IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
May 11, 2020 Session

MACK BILBREY v. ACTIVE USA, LLC ET AL.

Appeal from the Chancery Court for Trousdale County
No. 7355 Charles K. Smith, Chancellor

No. M2019-00720-SC-R3-WC – MAILED JUNE 17, 2020

This workers' compensation appeal requires us to determine whether Employee elected to receive workers' compensation benefits pursuant to Texas law and is, therefore, precluded from recovering in Tennessee under the doctrine of election of remedies. The trial court applied the election of remedies doctrine based on the Employee's filing of a Texas Department of Insurance, Division of Workers' Compensation Form-041, titled "Employee's Claim for Compensation for a Work-Related Injury or Occupational Disease" ("Claim for Compensation") with the Texas Department of Insurance ("TDI"), his filing of a "Request to Schedule, Re-Schedule, or Cancel a Benefit Review Conference (BRC)" ("Request to Schedule a Benefit Review Conference" or "Request") with the TDI, his consultation with an ombudsman in the Texas Office of Injured Employee Counsel, and his "knowing and voluntary" acceptance of temporary total and medical benefits issued pursuant to Texas law. The trial court therefore determined that Employee was precluded from recovering workers' compensation benefits in Tennessee. 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. After careful consideration, we affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e)(1) (2014) (applicable to injuries occurring prior to July 1, 2014) Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and WILLIAM B. ACREE, JR., SR. J., joined.

Rocky McElhaney and Justin Hight, Nashville, Tennessee, for the appellant, Mack Bilbrey, Jr.

Mark A. Baugh, Nashville, Tennessee, for the appellees, Active USA, LLC and Gallagher Bassett Services, Inc.

OPINION

Factual and Procedural Background[1]

Mack Bilbrey, Jr. ("Employee"), a resident of Hartsville, Tennessee, worked as a truck driver for Active USA, LLC ("Employer"), which has its principal office in Pleasant Prairie, Wisconsin. Employee initially worked for Employer as a truck driver based out of Madison, Tennessee in 2005 but was laid off approximately one year later. As a truck driver, Employee was responsible for delivering and unloading semi-trucks. In 2011, Employee resumed his employment as a truck driver with Employer, this time based out of a terminal located in Denton, Texas. Otherwise, his job duties were the same as they had been previously.

The parties do not dispute that Employee sustained a back injury in Florida during the course and scope of his employment with Employer on Friday, October 13, 2012. Employer completed a form titled "Employer's First Report of Injury or Illness" on October 15, 2012. According to Employee, he never saw this form and was not aware of "whether [Employer] had filed a first report of work injury for [him]." On October 26, 2012, Employee completed, with his wife's assistance,[2] a Claim for Compensation with the Texas Department of Insurance, Division of Workers' Compensation. Employee had not previously filed a workers' compensation claim.

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[1] It is not entirely clear from the record what documents the trial court considered when making its ruling. Therefore, the facts in this opinion have been gleaned from all of the documents in the record on appeal.

[2] Employee testified at trial that his wife generally "goes over [documents with him]" because it is "difficult for [him] to read and comprehend" the documents he receives. Employee further explained that, although he graduated from high school, he had to attend "special classes" in order to do so.

When shown the Claim for Compensation by his counsel during trial, Employee stated that a friend who also worked for Employer, Mr. Wiley Moore, "told [Employee he] needed to get some papers, and he faxed [Employee] some, and [the Claim for Compensation form] could have been one of them." The Employee further testified that no one, "whether [his] employer, workers' compensation [insurance] carrier or anyone[,]" had explained to him what the Claim for Compensation meant, the legal implications it could have, that Employee could have brought his workers' compensation claim in another state, that his benefits could differ based on the state he pursued a claim in, or that one state's benefits could be more favorable than another's. On cross examination, however, Employee made clear that no one from Employer or Employer's insurance carrier's third-party administrator, Gallagher Bassett Services, Inc. ("Gallagher Bassett"), sent Employee the Claim for Compensation. While undergoing treatment for his injury, Employee received benefits pursuant to Texas workers' compensation law.[3] He did not receive any medical bills at home, and he testified that workers' compensation paid "for all of the medical bills resulting from [his] treatment."

Employee hired counsel in Tennessee shortly before November 27, 2013. On that date, counsel sent a letter to Gallagher Bassett stating that Employee "elects to have his workers' compensation case governed by Tennessee law. [Employee] makes an election of remedy to be governed and covered under the Tennessee Workers' Compensation Act." According to a Workers' Compensation Specialist with the Tennessee Division of Workers' Compensation, Gallagher Bassett "did not transfer the claim from Texas to Tennessee, and continued to pay benefits in accordance with Texas worker's [sic] compensation law."

On January 23, 2014, Employee, with his wife's assistance but without consulting counsel, completed and submitted a Request to Schedule a Benefit Review Conference to the Texas Department of Insurance, Division of Workers' Compensation. On that form, Employee indicated that he disputed the date of maximum medical improvement ("MMI") and impairment rating of 5 percent assigned by Dr. David West, the evaluating doctor designated after the Texas Department of Insurance approved Gallagher Bassett's "Request for Designated Doctor Examination." Employee also marked a box on the Request to Schedule a Benefit Review Conference form indicating that he was assisted by the Texas Office of Injured Employee Counsel ("OIEC"). When asked during his deposition whether he had ever spoken with anyone at the OIEC, and whether he had ever spoken to Ms. Diane DeLeon, an ombudsman with the OIEC, Employee responded

[3] The record reflects that Employee received temporary total disability benefits and medical benefits from October 21, 2012, through January 1, 2014.

affirmatively. Specifically, he stated that he spoke with Ms. DeLeon about "all of this paperwork and stuff[,]" and pointed to "this sheet[, the Request to Schedule a Benefit Review Conference,] here" because he had "never done anything like this." When asked about his understanding of the Request to Schedule a Benefit Review Conference at trial, Employee explained that his "understanding of this paperwork, from Mr. Moore, [was] that if [Employee] sent it in, and [Mr. Moore] told [him] to type this down here,[4] that would keep all [his] benefits for [his] back and stuff." Furthermore, Employee testified that he believed that "[i]f [he] didn't turn in a form that [he] would lose [his] benefits. [He] wouldn't get [his] back or nothing paid for if something happened to [him]."

After he submitted the Request, Employee began receiving phone calls and paperwork that caused him confusion about the process that had been set in motion when he filed the Request. During his deposition, Employee stated that he spoke with Ms. DeLeon after he started receiving this paperwork and that she said "that if we done it, that it would be – it would be gone, and then there would be nothing else done about it if I didn't go through with it now." Employee explained that he understood that to mean that, if he didn't go through with the Benefit Review Conference, "all of [his] benefits and stuff would be gone." Employee did not attend the BRC in person or via telephone. A Contested Case Hearing was then set for May 21, 2014. At some point on or before May 12, 2014, Employee contacted and notified his Tennessee attorney about the paperwork Employee had submitted in Texas and the communications he was receiving. Employee and his Tennessee attorney then called and spoke with a representative from the Texas Department of Insurance in an effort to stop the Texas proceedings. On May 14, 2014, counsel for Employee submitted a "Request for Continuance of Contested Case Hearing" pending the outcome of Employee's claim in Tennessee.

While these proceedings were occurring in Texas, on March 13, 2014, Tennessee counsel for Employee filed a "Request for Assistance" with the Division of Workers' Compensation of the Tennessee Department of Labor and Workforce Development to determine whether Employee's claim was compensable under Tennessee Law. On April 29, 2014, a Workers' Compensation Specialist issued an "Order Denying Workers' Compensation Benefits," concluding that Employee had elected to receive benefits under Texas workers' compensation law. Counsel for Employee subsequently filed a complaint in the Chancery Court for Trousdale County on May 21, 2014.

Following a trial on February 27, 2019, the trial court found that it had jurisdiction pursuant to Tennessee Code Annotated section 50-6-115 (2014) because the contract of

[4] This reference is to the portion of the form where Employee indicated and described the disputed issues.

hire was made in Tennessee. Second, the court found that Employee elected to receive workers' compensation benefits under Texas law and was therefore precluded from recovering in Tennessee. The court based its conclusion primarily on three actions of Employee: (1) his filing of the Claim for Compensation shortly after his injury; (2) his filing of the Request to Schedule a Benefit Review Conference; and (3) his acceptance of payments for temporary total disability and medical expenses that were made pursuant to Texas workers' compensation laws. The court specifically concluded that Employee "knowingly and voluntarily" accepted these benefits. Additionally, discussing Employee's filing of the Request to Schedule a Benefit Review Conference, the court highlighted that Employee indicated on that form that he had used the Office of Injured Employee Counsel and that he had filed the Request after retaining Tennessee counsel who the court believed to be giving Employee "good advice."

Analysis

In workers' compensation cases, the standard of review applied to a trial court's conclusions of law is de novo with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009) (citations omitted). A trial court's findings of fact are reviewed "'de novo upon the record . . . , accompanied by a presumption of the correctness of the [trial court's] finding[s], unless the preponderance of the evidence is otherwise.'" *Id.* (quoting Tenn. Code Ann. § 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014)). Considerable deference is given to the factual determinations made by the trial court when the trial judge has had the opportunity to observe a witness's demeanor and hear in-court testimony. *Kilburn v. Granite State Insurance Co.*, 522 S.W.3d 384, 389 (Tenn. 2017) (citing *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009)).

"An employee who sustains an otherwise compensable injury in another state may be barred from [receiving] . . . benefits [under Tennessee law] through operation of the doctrine of election of remedies." *Bradshaw v. Old Republic Ins. Co.*, 922 S.W.2d 503, 504 (Tenn. 1996). "This doctrine is designed to prevent forum shopping, vexatious litigation, and double recovery for the same injury." *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004) (citing *Bradshaw*, 922 S.W.2d at 506). The question of whether an employee has elected to receive benefits in another jurisdiction and, thus, is precluded from recovering under Tennessee law, is a question of law that is reviewed de novo. *Bradshaw*, 922 S.W.2d at 503.

Under the election of remedies doctrine, an employee's "mere acceptance of benefits from another state does not constitute an election." *Id.* at 504. Furthermore, "it is not necessary that the employee actually receive benefits in another state." *Eadie*, 142 S.W.3d at 291. However, "affirmative action to obtain benefits or knowing and voluntary acceptance of benefits from another state will be sufficient to establish a

binding election."[5] *Perkins v. BE & K, Inc.*, 802 S.W.2d 215, 217 (Tenn. 1990). An employee is deemed to "knowingly" accept benefits when he "has full knowledge of his options." *Bradshaw*, 922 S.W.2d at 505; *True v. Amerail Corp.*, 584 S.W.2d 794, 794 (Tenn. 1979); *see also Hale v. Commercial Union Assurance Cos.*, 637 S.W.2d 865, 869-70 (Tenn. 1982) (To hold that an employee "who received voluntarily-paid benefits did not make a binding election . . .[i]t is sufficient . . . if benefits were received and accepted by the employee without knowledge on his part that he could have made a claim in Tennessee, or without the degree of knowledge which is required in order for a binding election to be made.").

The election of remedies doctrine was originally established in *Tidwell v. Chattanooga Boiler and Tank Company*, 43 S.W.2d 221 (Tenn. 1931) and has been consistently recognized and reaffirmed by the Tennessee Supreme Court. *See Thomas v. Transport Insurance Co.*, 532 S.W.2d 263 (Tenn. 1976); *True*, 584 S.W.2d 794; *Commercial Union Assurance Cos.*, 637 S.W.2d 865; *Perkins*, 802 S.W.2d 215; *Gray v. Holloway Constr. Co.*, 834 S.W.2d 277 (Tenn. 1992); *Hale v. Fraley's, Inc.*, 825 S.W.2d 690 (Tenn. 1992); *Bradshaw*, 922 S.W.2d 503; *Eadie*, 142 S.W.3d 288. The doctrine's application in a particular case turns acutely on the facts. *See Perkins*, 802 S.W.2d at 217 (emphasizing that "the *circumstances of each case* must be considered when determining whether the employee has made a binding election" (emphasis added)); *Bradshaw*, 922 S.W.2d at 505 (explaining that "the question of whether an employee has made a binding election must be determined from a *careful examination of the facts*" (emphasis added)). Despite the factual nature of the inquiry, the Court has noted some themes among its holdings, explaining:

> [t]he common thread in *Perkins* and *Tidwell*—cases in which recovery in Tennessee was held to be precluded—is the fact that workers injured in other jurisdictions had both filed out-of-state claims and received awards in those courts or entered into settlements approved by industrial commissions in those states. The common thread in *Thomas* and *Hale[v. Commercial Union Assurance Cos.]*—opinions in which we held that recovery was not precluded—is the fact that the workers in those cases had done no more than accept benefits tendered by their employers' insurance

[5] As another Special Workers' Compensation Appeals Panel recently clarified, however, the election of remedies doctrine does not preclude recovery if the employee actively pursued a claim in a venue that does not have jurisdiction. *See Goodwin v. Morristown Driver's Servs.*, __ S.W.3d __ (Tenn. Workers' Comp. Panel June 15, 2020) (citing *Gray v. Holloway Constr. Co.*, 834 S.W.2d 277 (Tenn. 1992)); *see also Goodwin v. Morristown Driver's Servs.*, No. E2019-01517-SC-WCM-WC (Tenn. June 15, 2020) (Order) (denying motion for review and designating the Special Workers' Compensation Appeals Panel's Opinion for publication).

> carriers upon notice of injury, at a time when they had too little knowledge to make an "informed choice" about which of two remedies they wished to pursue, and in what forum.

Gray, 834 S.W.2d at 280 (citation omitted) (footnote omitted).

After careful consideration of all of the facts and circumstances relevant to this appeal, we find that Employee elected to receive workers' compensation benefits under Texas law and is therefore precluded from claiming benefits under Tennessee law. It cannot be said that Employee in this case merely accepted benefits without doing more. Instead, unlike the employee in *Hale v. Fraley's, Inc*., 825 S.W.2d at 692, who simply "accepted the benefits which were tendered" and signed two "documents under circumstances where a reasonable person would expect to be required to execute a receipt[,]" Employee took intentional, affirmative steps on his own volition with the explicit intention of collecting workers' compensation benefits that were issued pursuant to Texas law. In other words, he took "affirmative action to obtain [workers' compensation] benefits" in Texas. *See Perkins*, 802 S.W.2d at 217.

In fact, in this case, Employee took affirmative action on at least two separate occasions, and, in the latter instance, even after retaining Tennessee counsel. Here, Employee filed the Claim for Compensation with the Texas Department of Insurance, Division of Workers Compensation, filed the Request to Schedule a Benefit Review Conference in Texas after retaining Tennessee counsel, albeit without counsel's advice, and discussed his Request with an ombudsman at the OIEC. Although Employee was not experienced in filing workers' compensation claims and was acting on the advice of a friend, no official from Employer sent Employee the documents he filed or encouraged, prompted, or instructed Employee to file these documents. Employee, with the assistance of his wife, acted on his own in these instances. *Cf. Fraley's Inc.,* 825 S.W.2d at 691-92 (holding that the employee was not barred by the election of remedies doctrine as, "[t]he record fail[ed] to demonstrate that [the employee] participated in the claim procedure beyond simply signing two documents[,]" which he was instructed by his employer to sign); *Gray*, 834 S.W.2d at 279 (citing *Commercial Union Assurance Cos.*, 637 S.W.2d at 870) ("[W]e have held on more than one occasion that mere acceptance by the employee of benefit payments initiated by the employer or its insurance carrier, without more, will not preclude recovery in Tennessee.").

The actions surrounding Employee's completion, filing, and discussion with the ombudsman at the OIEC regarding his Request to Schedule a Benefit Review Conference, in particular, required deliberate action on the part of Employee. In fact, Employee articulated this deliberateness when explaining that he filed the Request in an effort to "keep all [his] benefits for [his] back and stuff[,]" and that he believed "[i]f [he] didn't turn in [the Request] that [he] would lose [his] benefits. [He] wouldn't get [his]

back or nothing paid for if something happened to [him]." Furthermore, Employee had already retained his Tennessee counsel at the time he filed the Request, even though he chose not to consult him. Employee took steps to identify the date of MMI and the assigned impairment rating as the issues he disputed on the Request, and he spoke with Ms. DeLeon to get assistance because he had "never done anything like this." Employee also continued to accept benefits issued pursuant to Texas law for a time after retaining Tennessee counsel. All of this affirmative conduct on the part of Employee simply cannot be negated by the single letter Tennessee counsel sent to Gallagher Bassett claiming that Employee was electing to receive benefits under Tennessee workers' compensation law. Therefore, considering the totality of facts and circumstances in this case, we conclude that Employee is precluded from receiving benefits in Tennessee pursuant to the election of remedies doctrine.[6]

Conclusion

Based on the foregoing analysis, the judgment of the trial court is affirmed. Costs on appeal are taxed to Mack Bilbrey, Jr., for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE

[6] Any other issues related to compensability under Tennessee workers' compensation law are, therefore, pretermitted.