

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
December 14, 2009 Session

LARRY BESHIRE v. BERKLEY REGIONAL INSURANCE COMPANY

Appeal from the Chancery Court for Chester County
No. 10343 James F. Butler, Chancellor

No. W2009-00609-SC-WCM-WC - Mailed March 26, 2010
Filed June 18, 2010

AND

LARRY BESHIRE v. BERKLEY REGIONAL INSURANCE COMPANY

Appeal from the Chancery Court for Fayette County
No. 13507 William C. Cole, Chancellor

No. W2008-02771-SC-WCM-WC

These workers' compensation appeals were consolidated for hearing and disposition by order dated May 27, 2009. The employee, Larry Beshires, settled a claim for work-related injuries to his left knee and right shoulder, based upon the two and one-half times impairment cap in Tennessee Code Annotated section 50-6-241(a)(1). The settlement was approved by the Chancery Court of Fayette County. Mr. Beshires subsequently sustained a second injury, or aggravation of the previous injury, to his shoulder. He returned to work for a time, but then retired. He filed suit in the Chester County Chancery Court, seeking benefits for the new injury or, alternatively, reconsideration of his prior settlement. The reconsideration action was transferred to the Chancery Court of Fayette County. After a hearing on the merits, the Fayette County court declined to award additional benefits. The Chester County court awarded 48% permanent partial disability to the body as a whole for the later injury. Both sides have appealed, and the appeals have been consolidated by order of the Supreme Court.¹ Mr. Beshires contends that the Fayette County court erred by failing to award additional

¹ Pursuant to Tennessee Supreme Court Rule 51, they were then referred to the Special Workers' (continued...)

benefits. The employer contends that the Chester County court did not have subject matter jurisdiction, because the benefit review conference process had not been exhausted. We affirm both judgments.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and DAVID R. FARMER, SP. J., joined.

Alex C. Elder, Memphis, Tennessee, for Berkley Regional Insurance Company, appellant in No. W2009-00609-WC-R3-WC; appellee in No. W2008-02771-WC-R3-WC.

Ricky L. Boren, Jackson, Tennessee, for Larry Beshires, appellee in No. W2009-00609-WC-R3-WC; appellant in No. W2008-02771-WC-R3-WC.

MEMORANDUM OPINION

Factual and Procedural Background

The procedural history of these consolidated cases is somewhat convoluted. The issues presented on appeal, however, are relatively straightforward legal questions.

Larry Beshires was a maintenance worker at Westview Manor, an apartment complex in Somerville owned by the Pentad Group. Berkley Regional Insurance Company provided workers' compensation insurance to Pentad Group during all relevant periods of time. Mr. Beshires injured his left knee on February 6, 2003, when he slipped and fell on snow. The injury was deemed to be work-related. Dr. Lawrence Schrader performed an arthroscopic meniscus repair. After the surgery, physical therapy was ordered. During the course of that therapy, Mr. Beshires injured his right shoulder, sustaining a rotator cuff tear. The injury was also accepted as compensable pursuant to the Workers' Compensation Act. Dr. Keith Nord performed a surgical repair of that injury. Mr. Beshires returned to work at Westview Manor in his previous position. The claim for both injuries was settled, and the settlement was approved in the Chancery Court of Fayette County on December 3, 2004. Mr. Beshires received 30% permanent partial disability to the body as a whole, plus any future medical expenses, as a result of the settlement. The settlement specifically provided that Mr. Beshires retained the right to seek reconsideration under Tennessee Code Annotated section 50-6-241(a)(2) (1999).

¹(...continued)

Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

On October 13, 2005, Mr. Beshires was installing a shower head in an apartment. He reached up with his right arm and felt a popping sensation and immediate pain and numbness. He reported the injury immediately to his supervisor, who happened to be his wife, Vickie Beshires. He was referred back to Dr. Nord, who conducted additional tests. In March 2006, Dr. Nord performed a second surgery on Mr. Beshires's right shoulder, removing inflamed tissue and a portion of the distal clavicle. He returned to work in April 2006. His wife had been promoted to be the manager of another complex, and, shortly after his return, Mr. Beshires was promoted to take her place. In February 2007, he retired.

In June 2006, Mr. Beshires filed suit against Berkley Regional in the Chancery Court of Chester County (his residence). The complaint alleged that he had sustained a new injury and sought benefits for that injury. In the alternative, the complaint asserted that he had lost his pre-injury employment and sought reconsideration of his previous settlement pursuant to Tennessee Code Annotated section 50-6-241(a)(2). The case was set for trial on August 15, 2007. On that date, Berkley filed a motion to dismiss, contending that only the Chancery Court of Fayette County had jurisdiction over the reconsideration claim. See Freeman v. Marco Transp. Co., 27 S.W.3d 909, 912 (Tenn. 2000). The Chester County court entered an order transferring the reconsideration claim to Fayette County, but retained jurisdiction over the claim for the alleged new injury.

The reconsideration case was heard in Fayette County by Chancellor William Cole on September 18, 2008. Mr. Beshires testified concerning the difficulties he had with his shoulder and knee when he returned to work after the first injury. He testified that those problems increased after the second injury. His testimony was supported by his supervisor, Ms. Beshires, and by a former co-worker, J. D. Sprayberry.

The medical proof consisted of three evidentiary depositions. Dr. Nord testified, in summary, that the October 2005 incident had aggravated arthritic and other conditions related to the 2003 shoulder injury. He assigned an additional anatomical impairment of 6% to the body as a whole due to the second surgical procedure. He placed restrictions upon Mr. Beshires's activities which were similar to those he had placed upon him as a result of the first injury. Dr. Nord also testified that Mr. Beshires's current knee complaints were not related to his 2003 injury, but were the result of gout which had developed as a result of hereditary and other factors.

Dr. Samuel Chung conducted an independent medical examination at the request of Mr. Beshires's attorney and assigned an additional 8% impairment to the body as a whole as a result of the 2005 event and subsequent surgery. In Dr. Chung's opinion, Mr. Beshires had sustained a new and separate injury in October 2005.

Dr. Riley Jones conducted a second opinion examination prior to Dr. Nord's surgery of March 2006. Initially he was of the opinion that Mr. Beshires's symptoms in 2005 were a continuation of the original injury. On cross-examination, however, he retreated from that position, indicating he had been given an incomplete history.

Berkley provided medical treatment for the October 2005 injury, but had declined to pay temporary total disability benefits. Mr. Beshires filed a request for assistance with the Tennessee Department of Labor and Workforce Development (“Department”) on March 21, 2006, requesting that temporary total disability benefits be ordered. The Department denied the request on April 25, 2006. Mr. Beshires filed the Chester County lawsuit in June 2006. In October 2006, he requested a benefit review conference. The impetus for that request is not clear from the record. A benefit review conference was held in February 2007 which did not resolve the case. For unknown reasons, the Department issued an “Amended Benefit Review Report” on April 19, 2008 declaring that the benefit review conference process had been resolved, “effective retroactively to April 25, 2006.” At the trial of the Chester County “new injury” case, Berkley raised the issue of subject matter jurisdiction, arguing that the benefit review conference process had not been resolved at the time the lawsuit was filed. The transcript contains statements of counsel that the issue had been discussed at some previous time, but there are no pleadings or other documents in the record to support that assertion.

The reconsideration claim in Fayette County was tried on September 18, 2008. Chancellor Cole issued his findings from the bench. He found that Mr. Beshires’s retirement was not related to his original injury and, therefore, denied the petition for reconsideration. Mr. Beshires has appealed from that decision, contending that the Chancery Court of Fayette County erred by holding that he was not entitled to a reconsideration of his original settlement.

The “new injury” claim in Chester County was tried before Chancellor James F. Butler on January 15, 2008. Relying upon the Department’s April 19, 2008 amended report, the trial court found that the benefit review conference had been exhausted and that it had subject matter jurisdiction over the claim. It awarded permanent partial disability benefits of 48% to the body as a whole for the October 2005 injury. Berkley has appealed from this decision, asserting that the Chancery Court of Chester County erred by denying its motion to dismiss for lack of subject matter jurisdiction.

Standard of Review

We review of issues of fact de novo upon the record of the trial court. The trial court’s findings are accompanied by a presumption of correctness 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 to the trial court when the trial judge had the opportunity to observe the witness’ demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where 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 deposition, and we may draw our own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). We review the trial court’s conclusions of law de novo

upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

Reconsideration Claim

In denying Mr. Beshires's petition for reconsideration, the Fayette County court stated:

Here, [Mr. Beshires] had a second injury to the same body part. I understand the court's ruling in Clark [v. Lowe's Home Centers], 201 S.W.3d 647 (Tenn. 2006)], or I think I do, that you can maintain a reconsideration and a new action at the same time, and I can even see situations where that makes sense.

But wh[at] I can't discern from the proof [is] the causal relation for the increase in industrial disability, and the reason for that is because he had another injury to the same arm.

In other words, would he have retired without that second injury, and I think that's the purpose of the reconsideration statute is that the injury is what caused his industrial disability and had some role to play in his inability to maintain employment, or if he lost his job for reason other than that.

Now, for the record, I found [Mr. Beshires] to be very – a very credible witness. I just don't believe that the proof or that the burden of proof has been met that the original injury was the causal factor in his no longer working.

I think it was the second injury, the aggravation, looking at the proof, and I don't want to stray too far into this. But looking at the proof, I think it's clear, both from Dr. Chung and Dr. Nord, that there was an aggravation of the original injury or a new injury that caused additional anatomic changes and to the same part of the body for which he originally received his comp award. Therefore, I'm going to deny his claim for reconsideration for those reasons.

In Clark, the Supreme Court clarified its previous opinion in Brewer v. Lincoln Brass Works, Inc., 991 S.W.2d 226 (Tenn. 1999). In Brewer, the employee sustained a compensable injury to his back. He was able to return to work for his pre-injury employer at the same rate of pay. He received an award of permanent partial disability benefits subject to the limitation of two and one-half times the anatomical impairment, in accordance with Tennessee Code Annotated section 50-6-241(a)(1). He subsequently reinjured his back, resulting in surgery and additional impairment. He was unable to return to work for his pre-injury employer. He sought reconsideration of his previous award of

benefits pursuant to Tennessee Code Annotated section 50-6-241(a)(2). The Supreme Court held, in pertinent part, that:

A petition to enlarge a previous award under § 50-6-241(a)(2) is not the appropriate vehicle to use when a worker sustains additional injuries or additional anatomical impairment. A § 241(a)(2) petition is proper when the injured worker attempts to return to work but the original work-related disability later renders the injured worker unemployable with the pre-injury employer. Section 241(a)(2) then allows the injured worker to receive a new industrial disability rating when the employer's attempts to accommodate the worker fail. The new disability rating is not limited by the § 241(a)(1) cap and is based on the worker's previous anatomical impairment rating. We hold that if the worker, however, sustains additional impairment, whether caused by a subsequent work-related injury or work-related aggravation injury or aggravation of the original injury, the worker must file a new claim for workers' compensation rather than attempting to enlarge a previous award under § 241(a)(2).

991 S.W.2d at 229.

In Clark, an employee of Lowe's Home Centers, Inc., suffered a work-related injury to his right shoulder in 1994. His claim for benefits was settled for 17.5% permanent partial disability to the body as a whole. In 2000, the employee suffered a second injury to his right shoulder, his right arm and his neck. This claim was settled for 46.72% permanent partial disability to the body as a whole and within the limits of the cap contained in Tennessee Code Annotated section 50-6-241. 201 S.W.3d at 648. In 2003, the employee sustained a third injury to his right hand and arm. Thereafter, he was terminated by Lowe's. He filed suit seeking workers' compensation benefits for the third injury and a suit seeking reconsideration of the award for the second injury. Id. at 649. In the reconsideration suit, the trial court enlarged the award by 214 weeks, giving the employee a total of 400 weeks. The award of permanent total disability benefits was apportioned between Lowe's and the Second Injury Fund. The Second Injury Fund appealed, alleging that Brewer limited the employee to recovery for the subsequent injury alone. The Supreme Court disagreed, stating that Brewer:

“should not be read to preclude a lawsuit seeking reconsideration . . . simply because the employee has suffered new work-related injuries and has filed a separate lawsuit seeking compensation for the new injuries. A worker does not forfeit his right to reconsideration simply because he is unlucky enough to have a subsequent work-related injury.”

Id. at 650. It further noted that a construction which precluded a reconsideration action in such circumstances “would be inconsistent with both the principles of statutory construction and the remedial nature of the Workers' Compensation Law.” Id. at 651. The Court in Clark did not

overrule the holding in Brewer that an employee cannot recover benefits for a second injury by filing a reconsideration case.

In order to be entitled to reconsideration, the employee, after suffering an injury for which he has been awarded permanent partial disability, must have lost his or her employment within 400 weeks of returning to work. Tenn. Code Ann. § 50-6-241(a)(2). This case, however, involves a voluntary retirement. In Tryon v. Saturn Corp., 254 S.W.3d 321 (Tenn. 2008), the Supreme Court examined the application of the statutory caps in such situations:

“[A]n employee has not had a meaningful return to work if he or she returns to work but later resigns or retires for reasons that are reasonably related to his or her workplace injury. . . . If, however, the employee later retires or resigns for personal reasons or other reasons that are not reasonably related to his or her workplace injury, the employee has had a meaningful return to work which triggers the two and one-half multiplier allowed by Tenn.Code Ann. § 50-6-241(a)(1).”

Id. at 328-9.

In this case, the trial court appears to have examined the evidence to determine whether Mr. Beshires’s retirement was related to his 2003 work injury. In our view, if Mr. Beshires sustained a second work-related injury and did not have a meaningful return to work as a result of that injury, pursuant to the holding in Clark, he would be entitled to a reconsideration of the disability caused by his first injury without being limited by the caps contained in Tennessee Code Annotated section 50-6-241(a). Thus, the initial inquiry should be whether Mr. Beshires had a meaningful return to work following his second injury based upon the standard contained in Tryon, quoted above.

While the trial court did not specifically address this issue, our review of the evidence leads us to the conclusion that Mr. Beshires had a meaningful return to work following his second injury and failed to establish by a preponderance of the evidence that his decision to retire was primarily based upon his shoulder injuries. The restrictions imposed by Mr. Beshires treating physician following the 2003 injury were the same as those imposed following the 2005 injury: no repetitive overhead work. The testimony of Mr. Beshires and his co-worker indicated that those limitations were accommodated by the employer following his first injury. Following his second injury, he was promoted to a less physically demanding job. There is evidence the pain worsened following the second injury, but his physical limitations were not changed significantly by that event. Mr. Beshires activities when working, with one exception, appeared no more strenuous than his activities at home, where he maintained a vegetable garden and operated a church van on a voluntary basis. The exception was that at work he was required to climb stairs to get to the second floor apartments. Mr. Beshires testified climbing the stairs caused significant pain to his knees and was a part of the reason he resigned. As Chancellor Cole noted, all of the medical evidence indicated that his continuing knee problems were not related to his 2003 work injury, but resulted from gout. According to Dr. Nord, the gout results in the body not properly excreting uric acid, which crystalizes and is deposited in the joint. The crystalline deposits are like sandpaper, such that activity causes significant

grinding, eventually wearing away the surface. We also note that Mr. Beshires was 66 years of age at the time he resigned and had, for some time, been receiving Social Security benefits. In summary, we conclude that Mr. Beshires was able to return to work and received a promotion, but ultimately chose to retire. In our view, the evidence fails to establish that decision was based upon the shoulder injuries sustained by him, but was for other reasons unrelated to his work injury. Accordingly, the finding of the trial court that Mr. Beshires was not entitled to a reconsideration was ultimately correct and should be affirmed.

Subject Matter Jurisdiction over “New Injury” Lawsuit

Berkley argues that the Chancery Court of Chester County did not have jurisdiction over the subject matter of Mr. Beshires’s 2005 injury claim. The basis for this contention is that, at the time suit was filed in June 2006, the parties had not completed the benefit review conference process as required by Tennessee Code Annotated section 50-6-203(a) (Supp. 2004). Mr. Beshires had sought payment of temporary total disability benefits by filing a request for assistance with the Department. That request was denied on April 25, 2006. A recent panel decision, Holland Group v. Sotherland, No. M2008-00620-WC-R3-WC, 2009 WL 1099275 (Tenn. Workers’ Comp. Panel Apr. 24, 2009), held that the mere denial of a request for assistance does not satisfy the administrative exhaustion requirement. Id. at *3. Exhaustion of the benefit review conference process, which is usually initiated by a request for benefit review conference, is required. Id. The Panel stated:

The legislature has authorized the Department to promulgate rules “concerning all aspects of the administrative process related to benefit review conferences.” Tenn. Code Ann. § 50-6-239(d). The Department has exercised that authority by enacting rules providing that the benefit review conference process is “deemed exhausted only” if a workers' compensation specialist denies the claim as noncompensable, the parties settle the case, an “impasse report” is signed by a workers' compensation specialist, the parties complete private mediation, or the Department grants a waiver, none of which occurred in this case. See Tenn. Comp. R. & Regs. 0800-2-5-.09(1). Moreover, the benefit review conference process “shall not be deemed exhausted upon the occurrence of . . . [t]he filing of a Request for Assistance or a determination thereof on grounds other than noncompensability.” Tenn. Comp. R. & Regs. 0800-2-5-.09(4).

Id. at *2 (alteration in original).

There are several significant differences between Holland Group and the case at bar. In Holland Group, the initial request for assistance was granted by the Department. The lawsuit was then filed by the employer, essentially seeking to overturn the Department’s order. The issue of jurisdiction was raised by the Second Injury Fund, which had been named as a defendant in the suit. At no time did the employee file a request for a benefit review conference.

In the present case, Mr. Beshires's request for assistance was denied by the Department. The trial transcript contains statements of counsel that this occurred on April 25, 2006, and that the basis of the denial was that Mr. Beshires had failed to demonstrate that he had sustained a new injury. We are, however, unable to locate the actual order in the record.² A denial of relief on that basis could be deemed equivalent to a finding that the injury was not compensable and constitute an exhaustion of the administrative process. Without the actual order, we are unable to determine if that occurred. On April 19, 2008, the Department issued an "Amended Benefit Review Report," which retroactively declared that the benefit review process had been exhausted on April 25, 2006. In light of the sequence of events, the amended report appears to be a clarification of the original report. Courts generally defer to an administrative agency's interpretations of the law(s) which it administers. Riggs v. Burson, 941 S.W.2d 44, 50-51 (Tenn. 1997). Moreover, the amended report of April 19, 2008 is the only evidence in this record setting out the Department's position concerning the date upon which the benefit review process was completed. We therefore conclude that the evidence does not preponderate against the trial court's finding that the benefit review conference had been completed, and its consequent denial of Berkley's motion to dismiss.

Conclusion

The judgment of the Chancery Court of Chester County in No. W2009-0609-WC-R3-WC is affirmed. The judgment of the Chancery Court of Fayette County in No. W2008-02771-WC-R3-WC is affirmed. Larry Beshires and his surety shall be liable for one-half of the court costs of the consolidated appeals, for which execution may issue if necessary. Berkley Regional Insurance Company and its surety shall be liable for one-half of the court costs of the consolidated appeals, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

²Berkley's brief in this Court mentions the April 2006 report, but does not place it at any location in the record.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

LARRY BESHIRE v. **BERKLEY REGIONAL INSURANCE COMPANY**

Chancery Court for Chester County
No. 10343

No. W2009-00609-SC-WCM-WC - Filed June 18, 2010

AND

LARRY BESHIRE v. **BERKLEY REGIONAL INSURANCE COMPANY**

Chancery Court for Fayette County
No. 13507

No. W2008-02771-SC-WCM-WC

ORDER

This case is before the Court upon the motion for review filed by Larry Beshires pursuant to Tenn. Code Ann. § 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.

One-half of the costs of the consolidated appeals are assessed to Larry Beshires and his surety and one-half to Berkley Regional Insurance Company and its surety, for either of which assessments execution may issue if necessary.

PER CURIAM

Clark, J., N.P.