IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

October 25, 2010 Session

JIMMY RANKIN v. EVERYBODY'S OIL CORPORATION d/b/a QUICK TIRE/TIRE BARN, ET AL.

Appeal from the Chancery Court for Washington County
No. 37389 G. Richard Johnson, Chancellor

No. E2010-00587-WC-R3-WC - Filed March 9, 2011

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. The employee sustained a work-related injury in September 2007, but medical treatment was not offered by the employer at that time. He continued to work for several months despite his injury. In March 2008, his employer sent him to a physician. He was diagnosed with a significant spinal injury, which required surgical treatment and resulted in severe disability. His employer had changed its workers' compensation insurer in November 2007. Employee's claim was settled, but the two insurers disagreed as to which was liable. The trial court found that the insurer at the time of the original injury was liable. That insurer has appealed, contending that the later insurer should be liable due to the gradual worsening of the employee's condition after November 2007. We affirm the judgment.

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

Nicholas S. Akins, Nashville, Tennessee, for the appellant, Zenith Insurance Company.

J. Eddie Lauderback, Johnson City, Tennessee, for the appellee, FCCI Insurance Group

MEMORANDUM OPINION

Factual and Procedural Background

Jimmy Rankin ("Employee") was a tire trainer for Tire Barn, a tire store owned by Everybody's Oil Company ("Employer"). Mr. Rankin's job responsibilities required him to use hand jacks, lift and change tires, crawl beneath vehicles, and remove and mount wheels. These tasks required vigorous activity on his part. Mr. Rankin testified that he was injured on September 4, 2007, while lifting a tire. Mr. Rankin stated that he felt a popping sensation in his back. Mr. Rankin told his supervisor about his injury but was told to go back to work. At the time of Mr. Rankin's injury, Zenith Insurance Company ("Zenith") was Employer's workers' compensation insurer. Mr. Rankin continued to work, although he experienced increasing symptoms, including pain in his back and leg, as well as numbness and tingling in his feet. In November 2007, FCCI Insurance Group ("FCCI") became Employer's workers' compensation insurer. Mr. Rankin continued to work but the pain required him to alter his gait and body movement. He began to have a "drunken" sensation and had difficulty walking. In March 2008, Eldon Riggs, the Chief Operating Officer of Employer, made a routine visit to the Johnson City store where Mr. Rankin was employed. Mr. Riggs had originally hired Mr. Rankin and was aware that he was a good employee. Mr. Riggs testified that he noticed Employee limping and that he appeared to be leaning. Upon inquiry regarding his condition, Mr. Rankin told Mr. Riggs about his September accident and injury. Thereafter Mr. Riggs took steps to initiate a workers' compensation claim.

Mr. Rankin was ultimately referred to Dr. Scott Dulebohn, a neurosurgeon. Dr. Dulebohn found that Mr. Rankin had both cervical myelopathy (pressure on the spinal cord) and a herniated disc at the L5 level. The former condition was very serious, as it affected Mr. Rankin's ability to walk and had the potential to cause quadriplegia. Dr. Dulebohn performed a cervical corpectomy to remove discs at C4-5 and 5-6 and to replace bone with an artificial cage and plate. Dr. Dulebohn did not perform surgery at the L4-5 disc. Mr. Rankin was last seen by Dr. Dulebohn on November 10, 2008. At that time, Mr. Rankin was still dehabilitated and quadriparetic (weakness in all four limbs).

Mr. Rankin filed suit against Employer, Zenith and FCCI. Prior to trial, the parties reached a settlement requiring FCCI to pay a lump sum of $225,000.00 to Mr. Rankin. Mr. Rankin released all claims except past and future medical expenses. Zenith and FCCI reserved the right to litigate which insurer would be liable for the lump sum payment and medical expenses. Zenith and FCCI then proceeded to trial on that issue.

Dr. Dulebohn testified by deposition. He opined that both the cervical and lumbar injuries were caused by the September 2007 incident. On cross-examination, he agreed that

Mr. Rankin's condition worsened after the initial injury, and that the relatively strenuous work which he performed until March 2008 would have contributed to that worsening.

Dr. William Kennedy, an orthopaedic surgeon, performed an IME at the request of Employee's attorney. He also testified that Mr. Rankin's injuries were caused by the September 2007 event and that his subsequent work activities likely caused a worsening of his condition.

The trial court issued its findings from the bench. It held that Mr. Rankin's injury occurred on September 4, 2007, and Zenith was therefore liable for benefits arising from the injury. Zenith has appealed from that decision.

Standard of Review

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, 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 the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 898 (Tenn. 2009). "When 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 depositions, and the reviewing court may draw its own conclusions with regard to those issues." Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Zenith contends that the trial court erred by relying on Dr. Dulebohn's statement that "[e]verything is a result of the September 4th, 2007 incident," as well as similar statements by Dr. Kennedy. It notes that Mr. Rankin and both doctors testified that his condition deteriorated after the initial injury, continued to do so until he stopped working in the Spring of 2008, and that his work activities contributed to that deterioration. On that basis, Zenith argues that the "last day worked" rule, described in Building Materials Corp. v. Britt, 211 S.W.3d 706 (Tenn. 2007), should be applied, thus placing the injury date in March 2008, and imposing liability upon FCCI.

Britt, however, was a gradual injury case. See id. at 711 (describing the "last day

worked" rule as "prevent[ing] workers with gradually occurring injuries from losing the opportunity to bring workers' compensation claims due to the running of the statute of limitations"). In Aerospace Testing Alliance v. Anderson, No. M2007-00959-WC-R3-WC, 2008 WL 2199785 (Tenn. Workers' Comp. Panel May 23, 2008), a gradually occurring injury was defined as one that "typically commences at some unknown point and then gradually progresses in severity until it causes disability." Id. at *6.

Zenith cites Aerospace to support its position that the "last day worked" rule may be applied in circumstances in which an employee sustains a traumatic injury on a specific date that worsens over time. However, Aerospace was a hearing loss case in which the employee suffered tinnitus as a result of an explosion. Id. at *2-3. The employee had gradual hearing loss and worsening of his tinnitus thereafter as a result of noise exposure in the workplace. Id. The primary issue in that case was whether the injury should be apportioned to the body as a whole or to a scheduled member. Id. at *5. Its relationship to the issue raised here is not applicable.

Employee suffered an acute injury on September 4, 2007. There is no evidence of a separate, identifiable injury after that date. The extent and effects of the injury increased thereafter. Dr. Dulebohn testified that "every time he . . . lifted and strained, he caused a Valsalva in the neck which caused the spinal cord to push against the disc which continued to worsen and ding it over time. Every time he bent down and bent up, he continued to hurt himself." Although "not as dramatic as if [he was] straining," all of Mr. Rankin's activities, whether at work or elsewhere, caused the injury to worsen. Moreover, Dr. Dulebohn stated that Mr. Rankin's cervical myelopathy "may continue to worsen even though it's been decompressed because once the [spinal] cord has been damaged . . . the person can continue to worsen which is the disappointing thing about spinal cord surgery." The gist of Dr. Dulebohn's testimony was that Mr. Rankin's condition after the initial injury was a direct and natural consequence of the original trauma, rather than a separate process caused by subsequent gradual trauma. In light of that, we conclude that the evidence does not preponderate against the trial court's conclusion that liability for Employee's injury is properly assigned to Zenith, which insured Employer on the date of the original injury.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Zenith Insurance Company and its surety, for which execution may issue if necessary.

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JON KERRY BLACKWOOD, SENIOR JUDGE

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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 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 Zenith Insurance Company and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM