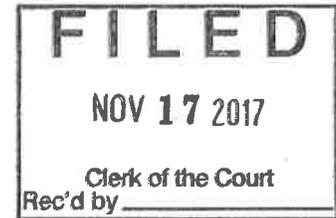


IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
August 22, 2017 Session

DOUGLAS E. SHULER v. EASTMAN CHEMICAL COMPANY ET AL.

**Appeal from the Circuit Court for Sullivan County
No. C41517(B) R. Jerry Beck, Judge**

No. E2016-02292-SC-R3-WC



The plaintiff, Douglas E. Shuler, filed this action seeking workers' compensation benefits in the Circuit Court for Sullivan County against his former employer, Eastman Chemical Company ("Eastman"), and the Second Injury Fund, Tennessee Department of Labor and Workforce Development ("Second Injury Fund"). Mr. Shuler alleged that he had developed cancer from exposure to harmful substances in Eastman's workplace. Eastman and the Second Injury Fund each filed a motion to dismiss Mr. Shuler's claim, asserting that the Court of Workers' Compensation Claims had original and exclusive jurisdiction over the subject matter of the claim. The trial court granted the motions and dismissed Mr. Shuler's claim. Mr. Shuler timely appealed. The 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 pursuant to Tennessee Supreme Court Rule 51. Following our thorough review of the record, we affirm the judgment of dismissal based on lack of subject matter jurisdiction. We further determine that any facial constitutional challenges to Tennessee Code Annotated §§ 50-6-217, -237, and -238 have been waived.

**Tenn. Code Ann. § 50-6-225 (Supp. 2017) Appeal as of Right;
Judgment of the Circuit Court Affirmed**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which SHARON G. LEE, J., and DON R. ASH, SR.J., joined.

David H. Dunaway, LaFollette, Tennessee, for the appellant, Douglas E. Shuler.

Russell W. Adkins, Kingsport, Tennessee, for the appellee, Eastman Chemical Company.

Herbert H. Slatery III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; and Alexander S. Rieger, Assistant Attorney General, for the appellee, Second Injury Fund, Tennessee Department of Labor and Workforce Development.

OPINION

I. Factual and Procedural Background

Mr. Shuler was employed by Eastman from August 1965 until his retirement in December 1999. In his complaint, Mr. Shuler alleged that he was exposed to cigarette smoke, asbestos, toluene, and other harmful substances during the course of his employment with Eastman. According to Mr. Shuler, in December 2015, he was diagnosed with bladder cancer, which allegedly developed as a result of his exposure to toxic chemicals while employed at Eastman. Mr. Shuler asserted that he was forced to undergo surgery for his bladder cancer and was rendered permanently and totally disabled. Mr. Shuler thus sought an award of benefits and attorney's fees.

Eastman and the Second Injury Fund filed answers to the complaint, asserting various defenses. Eastman later filed an amended answer and a subsequent motion to dismiss, by which Eastman argued that the trial court lacked subject matter jurisdiction over Mr. Shuler's claim because his injury occurred after July 1, 2014. *See* Tenn. Code Ann. § 50-6-237 (2014) (providing that the Court of Workers' Compensation Claims would "have original and exclusive jurisdiction over all contested claims for workers' compensation benefits when the date of the alleged injury is on or after July 1, 2014"). Ergo, Eastman took the position that the Court of Workers' Compensation Claims had exclusive jurisdiction over Mr. Shuler's claim by reason of his 2015 diagnosis date. The Second Injury Fund later joined in Eastman's motion to dismiss. In his response to the motions to dismiss, Mr. Shuler posited that his injury occurred in December 1999, the date of his last occupational exposure to harmful substances, and that therefore, Tennessee Code Annotated § 50-6-237 was not applicable to his claim.

The trial court conducted a hearing concerning the motions to dismiss on September 30, 2016. In its subsequent order, entered on November 1, 2016, the court granted the motions and dismissed Mr. Shuler's claim, determining that "exclusive jurisdiction lies with the Court of Workers' Compensation Claims." Mr. Shuler timely appealed, and the appeal has been assigned to this Panel in accordance with Tennessee Supreme Court Rule 51. Following the filing of his notice of appeal, Mr. Shuler provided notice to the Tennessee Attorney General that he was challenging the constitutional validity of Tennessee Code Annotated § 50-6-237.

II. Issues Presented

Mr. Shuler presents the following issues for our review, which we have restated slightly:

1. Whether the trial court erred by concluding that it lacked subject matter jurisdiction over this action.
2. Whether the trial court erred by applying Tennessee Code Annotated § 50-6-237 in this action, which provides that it is applicable only to injuries occurring on or after July 1, 2014, when Mr. Shuler's last exposure to Eastman's work environment was in December 1999.
3. Whether the trial court erred by retrospectively applying Tennessee Code Annotated § 50-6-237 and, if so, whether such retrospective application was unconstitutional.
4. Whether Tennessee Code Annotated §§ 50-6-217(c), -237, and -238 are facially unconstitutional.

III. Standard of Review

The interpretation and application of Tennessee's workers' compensation statutes are questions of law, which are reviewed *de novo* with no presumption of correctness. *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 399 (Tenn. 2013) (citing *Nichols v. Jack Cooper Transp. Co.*, 318 S.W.3d 354, 359 (Tenn.2010)). "When construing a statute, our goal is 'to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope.'" *Jefferies v. McKee Foods Corp.*, 145 S.W.3d 551, 554 (Tenn. 2004) (quoting *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)). "We determine legislative intent from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning." *Brown v. Erachem Comilog, Inc.*, 231 S.W.3d 918, 921 (Tenn. 2007) (quoting *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000)). The current version of Tennessee Code Annotated § 50-6-116 (2014) provides that the workers' compensation statutes "shall not be remedially or liberally construed but shall be construed fairly, impartially, and in accordance with basic principles of statutory construction[,] and this chapter shall not be construed in a manner favoring either the employee or the employer." *See Willis v. All Staff*, No. M2016-01143-SC-R3-WC, 2017 WL 3311318, at *3 (Tenn. Workers' Comp. Panel Aug. 3, 2017) (noting the stricter construction requirement under amended statute).

IV. Constitutional Challenge

We note at the outset that Mr. Shuler raised no issue regarding the constitutionality of Tennessee Code Annotated §§ 50-6-217, -237 and -238 in the proceedings before the trial court.¹ Accordingly, we determine that Mr. Shuler's constitutional challenges have been waived. As our Supreme Court has explained, "[a]s a general rule, 'questions not raised in the trial court will not be entertained on appeal.'" *City of Cookeville ex rel. Cookeville Reg'l Med. Ctr. v. Humphrey*, 126 S.W.3d 897, 905–06 (Tenn. 2004) (quoting *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983)). This principle applies with equal force to constitutional challenges. See *In re M.L.P.*, 281 S.W.3d 387, 394 (Tenn. 2009) (finding that failure to properly raise constitutional argument before trial court waived issue on appeal). Following our careful review of the record, we determine that because Mr. Shuler's constitutional challenges were never presented to the trial court, Mr. Shuler has waived such challenges on appeal.²

V. Tennessee Code Annotated § 50-6-237 and Subject Matter Jurisdiction

Mr. Shuler's additional issues concern the trial court's application of Tennessee Code Annotated § 50-6-237 (2014), which provides in pertinent part: "There is created the court of workers' compensation claims in the bureau of workers' compensation, which shall have original and exclusive jurisdiction over all contested claims for workers' compensation benefits when the date of the alleged injury is on or after July 1, 2014."

All of the remaining issues raised on appeal by Mr. Shuler, including subject matter jurisdiction, the applicability of Tennessee Code Annotated § 50-6-237 to his injury, and the alleged "retrospective" application of Tennessee Code Annotated § 50-6-237 by the trial court, are premised on his argument that his occupational disease occurred, for purposes of determining the applicable workers' compensation law, in December 1999, the date of his last exposure to purported harmful substances in the workplace. Mr. Shuler asserts that because occupational diseases "develop slowly and are considered to be progressive in nature . . . determining when an occupational disease begins is often difficult, uncertain, and unknown." According to Mr. Shuler, our workers' compensation statutes and Tennessee Supreme Court precedent dictate that when an employee develops an occupational disease, the employer who caused the employee to be last injuriously exposed to the hazards of the disease will be solely liable for the injury. See Tenn. Code Ann. § 50-6-304 (2014); *Morell v. Asarco, Inc.*, 611

¹ We also note that Mr. Shuler's notice provided to the Attorney General on November 9, 2016, challenged solely the validity of Tennessee Code Annotated § 50-6-237.

² We note that this analysis would have been different had Mr. Shuler filed his claim in the Court of Workers' Compensation Claims. See *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 456–57 (Tenn. 1995) (holding that a party does not waive its right to attack the facial constitutionality of a statute before a court by failing to raise the issue before an administrative tribunal).

S.W.2d 830, 831 (Tenn. 1981). Ergo, Mr. Shuler argues that the same rule should be applied to determine when an injury due to occupational disease occurs, which would result in a December 1999 injury date in this case. We disagree.

Concerning a prior version of the workers' compensation statutory scheme, our Supreme Court has explained:

In the case of a claim arising from an occupational disease, the date of the "accident or injury" is the date on which the employee becomes partially or totally incapacitated for work. T.C.A. § 50-1105. By using this definition of "accident or injury" in connection with occupational diseases, the legislature has provided a certain, determinable date at which the afflicted employee's cause of action accrues, a matter of some importance in cases involving occupational diseases, where the time at which the disease is first contracted is often unknown, and the development of the disease slow. This definition is in keeping also with the purpose of the Workmen's Compensation Law to compensate the employee in part for what he has lost i.e. his earning capacity at the time of his disability. Therefore, the applicable statute in cases involving occupational diseases is that in effect on the date on which the employee becomes disabled as a result of the disease, rather than that in effect on the date on which he was last exposed to the agent causing the disease.

Liberty Mut. Ins. Co. v. Starnes, 563 S.W.2d 178, 179 (Tenn. 1978) (internal citations omitted).

In a more recent decision, *Lively ex rel. Lively v. Union Carbide Corp.*, No. E2012-02136-WC-R3-WC, 2013 WL 4106697, at *7 (Tenn. Workers' Comp. Panel Aug. 13, 2013), the Panel discussed the implications of the current statutory section concerning occupational diseases, Tennessee Code Annotated § 50-6-303(a)(1), which similarly provides in pertinent part:

When the employer and employee are subject to this chapter, the *partial or total incapacity for work or the death of an employee resulting from an occupational disease as defined in § 50-6-301, shall be treated as the happening of an injury by accident or death by accident*, and the employee, or in case of the employee's death, the employee's dependents, shall be entitled to compensation as provided in this chapter.

(Emphasis added.) In construing the above statutory section, which remains unchanged to date and specifies that it is applicable to injuries occurring both prior to and on or after July 1, 2014, the *Lively* Panel elucidated:

[T]he parties appear to have operated, at least briefly, under the erroneous assumption that the date of injury in an occupational disease case should be the day that the employee is diagnosed with the disease. As stated, the primary statute governing occupational disease cases provides that the “happening of an injury” occurs by either the partial or total incapacity for work or death; there is no mention of the date of diagnosis as an option for determining the date of injury. *See* Tenn. Code Ann. § 50-6-303(a)(1) (2008). In contrast, the statute of limitations for filing a claim based on an occupational disease is not triggered without “[f]irst, an incapacity for work; [and s]econd, *either actual or constructive knowledge an occupational disease is the cause of the incapacity for work.*” *Brown*, 231 S.W.3d at 922 (emphasis added) (quoting *Tenn. Prods. & Chem. Corp. v. Reeves*, 220 Tenn. 148, 415 S.W.2d 118, 119 (Tenn. 1967)); *see also* *Nye v. Bayer Cropscience, Inc.*, 347 S.W.3d 686, 696 (Tenn. 2011) (“In ‘creeping disease’ cases, such as asbestos-related injuries, Tennessee law provides that the cause of action accrues with diagnosis of the disease.”); *Potts*, 796 S.W.2d at 684 (holding that dependent’s cause of action for employee’s death by mesothelioma did not accrue until date of diagnosis even though employee’s initial injury caused by exposure to asbestos occurred many years earlier); *Mayton v. Wackenhut Servs., Inc.*, No. E2010-00907-WC-R3-WC, 2011 WL 2848198, at *3 (Tenn. Workers’ Comp. Panel July 18, 2011) (observing that while the commencement of the statutory limitations period was not triggered until the employee knew or should have known that he had an occupational disease, the employee had become incapacitated from work because of the occupational disease when he was first placed on medical leave). In consequence, while the date of diagnosis in an occupational disease case is relevant insofar as the statute of limitations is concerned, it has no effect on the date of injury, which is determined by either the incapacity for work or the event of death.

Lively, 2013 WL 4106697, at *7.³

³ The defendants’ position is not completely without support. Tennessee Code Annotated § 50-6-302(a) (2014), applicable to injuries occurring both prior to and on or after July 1, 2014, does provide:

An occupational disease that an employee had on March 12, 1947, shall not be covered under this chapter. *An employee has an occupational disease within the meaning of this chapter if the disease or condition has developed to such an extent that it can be diagnosed as an occupational disease.* In every suit for compensation benefits, the burden shall be on the employee to prove that the employee did not have, as of that date, the occupational disease for which the employee is seeking compensation.

(Emphasis added.) This language has remained largely unchanged since its original enactment in 1947. *See* 1947 Pub. Acts, Ch. 139, § 1; *see also* *Greener v. E. I. Du Pont De Nemours & Co.*, 219 S.W.2d 185, 187 (Tenn. 1949). However, for the purpose of determining the date of an injury’s occurrence, this Panel

The worker's compensation statutory scheme currently in effect has eliminated the definition of "occupational diseases" previously contained in Tennessee Code Annotated § 50-6-301, as referenced in Tennessee Code Annotated § 50-6-303(a)(1) above. Instead, Tennessee Code Annotated § 50-6-102(14) (Supp. 2017) provides the following definition of an injury for workers' compensation purposes, in pertinent part:

"Injury" and "personal injury" mean an injury by accident, a mental injury, *occupational disease* including diseases of the heart, lung and hypertension, or cumulative trauma conditions including hearing loss, carpal tunnel syndrome or any other repetitive motion conditions, arising primarily out of and in the course and scope of employment, that causes death, disablement or the need for medical treatment of the employee

(Emphasis added.) However, the provisions contained within Tennessee Code Annotated § 50-6-303(a)(1), stating that "the partial or total incapacity for work or the death of an employee resulting from an occupational disease . . . shall be treated as the happening of an injury by accident or death by accident," have remained unchanged. Accordingly, we determine the *Lively* Panel's interpretation of this statutory section to be authoritative.

In this action, Mr. Shuler alleged in his complaint that "on or about December 8, 2015, the Plaintiff discovered that he was suffering from cancer arising out of and in the course and scope of the Plaintiff's employment with the Defendant, Eastman Chemical Company, as a result of his exposure to various chemicals." Mr. Shuler further alleged that "as a result of the discovery of the above-described occupational disease . . . the Plaintiff was rendered disabled to work and earn wages." Therefore, according to his complaint, Mr. Shuler became disabled from working at the time of his diagnosis in December 2015. As such, Mr. Shuler's injury occurred after July 1, 2014, and Tennessee Code Annotated § 50-6-237 is applicable to his claim. *See* Tenn. Code Ann. § 50-6-237; *Lively*, 2013 WL 4106697, at *7. We conclude that the trial court properly determined that it did not have subject matter jurisdiction regarding Mr. Shuler's workers' compensation claim because the Court of Workers' Compensation Claims had original and exclusive jurisdiction. The trial court thereby properly dismissed Mr. Shuler's claim for lack of subject matter jurisdiction.

Finally, Mr. Shuler argues that the application of Tennessee Code Annotated § 50-6-237 to his claim, which he asserts accrued in December 1999, constitutes an improper retrospective application in violation of Article I, Section 20 of the Tennessee Constitution. The fallacy of this argument is that Mr. Shuler's injury did not occur in December 1999 but rather in December 2015. As demonstrated by the *Liberty* and *Lively*

has relied upon the language of Tennessee Code Annotated § 50-6-303(a)(1). *See Lively*, 2013 WL 4106697, at *7.

decisions, the law in Tennessee regarding when an occupational disease injury occurs has remained the same for several decades. *See Lively*, 2013 WL 4106697, at *7; *Liberty Mut. Ins. Co.*, 563 S.W.2d at 179. Therefore, there has been no unconstitutional retrospective application of a statute in this case. We determine this argument to be without merit.

VI. Conclusion

For the aforementioned reasons, we conclude that the trial court did not err in its determination that it lacked subject matter jurisdiction regarding Mr. Shuler's workers' compensation claim. We thus affirm the trial court's dismissal of this action. We also determine that Mr. Shuler's facial constitutional challenges to Tennessee Code Annotated §§ 50-6-217, -237, and -238 have been waived. Costs on appeal are taxed to the appellant, Douglas E. Shuler. This case is remanded to the trial court for collection of costs assessed below.

THOMAS R. FRIERSON, II, JUDGE