IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 24, 2011 Session

MASON FISCHER v. SVERDRUP TECHNOLOGY, INC.

Appeal from the Chancery Court for Coffee County
No. 03-367 Walter C. Kurtz, Senior Judge

No. M2010-01095-WC-R3-WC - Mailed - May 4, 2011
Filed - June 7, 2011

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. The employee filed a Worker's Compensation action on August 22, 2003 alleging a compensable injury in the course of his employment with his employer in December 1998. The employer filed a motion to dismiss for failure to prosecute under Tenn. R. Civ. P. 41.02. The trial court entered an order in September 2008, stating that the employer was withdrawing the motion to dismiss for failure to prosecute based upon the employee's commitment to take a medical deposition within sixty days. A second motion to dismiss for failure to prosecute was filed and heard on March 15, 2010 because the medical deposition had not been taken. The trial court granted the motion with prejudice. The employee has appealed. We affirm the judgment.

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

E. RILEY ANDERSON, SP.J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and DONALD P. HARRIS, SR.J., joined.

Robert S. Peters, Winchester, Tennessee, for the appellant, Mason Fischer.

Margaret L. Noland, Cookeville, Tennessee, for the appellee, Sverdrup Technology, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

The employee, Mason Fischer, filed a worker's compensation action in the Chancery Court of Coffee County on August 22, 2003, alleging that he had sustained a compensable injury on December 20, 1998, in the course of his employment as an electrical technician with his employer Sverdrup Technology, Inc. Fischer alleged he was on a ladder erecting conduit above an office cubicle and while descending his foot went into a trash can at the base of the ladder causing an injury to his leg. He reported the leg injury to his supervisor; was transported to the infirmary; and was treated conservatively, but there was no diagnosis. Fischer continued to work but pain persisted. The employer's answer to the action contended that the one year statute of limitations at TCA § 50-6-203 had run barring the action. The employer filed a motion for summary judgment, based on the expiration of the statute of limitations. A hearing was held on March 1, 2006 at which the employer contended that Fischer knew he had an injury, reported it, did not work for a period of time and therefore knew he had a disabling injury on December 20, 1998 or shortly thereafter. Fischer contended that he went to the infirmary, returned to work after the injury, continued to have pain but continued to work assuming it would go away. Because the pain persisted he saw Dr. Sullivan in December of 2002 who examined him and performed an ultrasound. At that time, he alleged that he first learned from Dr. Sullivan the extent of his injury and his disabled condition. Fischer contended that his disability manifested itself at the time of the ultrasound in September of 2002 within the one year statute of limitations. At the time of the motion for summary judgment hearing, Dr. Sullivan's deposition had not been taken. The trial court denied the motion for summary judgment on July 13, 2006.

A trial date of September 25, 2006 was set and continued because discovery was not complete. The employer renewed its motion for summary judgment on February 1, 2007 after Dr. Sullivan's deposition was taken in August 2006. The trial judge denied the motion on March 9, 2007.

A trial date of October 7, 2007 was set and then continued at the request of the parties. A trial date of April 28, 2008 was set and continued at the request of the employee.

The employer filed a motion to dismiss for failure to prosecute which was set for hearing on August 6, 2008, but continued. An order was filed on September 16, 2008 by the trial judge reciting that the motion to dismiss for failure to prosecute was to be heard on that date, but employee's counsel had served on employer's counsel a physician's report showing the employee was at maximum medical improvement and that the employee's counsel had

agreed to depose Dr. Zimmerman within sixty days. On that basis the employer withdrew the motion without prejudice.

The motion to dismiss for failure to prosecute was refiled because Dr. Zimmerman's deposition had not been taken. Judge Kurtz entered an order setting a hearing on March 15, 2010.

At that hearing, employer's counsel stated to the trial court that no medical proof on the merits had ever been taken in the case and employee's counsel agreed that was true, but had offered dates to schedule the deposition of a Dr. Zimmerman before the end of April 2010.

Judge Kurtz granted Employer's motion and dismissed the worker's compensation action with prejudice. Employee has appealed, contending that the trial court erred by dismissing his complaint.

Standard of Review

The standard of review for a trial court's decision to dismiss an action for failure to prosecute is the standard of review for a discretionary action.

"Because decisions to dismiss for failure to prosecute are discretionary, White v. College Motors, 212 Tenn. 384, 386, 370 S.W.2d 476, 477 (1963), reviewing courts will second-guess a trial court only when it has acted unreasonably, arbitrarily, or unconscionably." Hodges v. Tenn. Attorney Gen., 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000); see Hanna v. Gaylord Entm't Co., No. M2004-00413-WC-R3-CV, 2006 WL 1815079 (Tenn 2006).

The defendant employer filed the second motion to dismiss for failure to prosecute asking that the case be dismissed with prejudice pursuant to Tenn R. Civ. P 41.02. The rule provides as follows:

> 41.02 Involuntary Dismissal – Effect Thereof- (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.

At the hearing on March 15, 2010 on the motion to dismiss, the employer argued that the case should be dismissed with prejudice on two grounds, the first being the failure to prosecute and the second being the failure of the employee to comply with the trial court's September 18,2008 order to take the deposition of Dr. Zimmerman within 60days from the date the order was entered. The employee's counsel acknowledged that he had not yet taken Dr. Zimmerman's deposition and that dates to do so had only recently been provided to employer's counsel.

In its ruling from the bench, dismissing the action with prejudice Judge Kurtz stated:

> "The injury is in '98. The case is filed in '03. There was a prior motion to dismiss as reflected in this order of September '08 that was withdrawn in the face of what appears to be [Employee's] counsel's promise that he was going to depose the doctor within 60 days. Even if that was somehow aborted, surely plaintiff's counsel was on notice that he was somewhat under the gun in proceeding in this case."

Hanna v. Gaylord Entertainment Co. is an example of earlier appellate cases which have upheld a trial court's decision to dismiss a case for failure to prosecute with prejudice. The facts in Hanna are substantially similar to those in this case. In Hanna, the trial court dismissed an employee's workers' compensation action based upon a local rule of court. The employee's motion to set aside the order of dismissal was granted, but he was directed to set the case for a hearing or for a status conference by a stated date, approximately six weeks after entry of the order. Neither event occurred. Two years later, the trial court dismissed the case again pursuant to the local rule of court. The trial court denied the employee's motion to set aside the second dismissal. In affirming the trial court's order, the Special Workers' Compensation Appeals Panel noted that the employee had failed to prosecute his case as required by Rule 41.02(1) of the Tennessee Rules of Civil Procedure, had failed to comply with the local rule of court, and had failed to comply with a specific order of the trial court requiring him to set the case for a hearing by a date certain.

In this case, more than four years elapsed between the date of the alleged injury and the filing of the complaint. Five years after the filing of the complaint, no medical proof had been taken on the merits, and a motion to dismiss for failure to prosecute was withdrawn based upon the commitment of Employee's counsel to obtain a medical deposition within sixty days. When the hearing on Employer's second motion to dismiss for failure to prosecute occurred approximately eighteen months later, that medical deposition still had not been taken. More than eleven years had passed since the date of the alleged injury, and more than six years had passed since the filing of the complaint. As the trial court noted in its

ruling, "[I]f this case can't be dismissed for failure to prosecute, then the obligation to move forward in a case really has no credibility at all . . . ." We conclude that the trial court did not abuse its discretion by granting Employer's motion to dismiss this action with prejudice.

Conclusion

The judgment is affirmed. Costs are taxed to Mason Fischer and his surety, for which execution may issue if necessary.

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E. RILEY ANDERSON, JUSTICE

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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 Mason Fischer and his surety, for which execution may issue if necessary.

PER CURIAM