IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 21, 2015 Session

JOHNNY BRADEN v. M&W TRANSPORTATION CO., INC., ET AL.

Appeal from the Chancery Court for Williamson County
No. 40368 Joseph Woodruff, Judge

No. M2015-00555-SC-R3-WC
Mailed November 20, 2015
Filed December 30, 2015

Johnny Braden ("Employee") suffered a compensable injury to his right elbow in April 2005 while working for M&W Transportation ("Employer"). Within six months of returning to work, Employee began experiencing pain in his right shoulder and numbness in his hand. He received treatment over the next two years and eventually was assigned a seven percent (7%) partial permanent disability rating. Three different insurance companies covered Employer during the time of Employee's treatment. Each insurer disclaimed liability for the eventual disability. The trial court found the disability to be a direct and natural consequence of the original injury and assigned liability to the first insurer. The insurer appealed, asserting that liability for the shoulder and hand conditions should be assigned to the subsequent insurers based on the "last day worked rule." Pursuant to Tennessee Supreme Court Rule 51, 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. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(a)(2) (2014) Appeal as of Right; Judgment of the Chancery Court Affirmed.

JEFFREY S. BIVINS, J., delivered the opinion of the Court, in which ANDY D. BENNETT, J., and BEN H. CANTRELL, SR.J., joined.

W. Stuart Scott, Nashville, Tennessee, for the appellant, Great West Casualty Company.

Owen R. Lipscomb, Brentwood, Tennessee, for the appellee, Liberty Insurance Corporation.

Alex C. Elder, Germantown, Tennessee, for the appellees, American Zurich Insurance Company and M & W Transportation Co., Inc.

Matt McFarland, Nashville, Tennessee, for the appellee, Johnny Braden.

OPINION

Factual and Procedural Background

Employee was employed as a truck driver by M&W Transportation ("Employer") for nearly twenty years. The defendant insurance companies each provided workers' compensation insurance for Employer for a period between 2005 and 2008: Defendant Great West Casualty Insurance Co. ("Great West") through September 30, 2006; Defendant Liberty Insurance Corp. ("Liberty") from October 1, 2006, through September 30, 2008; and Defendant American Zurich Insurance Company ("Zurich") from October 1, 2007, through September 30, 2008.

On April 18, 2005, Employee sustained an injury to his right elbow while working for Employer. Employee was taken to a walk-in clinic, where he was prescribed physical therapy. After several months of therapy, Employee had not improved and was referred Dr. Jeffry Watson, an orthopedic surgeon who specializes in hand and upper extremity surgery. Dr. Watson diagnosed Employee with medial epicondylitis, a painful condition that affects the tendon on the inside part of the elbow and typically is caused by injury or degeneration. In December 2005, Dr. Watson performed surgery to repair the diseased tendon. After surgery, Employee's arm was placed in a right-angle cast for approximately six weeks. Dr. Watson also placed work restrictions on Employee.

At a post-operation check-up on January 17, 2006, Employee first reported having discomfort in his shoulder. At his check-up on March 30, 2006, Dr. Watson noted that Employee was experiencing "minimal pain" in his shoulder and elbow but was "doing better." Dr. Watson removed Employee's work restrictions and anticipated placing him at maximum recovery at the next check-up. After three weeks back on the job, Employee suffered an unrelated heart attack and underwent by-pass surgery.

After recovering from his heart surgery, Employee returned to Dr. Watson in July 2006. At that time, Dr. Watson determined that Employee's elbow was at maximum recovery, although Employee's elbow and shoulder continued to be in some pain. Dr. Watson assigned Employee with a two percent (2%) permanent partial impairment to the right arm. Employee then returned to his job with Employer.

Great West ceased coverage for Employer on September 30, 2006. Liberty began coverage on October 1, 2006. Shortly thereafter, Employee returned to Dr. Watson,

complaining of elbow and shoulder pain. Dr. Watson determined that Employee was suffering from work-related bicipital tendonitis at the shoulder and elbow.

In June 2007, Employee returned to Dr. Watson with symptoms similar to the original medial epicondylitis diagnosis. Employee also reported reduced movement and increased pain in his shoulder. In response, Dr. Watson reinstated work restrictions and referred Employee to Dr. John Kuhn, an orthopedic surgeon who specializes in treatment of shoulder problems. Dr. Kuhn examined Employee and recommended physical therapy and steroid injections. In August 2007, Employee still was experiencing pain in his elbow and shoulder. At that time, Dr. Watson diagnosed Employee with ulnar neuritis and prescribed a soft elbow pad to use while working and a splint to wear while sleeping. Additionally, Dr. Kuhn recommended surgery to evaluate Employee's shoulder and relieve some of the pain. Employee's symptoms continued to worsen and an ulnar nerve test revealed diminished conduction, consistent with the ulnar neuritis diagnosis.

Liberty ceased coverage for Employer on September 30, 2007. Zurich began coverage on October 1, 2007. That same month, Dr. Watson performed a second surgery on Employee's elbow, and Dr. Kuhn performed surgery on Employee's shoulder. Dr. Watson's surgery, however, was not successful because Employee developed a blood clot after the operation. A third surgery had to be performed to deal with the blood clot. Despite the surgeries, Employee's ulnar nerve function worsened.

Dr. Kuhn initiated a course of physical therapy to help with Employee's shoulder. Employee gradually gained back the motor function in his right arm but continued to experience numbness in his hand. In October of 2008, both Dr. Watson and Dr. Kuhn found Employee to be at maximum medical improvement. Dr. Watson assigned a seven percent (7%) permanent partial impairment to Employee's right arm and restricted him from lifting more than twenty-five pounds with both arms and from overhead lifting with his right arm. Dr. Kuhn assigned a twenty-three percent (23%) permanent impairment to the right arm, which is equivalent to fourteen percent (14%) to the body as a whole. Employee was cleared to go back to work, but Employer could not accommodate his work restrictions. Consequently, Employee lost his job.

The question of fact that the lower court was to determine was whether Employee's conditions were caused by one distinct injury, by one gradually progressing injury, or by separate but correlative injuries. The trial court determined that Employee's ulnar nerve and shoulder conditions were direct and natural consequences of the original, distinct injury on April 18, 2005 and that Great West, the insurer at that time, was liable for all disability. Great West has appealed from that ruling, asserting that the evidence preponderates against the finding.

Standard of Review

We review the trial court's findings of fact in a workers' compensation case de novo, with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). Deference should be given to the trial court's weighing of the evidence and determinations of credibility. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 898 (Tenn. 2009). When the record contains medical expert testimony that goes to the issues involved, "the reviewing court may draw its own conclusion with regard to those issues." Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008) (citing Orrick v. Bestway Trucking, Inc., 184 S.W. 3d 211, 216 (Tenn. 2006). The trial court's conclusions of law are reviewed de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007) (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003)).

Analysis

Great West submits that it is liable for only the disability arising prior to Dr. Watson's July 2006 declaration that employee was at maximum medical improvement. We disagree.

The Tennessee Workers' Compensation Act requires employers to pay compensation for personal injury by accident "arising out of and in the course of employment." Tenn. Code Ann. § 50-6-102(13) (2005). Injuries are compensable if they occur (1) "while the employee is performing a duty he or she is employed to perform," and (2) there is a "causal connection between the conditions under which the work is required to be performed and the resulting injury." Anderson v. Westfield Grp., 259 S.W.3d 690, 696 (Tenn. 2008) (citations omitted).

When the causal connection is at issue, there are three rules that Tennessee courts have used to determine liability. The "direct and natural consequences rule" applies when a single incident causes the employee's disability. See id. at 696. Under this rule, liability for "a subsequent injury, whether in the form of an aggravation of the original injury or a new and distinct injury" is assigned to the employer and insurer who provided coverage on the date of the accident if it is the "direct and natural result" of the original injury. Id. (citing Rogers v. Shaw, 813 S.W.2d 397, 399-400 (Tenn. 1991)). Even if the employee returns to work before gradually becoming unable to perform the function of his job, liability is assigned as of the date of the original accident. See Mynatt v. Liberty Mut. Ins. Cos., 699 S.W.2d 799, 800 (Tenn. 1985).

The "last day worked rule" applies when repeated, injurious incidents cause a "gradual injury." Bldg. Materials Corp. v. Britt, 211 S.W.3d 706, 710 (Tenn. 2007). Under this rule, liability is assigned to the employer and insurer providing coverage on the date that the employee could no longer work. The hallmark of a "gradual injury" is a

condition that does not occur instantaneously as a result of a single accident. Instead, it develops gradually from work-related incidents. Barker v. Home-Crest Corp., 805 S.W.2d 373, 375 (Tenn. 1991) (citing St. Paul Ins. Co. v. Waller, 524 S.W.2d 478, 481 (Tenn. 1975).

Finally, the "last injurious injury" rule applies when a second, distinct occurrence combines with or "advance[s] the severity of [the Employees] pre-existing condition." Fink v. Caudle, 856 S.W.2d 952, 959 (Tenn. 1993). Under this rule, liability is assigned to the employer and the insurance company providing coverage on the date of the last injury, even if the employee was particularly fragile due to a previous injury. See, e.g., McCormick v. Snappy Car Rentals, Inc., 806 S.W.2d 527, 530 (Tenn. 1991).

When determining which rule applies, "each case must be decided on its facts based upon the proof relating to causation." Mynatt, 699 S.W.2d at 800. Additionally, "[a]lthough causation in a workers' compensation case cannot be based on speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain." Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004).

In this case, there is no dispute that Employee's original injury was caused by a specific incident that occurred in April 2005 while Employee was performing a duty that he was employed to perform. Great West agrees that it is liable for any disability arising as a direct and natural consequence of this incident. Great West contends, however, that Employee's subsequent elbow and shoulder injuries are either gradual injuries or separate and distinct injuries. Therefore, according to Great West, the court should have applied the "last day worked rule" or the "last injurious injury rule," rather than the "direct and natural consequences" rule.

In his deposition testimony, Dr. Watson stated that he associated Employee's original and subsequent elbow injuries together. Dr. Watson testified that he believed they were linked because, after suffering from medial epicondylitis, it "would be a mighty unusual coincidence for [Employee] to spontaneously develop ulnar neuritis." Dr. Watson also characterized the medial epicondylitis as the "bridging condition" between the two injuries. Furthermore, he confirmed that Employee never mentioned a specific, intervening incident occurring between the injuries. His conclusion, to a reasonable degree of medical certainty, was that the subsequent elbow problems were related to the original injury.

As for Employee's shoulder, Dr. Watson testified that "it was more than coincidental that [the shoulder impingement] occurred after [Employee] had been holding his arm at his side for awhile" after surgery for the original injury. Based on Employee's history, Dr. Kuhn likewise stated, "[I]t was probable that the shoulder injury condition and his shoulder pain was [sic] related to the use of the cast and immobilization of the arm after surgery."

Accepting Dr. Watson and Dr. Kuhn's conclusion that there was some link between the original medial epicondylitis and the subsequent ulnar neuritis and shoulder impingement, the facts categorically foreclose the possibility that the subsequent injuries were gradual. As previously noted, gradual injuries occur when otherwise minor, repetitious injuries aggregate into a disability. See Bldg. Materials, 211 S.W.3d at 710; Barker v. Home-Crest Corp., 805 S.W.2d 373, 374 (Tenn. 1991); Brown Shoe Co. v. Reed, 209 Tenn. 106, 115, 350 S.W.2d 65, 69 (1961) (citing Larson, 1 Workmen's Compensation § 39). Additionally, the record is devoid of any evidence pointing to a distinct and separate occurrence causing the subsequent injuries.

In light of the foregoing, we are unable to conclude that the evidence preponderates against the trial court's finding of a causal relationship between the original work injury and the elbow and shoulder conditions. Therefore, the trial court did not err in applying the "direct and natural consequences rule." Accordingly, the trial court properly assigned liability for those conditions to Great West.

Conclusion

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

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JEFFREY S. BIVINS, JUSTICE

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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Chancery Court for Williamson County
No. 40368

No. M2015-00555-SC-R3-WC - Filed December 30, 2015

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 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 will be paid by Great West Casualty Insurance Company, and its surety, for which execution may issue if necessary.

PER CURIAM