IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 5, 2004 Session

BERNARD FALCICCHIO v. GIBSON MECHANICAL CONTRACTORS, INC., ET AL.

Direct Appeal from the Circuit Court for Shelby County
No. CT-001000-03 George H. Brown, Jr., Judge

No. W2003-02078-WC-R3-CV - Mailed August 30, 2004; Filed October 8, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, Employee argues that the trial court erred in granting the motion to dismiss filed by Gibson Mechanical Contractors, Inc. and Amerisure Insurance Company. We conclude that the trial court erred granting the motion to dismiss and reverse the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Trial Court Reversed and remanded

ROBERT L. CHILDERS, SP.J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and WILLIAM B. ACREE, SP. J., joined.

Michael P. Pfrommer, Memphis, Tennessee, for the appellant, Bernard Falcicchio.

Stephen P. Miller and Evan Nahmias, Memphis, Tennessee, for the appellees, Gibson Mechanical Contractors, Inc., and Amerisure Insurance Company.

William C. Sessions, Memphis, Tennessee, for the appellees, Day & Zimmermann, and Zurich American Insurance Company.

MEMORANDUM OPINION

Factual Background

Bernard Falcicchio, ("Employee") worked for Gibson Mechanical Contractors, Inc. ("Gibson") as a pipefitter from March until November of 2001. While working at Gibson,

Employee began experiencing pain and numbness in both arms. Employee did not seek treatment at that time because he did not think the problem was serious or work-related. After Employee stopped working for Gibson in November 2001, he noticed his symptoms improved. In January 2002, Employee began working as a pipefitter for Day & Zimmerman, and he noted that the pain and numbness in his arms worsened. In February 2002, Employee sought treatment from his primary care physician, who diagnosed bilateral carpal tunnel syndrome. The physician opined that Employee's injury was caused by his work. Employee then gave notice to Day & Zimmerman and Gibson requesting medical treatment.

The trial court granted a motion to dismiss the complaint for failure to state a claim upon which relief can be granted filed by Gibson and its insurer, Amerisure Insurance Company ("Amerisure").

Employee's Argument

Employee argues that the trial court erred in granting the motion to dismiss filed by Gibson and Amerisure on the basis of the last injurious injury rule without first considering medical testimony regarding Employee's injury. Employee contends that the trial court must review medical testimony in order to determine whether work at the second employer, Day & Zimmerman, caused an aggravation or progression of Employee's carpal tunnel syndrome. Thus, Employee argues that the trial court's failure to consider medical testimony prior to ruling on the application of the last injurious injury rule was reversible error.

First Employer's Argument

Gibson and Amerisure, the first employer and its insurance carrier, argue that the trial court properly granted their motion to dismiss on the basis of the last injurious injury rule in light of Employee's complaint, which pleaded identical successive jobs resulting in the discovery of carpal tunnel syndrome while working for the second employer, Day & Zimmerman. Thus, Gibson and Amerisure argued that the trial court properly found that the last injurious injury rule was inapplicable as a matter of law.

Second Employer's Argument

Day & Zimmerman and Zurich American Insurance Company ("Zurich"), the second employer and its insurance carrier, argue that Employee's complaint clearly established sufficient facts to support a claim as to Gibson and Amerisure and that, therefore, the trial court erred in granting Gibson and Amerisure's motion to dismiss. Day & Zimmerman and Zurich also argue that the last injurious injury rule should not have been applied to this case because there is a genuine issue of material fact regarding whether Employee sustained a subsequent injury. They contend that Employee's complaint mentioned only an increase in pain, not a subsequent injury. Furthermore, Day & Zimmerman and Zurich insist that the only reason Employee delayed treatment for his carpal tunnel symptoms until his employment with Day & Zimmerman was

because he had no health insurance coverage until then. Thus, they argue that financial reasons, not a progression in symptoms, precipitated Employee's visit to a doctor.

Standard of Review

Pursuant to Tenn. R. Civ. P 12.02(6), Defendants Gibson and Amerisure presented a motion to dismiss for failure to state a claim upon which relief can be granted. Such a motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof. *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.2d 691 (Tenn. 2002). When considering a motion to dismiss, the appellate court should construe the allegations set forth in a complaint liberally with all facts presumed to be true and the plaintiff given the benefit of all reasonable inferences. *Id*, at 696-7. A motion to dismiss for failure to state a claim should not be granted unless it is clearly shown that the plaintiff can prove no set of facts supporting his claim that would warrant relief. *Id.* This standard is similar to the summary judgment standard, which is almost never an option in a contested worker's compensation action. *Barry v. Consolidated Systems, Inc.*, 804 S.W.2d 445, 446 (Tenn. 1991). As with summary judgment review, a trial court should not grant a motion to dismiss where resolution of the case depends upon an interpretation or weighing of facts presented by affidavit or deposition. *Id.*

Analysis

The last injurious injury rule applies to find an employer "liable for disability resulting from injuries sustained by an employee… even though it aggravates a previous condition with resulting disability far greater than otherwise would have been the case." *Baxter v. Smith*, 364 S.W.2d 936 (Tenn. 1962). In *Henton v. State*, 800 S.W.2d 823 (Tenn. 1990), the Tennessee Supreme Court stated that this rule operates to place liability on the last employer if the trier of fact is convinced that the disability was caused by successive work-related injuries, but is unconvinced that any one employment is the more likely cause of the disability. *Id.* "When a compensable injury at one employment contributes to a disability occurring during a later employment involving work conditions capable of causing the disability, but which do not contribute to the disability, the last injurious exposure rule does not apply, and the first employer is liable." *Id.* at 824. In accordance with this rule, it is for the trier of fact to determine, after hearing all of the testimony of witnesses and other evidence, which employer caused and/or contributed to the disability.

We agree with Employee's assertion that, because this is a question of fact, all of the testimony and evidence, including medical evidence, must be considered in order to determine whether the last injurious exposure rule applies. *Thomas v. Aetna Life & Casualty Co.*, 812 S.W.2d 278, 283 (Tenn. 1991). Thus, we conclude that the trial court's failure to consider all of the testimony and other evidence resulted in the erroneous dismissal of Gibson and Amerisure from the case.

Conclusion

From our review of the complaint, we conclude that the trial court erred in granting the motion to dismiss. Therefore, we reverse the judgment of the trial court and remand the matter to the trial court for trial. Costs are taxed to the appellants, Gibson Mechanical Contractors, Inc. and Amerisure Insurance Company, for which execution may issue if necessary.

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ROBERT L. CHILDERS, SPECIAL JUDGE

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JUDGMENT ORDER

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 appears 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 on appeal are taxed to the Appellees, Gibson Mechanical Contractors, Inc., and Amerisure Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM