griffin responded by filing a Motion to Dismiss.

The employer subsequently filed a supplemental pleading converting its motion into a motion for summary judgment. The motion was supported by an affidavit of Ginger Gonzalez, a paralegal employed by counsel for Griffin. The affidavit stated in pertinent part as follows:

> During late August of 2008, I was responsible for opening of the above-styled claim for the purpose of acquiring a legally effective settlement approval. At that time, a settlement agreement had already been reached

> between the Plaintiff, and the Defendant's workers' compensation insurance carrier, Great American Insurance Company.
>
> Later, I primarily assisted with the further handling of the above-styled claim. After discussing this matter with the Plaintiff over the telephone, we agreed to set the settlement approval hearing before the Chancery Court of Hamilton County, Part I, on October 7, 2008 via teleconference.
>
> On September 17, 2008, I sent the original copies of the Petition for Workers' Compensation Benefits, Final Decree, SD1 (Workers' Compensation Statistical Data Form) and Affidavit of the Employee, William Downey, for execution. *See Exhibit #1 to this Affidavit, cover letter to Plaintiff dated September 17, 2008.* At the time, my understanding was that the Plaintiff intended to consult with an attorney about the content of the settlement documents. I do not know whether he ever did or not. On September 29, 2008, our office received the settlement documents, which had been signed by the Plaintiff.

Mr. Downey subsequently filed an affidavit, his second in this action, in response to the summary judgment motion. Relevant to this appeal, his affidavit stated:

> I was told by the insurance adjuster that this settlement offer was all that I was entitled to under the Tennessee Workers Compensation Act;
>
> I was told by the insurance adjuster that I would be contacted by their lawyer about the settlement conference;
>
> I was not advised that I needed a lawyer to review my case;
>
> I received paperwork from the insurance company's lawyer in the mail;
>
> I did as instructed and signed and had notarized the paperwork;
>
> I did not review the paperwork closely as I would not have understood the legal language anyway nor did I retain a lawyer to review this paperwork;
>
> I was then advised that I would be called by the insurance company's lawyer when the judge was available to finalize my settlement;
>
> I was not advised to be in Court nor was that ever recommended;

> I was not advised that this court approval should have been done in person nor was I told that it should be done in the county where I was injured or where I lived at the time of my injury.

Oral arguments in connection with the petition were presented on January 20, 2009, and the trial court entered a written Memorandum opinion and order on January 28, 2009. The Chancellor found that Mr. Downey was not entitled to relief under Tenn. Code Ann. § 50-6-206, because more than thirty days had passed since receipt of the settlement documents by the Department of Labor. The trial court further found that Mr. Downey had not sustained his burden of proof that he was entitled to relief under Tenn. R. Civ. P. 60.02. Mr. Downey's petition for relief was therefore denied. Mr. Downey has appealed from that decision, asserting that the trial court erred by failing to grant relief pursuant to Rule 60.02.

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). 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' demeanor and to hear in-court testimony. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Mr. Downey's appeal is premised upon the trial court's adverse ruling on his Tenn. R. Civ. P. 60.02 motion. He does not raise any issues concerning the denial of relief under Tenn. Code Ann. § 50-6-206. A motion made pursuant to Rule 60.02 addresses itself to the sound discretion of the trial judge. The scope of review of an appellate court is to determine if that discretion was abused. *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993); *Banks v. Dement Const. Co.*, 817 S.W.2d 16, 18 (Tenn. 1991); *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991). A trial court abuses its discretion "only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

Mr. Downey's Rule 60.02 motion was based upon two fundamental premises. First, he posited that the settlement did not afford to him substantially the benefits to which he was entitled under the Workers' Compensation Act. Second, he asserted that the practice of "long distance" court approvals should be abolished in Tennessee.

In ruling upon the Rule 60.02 motion, the trial court fully considered the contents of Mr. Downey's two affidavits, the first executed in connection with the approval of the proposed settlement, and his second affidavit, submitted in opposition to Griffin's motion for summary judgment. The first affidavit stated in pertinent portion the following:

> I understand that venue in this matter would be available in either the county of my residence and/or in the County where the accident occurred, among possibly other Counties, and that venue would not automatically lie in Hamilton County. Nonetheless, I agree to waive venue, and to submit to the venue and jurisdiction in the Chancery Court of Hamilton County, expressly waiving my right to appear before either the Chancery or Circuit Court of Weakley or Campbell County, Tennessee, for the purpose of obtaining the Court's approval of the settlement agreement for the injuries that I sustained within the course and scope of my employment with Griffin Industries as a maintenance worker on or about the date of November 1, 2006.
>
> . . .
>
> I understand that as a term of settlement, future medical benefits shall remain open with Dr. Deborah St. Clair, my treating physician, or an approved medical provider.
>
> I have both read and sworn to the Petition and the Final Decree, agreeing to the representations and stipulations therein, which are fully understood.
>
> I voluntarily enter into the settlement of my workers' compensation claim, with full realization of my right to retain an attorney, and to have a Trial to determine my rights available under the Tennessee Workers' Compensation Act.
>
> I declare that I have signed the Petition and Decree to which the Affidavit is attached and understand that, if the Court approves the settlement, I will be entitled to no further benefits whatsoever under the Tennessee Workers' Compensation Act for the accident and injuries described herein,

> other than future medical benefits as specifically provided within the Petition and Final Decree.
>
> Having fully considered the Petition and Decree, I freely, willingly and voluntarily accept the compensation sum of Nine Thousand One Hundred and Sixty-Five Dollars and Sixty-Nine Cents ($9,165.69) as a full and final settlement of my claim in all respects with the exception of future medical benefits as specifically outlined.

There was no additional evidence presented to corroborate the contents of either affidavit. Confronted with this dearth of evidence, the Chancellor applied the "cancellation rule," the operation of which was explained by the court in *Helderman v. Smolin*, 179 S.W.3d 493, 501 (Tenn. Ct. App. 2005) as follows:

> The courts of this state adhere to the rule that contradictory statements by the same witness regarding a single fact will cancel each other out. *Wilson v. Patterson*, 73 S.W.3d 95, 103-04 (Tenn. Ct. App. 2001) (citing *State v. Matthews*, 888 S.W.2d 446, 449 (Tenn. Crim. App. 1993)); *see also Tibbals Flooring Co. v. Stanfill*, 219 Tenn. 498, 410 S.W.2d 892, 896 (1967); *Church v. Perales*, 39 S.W.3d 149, 169-70 (Tenn. Ct. App. 2000); *Gambill v. Middle Tenn. Med. Ctr., Inc.*, 751 S.W.2d 145, 149-50 (Tenn. Ct. App. 1988); *Taylor v. Nashville Banner Publ'g Co.*, 573 S.W.2d 476, 482 (Tenn. Ct. App. 1978). If determined by the trial court to be contradictory, the statements by the witness are considered to be "no evidence" of the fact sought to be proved. Wilson, 73 S.W.3d at 104 (citing *Johnston v. Cincinnati N.O. & T.P. Ry. Co.*, 146 Tenn. 135, 240 S.W. 429, 436 (1922)). The policy for such a rule can be stated as follows:
>
>> If parties in court were permitted to assume inconsistent positions in the trial of their cause, the usefulness of courts of justice would in most cases be paralyzed. The coercive powers of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come in or are brought before them. It may accordingly be laid down as a broad proposition that one, without mistake induced by the opposite party, who has taken a particular position deliberately, in the course of litigation, must act consistently with it. One cannot play fast and loose.

Stamper v. Venable, 117 Tenn. 557, 97 S.W. 812, 813 (1906); *see also Sipe v. Porter*, No. E2002-02938-COA-R9-CV, 2003 Tenn. App. LEXIS 763, at *9 (Tenn. Ct. App. Oct. 30, 2003).

The "cancellation rule" only applies, however, "when the inconsistency in the witness's testimony is unexplained and when neither version of his testimony is corroborated by other evidence." *Taylor*, 573 S.W.2d at 483. As our supreme court has stated,

> The question here is not one of the credibility of a witness or of the weight of evidence; but it is whether there is any evidence at all to prove the fact. If two witnesses contradict each other there is proof on both sides, and it is for the jury to say where the truth lies; but if the proof of a fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way. *Id.*

Helderman, 179 S.W.3d at 501-02.

Having examined the record *de novo*, we conclude that the Chancellor correctly applied the cancellation rule in this case. Mr. Downey's affidavits are contradictory. He did not testify in support of his motion, nor did he submit any additional evidence to corroborate the statements contained in his second affidavit. In the absence of such evidence, we conclude that the trial court did not abuse its discretion by finding that Mr. Downey did not sustain his burden of proof.

In light of *Kirk v. St. Michael Motor Express, Inc.*, No. M2007-01058-WC-R3-WC, 2008 WL 4072053 (Tenn. Workers' Comp. Panel Sept. 2, 2008), the trial court additionally considered the issue of whether the settlement provided Mr. Downey with the benefits to which he was entitled under the workers' compensation law. In *Kirk*, as in this case, the employee, Ms. Kirk, sought to set aside a settlement by means of a motion under Rule 60.02. The trial court denied her motion.

As in this case, the settlement was approved based upon an affidavit executed by an unrepresented employee, rather than a personal appearance before the trial judge. In her motion and on appeal, the employee asserted that the settlement was fraudulent, and that the procedure used in approving the settlement did not satisfy the requirements of the workers'

compensation statute. The Special Workers' Compensation Appeals Panel rejected each of those arguments. However, the amount of the benefits received was not commensurate with the anatomical impairment assigned. Largely as a result of that factor, the Panel concluded that the case was one proper for relinquishing the importance of the principle of finality of judgments, and set the settlement aside.

We conclude that *Kirk* is factually distinguishable from the circumstances of this case. Although Mr. Downey's petition to set the settlement aside alleged that Dr. St. Clair's 4% impairment rating was incorrect, he produced no actual evidence to support that allegation. A copy of a table from the American Medical Association Guides to the Evaluation of Permanent Impairment was submitted with the motion. However, there was no testimony, affidavit, written report or clinical record, from Dr. St. Clair or any other physician, to support the argument that her impairment rating was incorrect.

We agree with the trial court that Mr. Downey did not carry his burden of proof on the matter. Because he had returned to work, any potential award for permanent partial disability would have been capped at 1.5 times the impairment, which is 6% to the body as a whole. His net recovery, if he had been represented by counsel and had recovered the maximum permitted by this evidence, would have been 4.5% permanent partial disability to the body as a whole, after deduction of his attorney's fee. In light of those facts, Mr. Downey received substantially the benefits to which he was entitled under the workers' compensation law. We therefore conclude that the trial court did not abuse its discretion by denying Mr. Downey's Rule 60.02 motion.

Finally, Mr. Downey questions the venue of the Hamilton County Chancery Court for its approval of his workers' compensation settlement. He further challenges the practice of a "long distance" telephone approval by the trial court. Venue for claims seeking benefits under the Tennessee Workers' Compensation Act is established by Tenn. Code Ann. § 50-6-225(a). Such venue may be waived upon agreement of the parties. *See Gould, Inc., Century Electric Div. v. Barnes*, 498 S.W.2d 623 (Tenn. 1973).

In the case at bar, the parties waived venue and instituted the action in the Chancery Court for Hamilton County. Regarding Mr. Downey's participation by telephone in the process of the trial court's approval of his workers' compensation claim, the court in *Kirk*, *supra*, recognized the following controlling principle:

> In *Thompson v. Firemen's Fund Ins. Co.*, 798 S.W.2d 235 (Tenn. 1990), the Tennessee Supreme Court held, however, that current Tennessee Code Annotated section 50-6-206 does not require the personal appearance of the employee before the court at a settlement approval hearing, "although the

> better practice would clearly include personal examination by the trial judge." *Id.* at 238. In this case, Ms. Kirk executed an affidavit which states on its face that she understood the terms of the agreement and requested the trial court's approval. While it clearly would have been the better practice for Ms. Kirk to have appeared and been examined before the trial court, based upon the current language in the statute and the holding in *Thompson*, we cannot find the failure of the trial court to require her appearance was fatal to the approval proceeding.

Kirk, 2008 WL 4072053, at *6 (footnote omitted).

Under the circumstances of this case, we conclude that although the better practice would have been for Mr. Downey to have personally appeared for an examination by the trial court, the failure of the Chancellor to require Mr. Downey's personal appearance was not fatal to the approval proceeding. Accordingly, Mr. Downey has failed to establish any basis for relief pursuant to Rule 60.02 under this argument.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellant, William Downey, and his surety, for which execution may issue if necessary.

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THOMAS R. FRIERSON, II, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

WILLIAM DOWNEY v. GRIFFIN INDUSTRIES

Chancery Court for Hamilton County
No. 08-0820

No. E2009-00313-SC-WCM-WC - Filed April 15, 2010

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by William Downey 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 the appellant, William Downey, and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Sharon G. Lee, J., not participating