IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
JUNE 2003 Session

DARRELL DWAIN BINKLEY v. TENNESSEE DIECASTING-HARVARD INDUSTRIES, ET AL.

Direct Appeal from the Chancery Court for Lauderdale County
No. 10,950 Martha Brasfield, Chancellor

No. W2002 -02188-SC-WCM-CV - Mailed August 28, 2003; Filed December 18, 2003

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn. Code Ann. Section §50-6-225 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The Appellant, employer, argues that the trial court erred in finding that the employee sustained a herniated disc as a result of his on the job injury; in awarding temporary total and permanent partial disability benefits and in not applying the "Last Injurious Injury Rule" to dismiss the employee's claim against Appellant. The Appellee, employee, argues that the trial court erred in limiting employees permanent award to 2.5 times the anatomical rating pursuant to T.C.A. §50-6-241(a)(1) because employee's return to work was not "meaningful". For the reasons discussed below, the panel has concluded that the judgment of the trial court should be affirmed in all respects.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed

ARNOLD B. GOLDIN, Sp. J., delivered the opinion of the court, in which HOLDER, J. and LOSER, Sp. J. joined.

Byron K. Lindberg and Peggy Tolson, Tolson and Associates, Brentwood, Tennessee, for the appellant, Tennessee Diecasting-Harvard Industries and ITT Hartford Insurance Group

D. Michael Dunavant, Ripley, Tennessee, for the appellee, Darrell Dwain Binkley

MEMORANDUM OPINION

STANDARD OF REVIEW

The review of the findings of the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). Stone v. City of McMinnville, 896 S.W. 2d 548,550 (Tenn. 1995). This court is not bound by the trial court's findings, but instead conducts its own independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1981).

FACTUAL BACKGROUND

The employee, Darrell Dwain Binkley, filed his complaint for workers' compensation benefits alleging that he sustained an injury to his lower back on September 29, 1997, when he lifted a five gallon bucket of oil, weighing approximately 75 pounds, while at work for his employer, Tennessee Diecasting. His complaint alleged that his injury was permanent and that he was entitled to benefits for both temporary total and permanent partial disability, in addition to current and future medical care. Appellant denied the employee's claim in its entirety and further alleged that if the employee sustained an on the job injury that the court should dismiss the claim against it based on the "Last Injurious Injury Rule".

Following a trial on May 21, 2002, the court found that the employee sustained a compensable injury to his low back and awarded him five (5%) per cent permanent partial disability to the body as a whole. The court further found that the employee was entitled to benefits for a period of temporary total disability and that the "Last Injurious Injury Rule" did not apply to the facts of this case. The employer has appealed from the entire award.

The employee was 42 years old at the time of trial. He had a varied work history. He had been in the military, albeit briefly; had performed seasonal work at two different cotton gins over several years; had worked as a laborer at factories and warehouses and had been a maintenance man for two adult family homes in the State of Washington, one of which was owned by his former wife. He had also worked as a laborer and maintenance man for a diesel company. While working for this employer in 1988, he slipped and sustained a herniated disc at the L5-S1 level for which he underwent surgery. He received a workers' compensation settlement as a result of this injury.

LEGAL AND MEDICAL CAUSATION

The employee went to work for the Appellant in 1997. His duties were to operate a machine and to dispense parts. His job required constant lifting, bending and stooping. Part of his job required him to keep the machines well oiled and lubricated. The oil for the machines was carried in the plant in large open buckets. The oil would splash out of the buckets onto the floor causing a slipping hazard. On the day of his injury, he was preparing to carry oil to his machine in a 5 gallon bucket,

weighing approximately 75 pounds. As he lifted the bucket, he felt a "pop" in his back causing a shock to run into his knees and toes and numbness, tingling and pain in his left leg and foot.

He advised his plant supervisor that he had been injured and was told to go to the emergency room at the local hospital where he was treated and released. He did not improve. The employer then authorized treatment by Dr. William Tucker, a family practice physician in Ripley. Again, he did not improve and was referred by Dr. Tucker to Dr. D.J. Canale, a Memphis neurosurgeon. Dr. Canale ordered an MRI performed. Dr. Canale read the MRI as showing a mild bulging disc, especially at the L5 level. Dr. Canale testified that he found no evidence of a recurrent disc rupture and returned the employee to work full duty without restrictions and with no permanent physical impairment.

The employee was not satisfied with his treatment from Dr. Canale. He felt that his pain was similar to the pain he had experienced from his earlier 1988 disc injury. He told his employer he was going to seek treatment at the V.A. Hospital. In the meantime, the employer's workers compensation carrier referred him to Dr. John Brophy, another Memphis neurosurgeon. Though Dr. Brophy sent him to a work hardening/physical therapy program the employee did not participate in it because it was going to require him to sign a form that stated he would not seek treatment from anyone other than Dr. Brophy. Since he was also being treated at the V.A., he refused to sign the form. Dr. Brophy then released him and returned him to work at full duty without restrictions and with no permanent physical impairment.

He was offered light duty work by his employer in October, 1997, which he performed for a very brief period of time. He left the job voluntarily and never returned to full duty as per the instructions of Drs. Canale and Brophy.

The employee was treated at the V.A. Hospital in Memphis between 1997-1999. He then moved back to Washington State in 1999, and began treatment at the V.A. Hospital there in July, 1999, undergoing back surgery on December 30, 1999. The operative notes reflect that the surgeon found scar tissue, fatty tissue, and *a large disc fragment at the L5-S1 level.*

Following his surgery, the employee continued to seek treatment for his back problem from the V.A. Hospital rather than from physicians authorized by his employer. Dr. Samuel Pieper, a psychiatrist with the V.A. Hospital in Murfreesboro, who never examined or treated him, reviewed the records of his treatment at the V.A. Hospitals. Dr. Pieper testified that the employee sustained a permanent impairment from his on the job injury of September, 1997, based primarily on the fact that a disc fragment was found at the L5-S1 level during surgery. Dr. Pieper opined that the employee had sustained a 10% permanent physical impairment from his 1988 back surgery and that, in accordance with the AMA Guidelines, he should receive an additional 2% for his second surgery at the same level in1999.

Appellant contends that the trial court should have denied compensability of this claim because two highly respected neurosurgeons, Drs. Canale and Brophy, testified that Mr. Binkley did

not sustain a permanent impairment from his injury of September, 1997. They also argue that the credibility of the V.A. records and its surgeons is somewhat "jaundiced" and that a patient, if he looks long and hard enough, can always find a surgeon who will perform surgery.

This is an interesting argument which may be valid in some cases. In this case, however, not only did the employee consistently complain of back and leg pain from the date of his injury in September, 1997 until his surgery on December 30, 1999, but when surgery was ultimately performed at the V.A. Hospital, *a large disc fragment was found and removed from his back*. Dr. Pieper opined that the disc fragment was the abnormality that showed up on the MRI, myleogram and CAT scan and that these diagnostic test results had been incorrectly interpreted by Drs. Canale and Brophy. It was his opinion that the disc fragment that was found as a result of the December, 1999, surgery had caused the employee's pain since September 29, 1997.

The trial court found that the preponderance of the evidence supported the employee's claim that he sustained a ruptured disc when he lifted the oil bucket on September 29, 1997 and we are not persuaded otherwise.

TEMPORARY TOTAL DISABILITY

The employee was injured on September 27, 1997. He was off work until November 7, 1997, when he was returned to work by Dr. Canale. The employer provided him with light duty work at full pay and stopped paying him temporary total disability benefits. His return to work lasted approximately three (3) hours after which he voluntarily terminated his employment. It was on this same date that he began seeking medical treatment at the V.A. Hospital in Memphis.

He continued to seek treatment at the V.A. for his work injury both in Memphis and Washington State culminating with his back surgery on December 30, 1999.[1]

The post operative notes from the V.A. indicated that he was doing well following his surgery until January 10, 2000, when he "picked up a bag of sugar, and his problems began anew".

The trial court found that the employee had been unable to work from the time he voluntarily left his light duty employment with his employer and continued with his treatment at the V.A., including his surgery. The court found he reached maximum medical improvement on January 10, 2000, the date he picked up the bag of sugar.

Appellant argues that because the employee voluntarily left his employment while assigned to light duty, that he should not be entitled to reinstatement of additional temporary total disability.

[1]He had also been released by Dr. John Brophy on December 15, 1999 to return to work at full duty *without restrictions*.

As the Supreme Court stated in Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 776 (Tenn.2000):

"T.C.A. §50-6-207(3)(A)(i) specifically provides that the injured employee shall receive compensation 'for the period of time during which [the employee] suffers temporary total disability on account of the injury' and thus the purpose served by such benefits is to allow for 'the healing period during which the employee is totally prevented from working' Gluck Bros., Inc.v. Coffey, 222 Tenn. 6, 13-14, 431 S.W. 2d 756, 759 (1968)."

Appellant relies upon the employees return to work by Drs. Canale and Brophy. Based on the employee's findings at surgery and the opinion of Dr. Pieper, the trial court obviously found that both Drs. Canale and Brophy had been incorrect in their diagnosis at the time they returned the employee to work.

Moreover, as the court stated in Cleek, "the fact that benefits were terminated by a nominal return to work does not necessarily mean that temporary total disability benefits can never be revived under any set of circumstances". 19 S.W. 3d at 776.

The trial court found that the employee is entitled to an additional period of temporary total disability benefits for the period November 7, 1997, when he began seeking treatment at the V.A. Hospital until January 10, 2000. We agree with the trial court.

PERMANENT IMPAIRMENT

Once the causation and permanency of an injury have been established by expert testimony, the trial court may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. McCaleb v. Saturn Corp., 910 S.W.2d 412, 416 (Tenn. 1995).

T.C.A. § 50-6-241(a)(1) states that if the employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is 2.5 times the medical impairment rating determined pursuant to the provisions of the AMA Guides to the Evaluation of Permanent Impairment. The case law has interpreted this section to mean that the return to work must be a "meaningful" return to work. Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625,630 (Tenn. 1999).

The Appellant argues that it returned the employee to work at light duty at his full pre-injury wage, and that he voluntary left their employment, not because he was unable to perform the light duty work assigned to him, but because "he did not like going to work and being unable to perform his share of the workload". In light of this, Appellant urges that if the employee is entitled to an award of permanent physical impairment at all, which it argues he is not, that it should be limited

to 2.5 times his anatomical impairment rating.

The employee, on the other hand, argues that T.C.A. § 50-6-241(b) should apply to the facts of this case. This section provides that if the employer does not return the employee to employment at a wage equal or greater than the wage the employee was receiving at the time of the injury or by analogy, the return to work is not "meaningful", the maximum permanent partial disability award that the employee may receive is six (6) times the anatomical impairment rating.

The employee argues that he was only returned to light duty work. His job was to walk, stand and watch the other employees work. He was not required to perform the heavy labor of working on one of the machines. The employee testified that he did not like going to work and being unable to perform his share of the workload, and that he went home after about three (3) hours. He argues that this was, in essence, "make work" and not meaningful. Implicit in the employee's argument is that he was returned to work before reaching maximum medical improvement and before he was capable of attempting a meaningful return to work.

This issue has now been resolved by the Supreme Court in Lay v. Scott County Sheriff's Department, E2002-01731-SC-R3-CV (Filed: June 19, 2003).

Lay was injured in an automobile accident while working as a deputy sheriff for the Scott County Sheriff's Department in October, 2000. He was diagnosed as having a bulging disc with nerve impingement at the L4-5 disc space. He continued to work for the Sheriff's Department for five months after the accident, in the same position and at the same pay as before the accident. In March, 2001, before having surgery and before reaching maximum medical improvement, he voluntarily resigned from the Sheriff's Department for a better paying private sector job. Subsequently, he had surgery, and as a result of his post-surgery medical restrictions, the private sector employer refused to take him back. The Sheriff's Department did rehire him but at the bottom of the pay scale.

Lay argued that the determination of whether there was a meaningful return to work must occur only after an employee reaches maximum medical improvement while the county argued that Lay's first return to work after the accident was "meaningful" under Nelson.

The court stated in Lay that "in determining whether there has been a meaningful return to work, the focus is upon 'the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to return to work' not the date on which maximum medical improvement was attained." Slip Op., p.4.

As in this case, the court in Lay found that his voluntary resignation "was 'unreasonable' behavior, ... as it was not related to his injury." Slip.Op., p. 5.

The court went on to state, as follows:

> "Finding that a court, when assessing meaningful return to work, is limited to only those events occurring after an employee attains maximum medical improvement, regardless of the employee's own actions, would be contrary to the holdings of other cases and to the purposes of Section 50-6-241.
> ...
> ...an employee cannot avoid the statutory caps and thereby augment his award through his unilateral acts when those acts are unrelated to the injury." Slip Op., p.6.

The trial court found that the Appellant fully complied with the statute in providing the employee with a job, albeit light duty, at his full pre-injury wage but that the employee chose not to perform it, even though he was fully capable of doing so. Based on these facts, the trial court found that the caps of 2.5 times the anatomical impairment rating applied. We agree.

The Appellant then urges that the employee should not be awarded any permanent physical impairment. It argues that Drs. Canale and Brophy gave the employee 0% impairment and that Dr. Pieper's rating of 2% was not given until after the employee's "third" back injury in January, 2000 when he lifted a bag of sugar.

Dr. Pieper testified, however, that his impairment rating was based on the employee's second disc surgery in1999. He testified that the employee had a 10% anatomical rating for his 1988 surgery and that the AMA Guide provides an additional 2% for his 1999 surgery at the same L5-S1 level.

The trial court applied the 2.5 caps and found that the employee sustained a 5% permanent physical impairment to the body as a whole based on his anatomical impairment of 2%. We find that the evidence does not preponderate against the trial court's award.

THE LAST INJURIOUS INJURY RULE

Finally, Appellant argues that the trial court erred in not applying the "Last Injurious Injury Rule" to the facts of this case. [2]

The substance of the Appellant's argument is that the employee sustained a "third injury" in January, 2000, when he picked up a bag of sugar and that this injury should serve to shift the entire responsibility for his impairment to the *person or entity* responsible for his last or most recent injury in a series of successive injuries. Appellant relies on the Supreme Court's decision in Riley v.INA/Aetna Ins. Co., 825 S.W. 2d 80 (Tenn. 1992). We believe the Appellant's reliance on Riley and on the application of the rule to the facts of this case is misplaced.

---

[2] The Chancellor's ruling stated that the court had issued an earlier order setting out the facts and the law that the court relied upon in denying the applicability of the "Last Injurious Injury Rule" to the facts of this case. Unfortunately, the earlier order was not included in the record on appeal.

Under the Last Injurious Injury Rule, an employer takes the employee as he finds him and if an employee, having previously sustained an injury while working for a different employer, is injured on his new job and the new injury is causally connected to his employment, the new employer is liable for the effects of the entire injury even though the resulting disability is far greater than if the second injury were evaluated on its own. Baxter v. Smith, 364 S.W.2d 936, 943 (Tenn. 1962).

In Riley, the employee, a 44 year old truck driver with an existing 40% disability to the body as a whole, sustained a work-related back injury. Following back surgery and before reaching maximum medical improvement, the employee began work for another employer. He sustained another back injury while working for the new employer. The employee brought separate suits against both employers for the injuries sustained while working for them. The court sustained the trial court's finding that the Last Injurious Injury Rule was inapplicable because "there was an assessment of [employee's] first-injury permanent disability before the occurrence of the second injury." In fact, the employee's physician did not actually assign the employee a permanent physical impairment rating prior to his subsequent back injury at the new employer. The physician testified that "if asked" prior to the new injury he would have assigned a 5% rating attributable to the earlier injury. Based on this testimony, the court held that this "assessment" of the employee's permanent disability was "sufficient to forestall application of the last injurious injury rule". 825 S.W. 2d 80, 82, 83 (Tenn. 1992).

In the present case, the rule is inapplicable for two reasons: 1) There is no proof in this record that the employee was employed by a new or successive employer when he sustained his "third injury" on January 10, 2000. Without a successive employer, the rule is inapplicable.[3] Baxter at 943. 2) An "assessment" was made by Dr. Pieper that the employee should have an additional 2% permanent physical impairment that was attributable to his injury of September 29, 1997. As in Riley, the assessment was made after the subsequent injury, but was specifically attributed to the earlier injury.

CONCLUSION

For the reasons stated above, the judgment of the trial court is affirmed in its entirety. The cost of this appeal is taxed to the Appellants.

_____

ARNOLD B. GOLDIN, SPECIAL JUDGE

[3] The determination of a successive employer is the threshold inquiry. Because in this case there was no proof of a successive employer, it is not necessary to determine the causal connection between the employment and the resulting injury or whether the successive injury created a greater disability than would have otherwise been the case. Of course, in a case where the rule is applicable, all of the criteria must be met.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
JUNE 2003 SESSION

DARRELL DWAIN BINKLEY v. TENNESSEE DIECASTING-HARVARD INDUSTRIES AND ITT HARTFORD INSURANCE GROUP

Chancery Court for Lauderdale County
No. 10,950

No. W2002-02188-SC-WCM-CV - Filed December 18, 2003

ORDER

This case is before the Court upon motion for review filed by the appellant, Tennessee Diecasting-Harvard Industries and Itt Hartford Insurance Group, pursuant to Tenn. Code. Ann. § 50-6-225(e)(5)(B) the entire record, including the order of referral to the Special Workers' Compensation Appeal 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.

Costs are assessed to Appellants, for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating