

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
May 17, 2009 Session

VICKY L. BENSON v. OLD REPUBLIC INSURANCE COMPANY, ET AL.

**Appeal from the Circuit Court for Blount County
No. L-14635 David R. Duggan, Judge**

No. E2009-01173-WC-R3-WC - Filed July 28, 2010

Pursuant to Tennessee Supreme Court Rule 51, 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. Vicky Benson ("Employee") developed bilateral carpal tunnel syndrome in 2002, as a result of her work for New Gray Cemetery ("Employer"). Her claim was accepted. She had surgery on her right arm in 2004 and returned to work. After her return, she was terminated for reasons not related to her injury. She continued to receive conservative medical treatment from time to time. She found new employment in 2006. In September 2007, her treating physician recommended surgery for her left arm. Employer denied the claim, contending that her subsequent employer was liable for the condition and its effects. The trial court ruled that Employee's condition had been worsened by her later employment, and dismissed the claim. On appeal, Employee contends that the evidence preponderates against the trial court's finding. We affirm the judgment.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which GARY R. WADE, J., and WALTER C. KURTZ, SR. J., joined.

Eugene B. Dixon, Maryville, Tennessee, for the appellant, Vicky L. Benson.

Joshua A. Wolfe, Knoxville, Tennessee, for the appellees, Old Republic Insurance Company and New Gray Cemetery.

MEMORANDUM OPINION

Factual and Procedural Background

Employee began working as a groundskeeper for Employer in 1997. Over time, she developed symptoms of numbness and tingling in her hands. She reported these symptoms to her supervisor in the summer of 2002, and was ultimately referred to Dr. John Ambrosia, an orthopaedic surgeon, for treatment. He first examined her in August 2002, and diagnosed her with bilateral carpal tunnel syndrome. Initially, he provided conservative treatment, which relieved her symptoms for a period of time. However, her symptoms worsened in March 2004. Dr. Ambrosia performed a right carpal tunnel release in June 2004. He ultimately assigned 0% impairment for her condition and the procedure.

In July 2004, Employee was terminated for reasons unrelated to her injury. In January 2005, her left carpal tunnel symptoms worsened, and she returned to Dr. Ambrosia. Although surgery was discussed, conservative treatment was ultimately administered. A similar flare-up occurred in January 2006.

In July or August 2006, Employee began to work as a cashier and deli clerk at a convenience store. In September 2007, she was reevaluated by Dr. Ambrosia, who recommended surgery for the left arm. Employer's workers' compensation insurer sent a letter to Dr. Ambrosia requesting his opinion of the relationship of the symptoms Employee was having at that time with her original workers' compensation injury. His October 1, 2007 response indicated that her previous injury and her then-current work status each contributed 50% to the symptoms she was having in her left arm. Dr. Ambrosia's opinions were expressed by means of a C-32 report and attached medical notes.

In her discovery deposition, Employee initially testified that her symptoms were about the same after she began working at the convenience store, but later stated that they had increased somewhat. Concerning her job, she said "usually something irritates [her arm] every day." She indicated that counting money and rush period at the deli caused her symptoms to increase.

The case was set for trial in August 2007, but the trial was continued upon motion of Employee. In December 2008, Employer filed a motion for summary judgment, or in the alternative to dismiss for failure to prosecute. The motion was supported by the C-32 and attached records of Dr. Ambrosia, and Employee's discovery deposition. In its motion, Employer argued that Dr. Ambrosia's records established that Employee's left carpal tunnel syndrome had worsened as a result of her employment at the convenience store, and that it

was therefore no longer liable based upon the last injurious exposure rule.¹ Employee did not respond to the motion, but relied upon the allegations of her pleadings, and also asserted that the facts set out in support of the motion were not sufficient to entitle Employer to summary judgment.

In a written memorandum, the trial court found that it was “clear from the undisputed material facts that [Employee’s] injury has been aggravated, advanced, or progressed while employed by the second employer.” Citing Mahoney v. NationsBank of Tennessee, N.A., 158 S.W.3d 340 (Tenn. 2005), it granted summary judgment to Employer. Employee has appealed, arguing that the trial court’s decision was incorrect.

Standard of Review

Rule 56 of the Tennessee Rules of Civil Procedure provides the applicable standard of review when a workers’ compensation claim is decided on a party’s motion for summary judgment. Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524 (Tenn. 1991). A motion for summary judgment should be granted when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. See Tenn. R. Civ. P. 56.04; Penley v. Honda Motor Co., 31 S.W.3d 181, 183 (Tenn. 2000); Byrd v. Hall, 847 S.W.2d 208, 211 (Tenn. 1993). The appellate court must review the evidence in a light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000). The standard of review is de novo with no presumption of correctness attached to the trial court’s conclusions. Teter v. Republic Parking Sys., Inc., 181 S.W.3d 330, 337 (Tenn. 2005).

Analysis

Employee contends that the trial court misapplied Mahoney. She argues that the last injurious injury rule requires a specific second accidental injury to place liability for a work-related injury upon the second employer, and that the evidence submitted in support of Employer’s motion does not establish that her carpal tunnel syndrome had progressed or been aggravated by the working conditions at the convenience store.

In support of the trial court’s decision, Employer first points out that Rule 56.03 of the Tennessee Rules of Civil Procedure does not permit a party to rely upon its pleadings to oppose a motion for summary judgment. Employee did so in this case. The trial court found that Dr. Ambrosia’s statements, considered in light of Employee’s deposition testimony,

¹ This principle is probably more correctly characterized, in this case, as the last injurious injury rule.

established that “[Employee’s] condition was ‘aggravated, advanced,’ or ‘progressed,’ as a result of her subsequent employment.” That interpretation does not conflict with Dr. Ambrosia’s opinions, as set out in his C-32 and office notes. Employee presented no evidence tending to show that he meant something else, nor did she present any contrary medical opinions. Because Tennessee does not recognize apportionment of liability, the employer at the time of the last injurious injury is liable for the entire disability, even if that exposure caused only a slight change of the employee’s condition. Bennett v. Howard Johnson’s Motor Lodge, 714 S.W.2d 273,279 (Tenn. 1986).

In light of Employee’s tactical decision to rely on her pleadings, there is nothing in the record to suggest that the trial court’s finding was in error. The only medical evidence in the record supports the finding that Employee’s work for her subsequent employer caused some advancement of her pre-existing left carpal tunnel syndrome. In that event, the later employer would be liable for any workers’ compensation benefits arriving from that condition.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Vicky L. Benson and her surety, for which execution may issue if necessary.

JON KERRY BLACKWOOD, Senior Judge

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL
May 17, 2010 SESSION

VICKY L. BENSON v. OLD REPUBLIC INSURANCE COMPANY, ET AL

**Circuit Court for Blount County
No. 2008-01101-1**

No. E2009-01173-WC-R3-WC - Filed July 28, 2010

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 appeals 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 are taxed to Vicky L. Benson and her surety for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM