IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 23, 2010 Session

BUILDERS MUTUAL INSURANCE COMPANY
v. S & W BUILDERS, INC. ET AL.

Appeal from the Circuit Court of Hardin County
No. 4208 C. Creed McGinley, Judge

TIMOTHY MORRIS v. S & W BUILDERS, INC.

Appeal from the Circuit Court for Hardin County
No. 4266 C. Creed McGinley, Judge

No. W2009-01920-WC-R3-WC - Mailed January 19, 2011; Filed March 3, 2011

In this workers' compensation action, the trial court held that the employee sustained a compensable injury to his neck. The trial court found that the employee had a 30% impairment as a result of the injury and awarded 75% permanent partial disability to the body as a whole. The employer had two policies of workers' compensation insurance in effect on the date of the injury. The trial court held each insurer liable for one-half of the benefits paid to the employee. One of the insurers has appealed, contending that the evidence preponderates against the finding that the employee sustained a compensable injury and that it erred in its apportionment of liability.[1] We affirm the judgment.

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

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[1] 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.

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and TONY A. CHILDRESS, SP. J., joined.

Amelia C. Roberts, Nashville, Tennessee, for the appellant, Builders Mutual Insurance Company.

Ricky L. Boren, Jackson, Tennessee, for the appellee, Timothy Morris.

George C. Rieger, III and Joey Johnson, Nashville, Tennessee, for the appellee, American Home Assurance Company.

MEMORANDUM OPINION

I. Factual and Procedural Background

This appeal arises from two consolidated civil actions. The first, Builders Mutual Insurance Co. v. S & W Builders, is a declaratory judgment action to determine the relative liability of two insurers in connection with the second action, Morris v. S & W Builders, in which the employee seeks workers' compensation benefits.

Timothy Morris[2] was employed as a construction laborer for S & W Builders ("S & W") in March 2007. His brother-in-law, Danny Irvin, an employee of S & W, assisted Mr. Morris in securing the employment. Mr. Morris and Mr. Irvin often drove to work together. Mr. Irvin testified at trial that as they were driving to work for Mr. Morris's first day on the job, Mr. Morris stated that,"[Mr. Irwin] would have to take it easy on him today because his shoulder was killing him." When questioned concerning the statement, Mr. Morris answered: "I must have slept on it wrong."

Mr. Morris worked without incident until Friday, June 15, 2007.[3] On that date, he and three other employees worked together to install a very heavy window in a house that they were building. Marty White, one of the owners of S & W, and Mr. Irvin were among those working on the window. Mr. Morris testified that he felt a burning pain in his right shoulder as they were lifting the window. He did not mention the pain to either Mr. White or Mr. Irvin. After Mr. Morris went home, the pain became worse, and he began experiencing numbness in his fingers. He went to a local emergency room for treatment. The history

[2]Timothy Morris is also referred to as "Jimmy Dwight Morris" in the trial transcript.

[3]As will be discussed below, S & W was insured by both Builders Mutual Insurance Company ("BMIC") and American Home Assurance Company ("AHAC") on the date of the injury.

portion of the emergency room record states: "[Patient] presents to ER [with complaint of] R shoulder & neck pain x 3-4 months . . . denies known injury but does work construction."

Mr. Morris returned to work on Monday. The job on that day took three hours to complete and he returned home afterwards. On Tuesday morning, he reported to work again. He testified, "I lost strength in my arm. . . . I couldn't pick nothing up and hold it up. I couldn't straighten my arm or nothing out. I still had numbness in my fingers. I still had pain in my right arm." At that time, he advised Mr. White of his symptoms and told him that he needed to file a workers' compensation claim. Mr. Morris was referred to Dr. Michael Smith, a primary care physician. Dr. Smith did not testify, but his records were placed into evidence. Dr. Smith ordered a magnetic resonance imaging (MRI) scan, which revealed disc herniations at C5-6 and C6-7. Dr. Smith referred Mr. Morris to Dr. Roger Ray of Florence, Alabama. Dr. Ray recommended surgery. Mr. Morris requested and received a second opinion. The second opinion was given by Dr. John Neblett, a neurosurgeon, who agreed with Dr. Ray's recommendation. Mr. Morris elected to have Dr. Neblett perform the surgery.

Dr. Neblett testified by deposition. On August 22, 2007, he performed a two-level fusion of Mr. Morris's cervical spine. After the incision healed, he prescribed physical therapy. Mr. Morris's condition gradually improved until he "pretty much recovered, except for some minor neck pain that he continued to have by January 2008." On January 9, 2008, Dr. Neblett found that Mr. Morris had reached maximum medical improvement. He released him with no formal restrictions but did suggest that he "not try to do any heavy lifting overhead or repetitive lifting above the shoulders." In Dr. Neblett's opinion, the two disk herniations were caused by the work event of June 15, 2007. He assigned 30% permanent anatomical impairment to the body as a whole, based upon the Diagnosis Related Estimate (DRE) section of the American Medical Association Guides to the Evaluation of Permanent Impairment (Fifth Edition) ("AMA Guides"). On cross-examination, he was presented with hypothetical questions based upon the history that Mr. Morris had given to the emergency room personnel on June 16. Those facts did not change his opinion on the issue of causation. He agreed that the AMA Guides stated a preference for the range of motion method when assessing impairment in cases involving multiple level fusions. He agreed that Mr. Morris had a 2% impairment for lost range of motion based on measurements taken by another doctor.[4] Dr. Neblett did not change his opinion concerning the appropriate impairment to be assigned.

[4]The range-of-motion method for assessing spinal impairment, Chapter 15.8 of the Guides, provides an impairment of 11% to the body as a whole for a two level cervical fusion, to which impairments due to loss of range of motion must be added. See AMA Guides at 404.

Dr. John Masterson, also a neurosurgeon, conducted an independent medical evaluation at the request of counsel for American Home Assurance Company ("AHAC"). It was his opinion that Mr. Morris's injury was the result of the June 15, 2007 incident. Dr. Masterson assigned an impairment of 28% to the body as a whole. Dr. Masterson did not testify, but his report was introduced into evidence by agreement of the parties.

Mr. Irvin testified that Mr. Morris made no more complaints about his shoulder after the conversation that took place before his first day of work. Mr. Irvin worked with him every day thereafter and did not observe him having any difficulty in performing his job. Mr. Irvin also stated that Mr. Morris did not say anything to him about being injured on June 15.

Marty White testified that he worked with Mr. Morris frequently. Mr. Morris made no complaints to him about his neck or shoulder prior to reporting his injury on June 19. He stated that Mr. Morris did not mention a specific injury at that time. He also testified that Mr. Morris was able to perform his job without difficulty prior to the injury.

Mr. Morris was thirty-six years old. He had attended school until the tenth grade, and had no additional education. Prior to working for S & W, he had worked in a furniture factory, in a sawmill, as a truck mechanic, and as a carpenter. He testified that he did not believe he would be able to return to most of those jobs due to pain in his shoulder. After being released by Dr. Neblett, he found work as a finish carpenter for a company that remodeled restaurants.

The parties stipulated that AHAC had issued a policy of workers' compensation insurance for S & W, with effective dates of June 3, 2007, through June 3, 2008. AHAC filed the required proof of insurance with the Department of Labor on May 9, 2007. For unknown reasons, S & W obtained a second workers' compensation insurance policy from Builders Mutual Insurance Company ("BMIC"), with effective dates June 8, 2007, through June 8, 2008. BMIC filed its notice with the Department of Labor on July 10, 2008. After Mr. White was given notice of Mr. Morris's injury on June 19, the claim was forwarded to AHAC, which accepted the claim and paid medical and temporary total disability benefits. BMIC was not notified of the claim until January 2008, when AHAC sent a letter demanding that BMIC take over the claim. BMIC then filed an action for a declaratory judgment, which was consolidated with Mr. Morris's action for workers' compensation benefits.

The trial court found that Mr. Morris had sustained a compensable injury, and that his anatomical impairment was 30% to the body as a whole. The trial court awarded 75% permanent partial disability to the body as a whole. It found that both BMIC and AHAC had policies in effect on the date of the injury and ordered that each company was liable for one-half of Mr. Morris's benefits, with AHAC receiving credit for payments already made.

BMIC appealed, contending that the trial court erred by determining that Mr. Morris sustained a compensable injury, by determining that he had a 30% anatomical impairment to the body as a whole, and by ruling that each insurer was liable for one-half of the benefits received by and awarded to Employee.

II. Standard of Review

The standard of review of findings of fact is "de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, 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 to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). 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. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004);Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Sieber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009);Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

III. Analysis

This case comes to us in an unusual posture. The trial court consolidated two cases, Morris v. S & W Builders and Builders Mutual Insurance Co. v. S & W Builders. Both of these cases have been appealed pursuant to Tennessee Code Annotated section 50-6-225. The first of these cases is a straightforward workers' compensation case; the latter is a declaratory judgment action in which Builders Mutual Insurance Company seeks to determine its liability for any judgment awarded to Mr. Morris.

The trial court held joint hearings on all of the matters in both cases. The trial court issued a single order to resolve the consolidated cases, determining the benefits due to Mr. Morris and determining the respective liability of each of the insurance carriers. All parties to the consolidated cases participated in mediation pursuant to Tennessee Supreme Court Rule 37 prior to appeal to this Panel. BMIC, which was not a named party to the original worker's compensation case, filed an answer to the complaint on its own behalf. BMIC filed the appeal in this matter contesting both the award and the apportionment of the award. BMIC raises no issue as to whether the appeal of its case is properly before this Panel.

BMIC has participated fully in the consolidated cases and has had an opportunity to fully pursue its legal interests and remedies in the workers' compensation case before both the trial court and this Panel.

While not formally adding BMIC as a party to the workers' compensation case, the trial court effectively merged the cases into a single action with BMIC, AHAC, and S & W as defendants. We therefore recognize the de facto joinder merger of the two cases by the trial court. We next turn to the issues of causation, impairment, and apportionment.

(1) *Causation*

BMIC contends that the trial court erred by finding that Mr. Morris sustained a compensable injury and argues that the injury occurred prior to the commencement ofhis employment. In support of this contention, it points to Mr. Morris's statement to Mr. Irvin that his shoulder was hurting while traveling to his first day of work. It also points to the history of three or four months of neck and shoulder pain Mr. Morris provided on June 16 at the emergency room on June 16.

In support of the trial court's ruling, Mr. Morris relies upon his own testimony that he sustained an injury on June 15. That evidence is consistent with the testimony of Mr. Irvin and Mr. White that Mr. Morris was able to perform his job without observed difficulty prior to that date. In addition, Dr. Neblett and Dr. Masterson both opined that the injury was work-related. Mr. Morrison contends that there is no medical evidence to the contrary. Dr. Neblett testified, moreover, that Mr. Morris would have been unable to work in construction with the two herniated discs Dr. Neblett observed during surgery. Our independent review of the record leads us to the conclusion that the evidence supports the trial court's finding that Mr. Morris sustained a compensable injury.

(2) *Impairment*

In the alternative, BMIC argues that the trial court incorrectly found Mr. Morris's anatomical impairment to be 30% to the body as a whole. It bases this argument upon Dr. Neblett's testimony during cross-examination that the AMA Guides state a preference for the use of the range-of-motion model, rather than the DRE method, for assessing impairment for spinal fusions involving two levels. BMIC argues that 2%, the amount of impairment attributable to Mr. Morris's loss of range of motion is the appropriate impairment for determining the permanent partial disability award.

Although Dr. Neblett conceded that the AMA Guides expressed a preference for the range-of-motion method for two-level fusions, he did not change his opinion concerning the

correct impairment in this case. He stated that the AMA Guides were "guidelines, and I don't necessarily agree with everything they write. I use the DRE method." Dr. Neblett's opinion is consistent with that of Dr. Masterson, who examined Mr. Morris at the request of AHAC and assigned a 28% impairment. Dr. Masterson's report assigning a 28% impairment was admitted by agreement of the parties and is unrebutted. Based upon the agreement of the medical experts, we conclude that the evidence does not preponderate against the trial court's finding that Mr. Morris sustained a 30% anatomical impairment as a result of his injury and surgery.[5]

(3) *Apportionment between insurers*

As outlined above, S & W had insurance policies in effect with both BMIC and AHAC on the date of the injury. BMIC, however, did not file its proof of insurance with the Department of Labor until several weeks later. Citing Karstens v. Wheeler Millwork Cabinet & Supply Co., 614 S.W.2d 37 (Tenn. 1981), BMIC contends that its policy did not take effect until the filing of the proof of insurance occurred. In Karstens, the issue presented was whether or not the insurer was liable for a claim arising from an injury which occurred after it had cancelled its policy with the employer, but before it had filed notice of that cancellation with the Department of Labor. The Supreme Court held that the insurer was liable, stating, "We are of the opinion that the foregoing workers' compensation statutes and cases cited require that we give precedence to the status of the proof of insurance as filed with the Division of Workers' Compensation over the contractual status between the employer and the insurance carrier." Id. at 41. BMIC bases its position upon that language. In our view, BMIC's argument misreads the holding of the case. The intent of the Court was to protect employees by requiring insurers to follow the letter of the law to terminate coverage. The Supreme Court specifically stated:

> We hold that an insurance carrier *remains liable for the policy period* shown on any initial or renewal filing of an Employer's Proof Of Insurance Of Liability To Pay Compensation filed with the Division of Workers' Compensation unless terminated by notice thereof filed with the Division and the effective date of termination cannot precede the date such notice is received by the Division.

Id. at 41-42. (Emphasis supplied). There is nothing in Karstens which leads to an inference that an insurer's liability under an existing policy does not commence until notice is filed

[5] Although not necessary to our opinion, we note that an interpretation of the AMA Guides which results in a significantly lower impairment for an injury and surgical procedure affecting two levels of the spine than for an injury which affects only one level is illogical.

with the Department of Labor. As stated by the Tennessee Court of Appeals, "the Karstens policies protecting the employee are obviously not available to one who is, in fact, the insurer of the employer . . ." Tennessee Ins. Guar. Ass'n v. Ctr. Ins. Co., M2003-02647-COA-R3CV, 2005 WL 1384878 *7 (Tenn. Ct. App. June 10, 2005).

BMIC also argues that it is not liable because S & W did not give it notice of the claim "at once," as required by the terms of the policy. It is undisputed that BMIC did not receive notice of the claim until January 2008, when AHAC sent a letter demanding that BMIC take over responsibility for the claim. BMIC argues that it was prejudiced by this untimely notice because "it lost the opportunity to investigate the claim from the outset as there are issues concerning compensability," "missed the opportunity to prepare a panel of physicians from whom [Mr. Morris] would choose to treat and missed the opportunity to have [him] examined by a physician of its own choosing or to have a utilization review prior to [his] significant surgeries," and "[BMIC] missed the opportunity to take timely witness statements, consult with the insured, and/or negotiate with [him]," as a result of AHAC's acceptance of the claim. These contentions are conclusory. Two doctors opined that Mr. Morris's injury was as a result of the June 15, 2007 incident and that surgery was necessary to repair the injury. There is nothing in the record to indicate that BMIC consulted other physicians regarding the validity of those opinions or sought to have him examined by a physician of its choosing. There is nothing in the record to suggest that there were any witnesses other than Mr. White and Mr. Irvin, both of whom testified, who could have contributed to the investigation of the claim. There is no evidence to support BMIC's assertion that it was prejudiced in any way by the lapse of time between the date of injury and its receipt of AHAC's letter. BMIC issued a valid policy which was in effect on the date of the injury. Under the circumstances, we find no error in the trial court's equitable division of liability for Mr. Morris's claim.

Conclusion

The judgment of the trial court in Morris v. S & W Builders is affirmed. Costs are taxed to appellant, Builders Mutual Insurance Company, and its surety, for which execution may issue if necessary.

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DONALD P. HARRIS, SENIOR 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 Appellant, Builders Mutual Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM