

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

March 26, 2012 Session

GAIL FLY v. TRAVELERS INSURANCE ET AL.

Appeal from the Chancery Court for Gibson County

No. H-5055 George R. Ellis, Chancellor

No. W2011-01215-SC-WCM-WC - Mailed June 21, 2012; Filed September 20, 2012

The employee alleged that she was permanently and totally disabled due to a lower back injury suffered while operating a foot pedal on a drill press in April 2004. The employee had previously alleged an injury to her lower back, which was settled on a “doubtful and disputed” basis. Although the employee’s treating physician testified that the April 2004 incident was a temporary flare-up of her earlier injury, he did assign new permanent restrictions. The trial court found that the employee had sustained a new injury and awarded permanent total disability benefits. The Second Injury Fund and the employer have appealed. We reverse the judgment of the trial court.

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

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

Robert E. Cooper, Jr., Attorney General & Reporter; William E. Young, Solicitor General; Joshua Davis Baker, Assistant Attorney General, for the appellant, Abigail Hudgens, Administrator of the Second Injury Fund.

T. J. Emison, Jr., Alamo, Tennessee, for the appellee, Gail Fly.

Amber E. Luttrell and Hailey H. David, Jackson, Tennessee, for the appellee, Travelers Insurance.

MEMORANDUM OPINION

Factual and Procedural Background

Ms. Gail Fly was a production worker for Ceco Door Products (“Ceco”) from 1992 until her termination in October 2004. In 2001, Ms. Fly sustained a compensable injury to her neck and left shoulder. The injury resulted in a settlement based on 77.5% permanent partial disability to the body as a whole. Ms. Fly returned to work for Ceco and sustained a subsequent injury to her lower back in October 2002. As a result of her back injury, Ms. Fly’s treating physician, Dr. Stephen Waggoner, placed permanent restrictions on her activities. Ceco denied that the back injury was compensable and did not provide medical treatment through its workers’ compensation carrier. Ultimately, Ms. Fly’s claim was settled on a “doubtful and disputed” basis in 2005. That settlement was based on 22.5% permanent partial disability to the body as a whole and provided that Ceco was not responsible for medical treatment of the injury.

Ceco placed Ms. Fly in a temporary clerical position until April 2004, at which time Ms. Fly was placed in a position in Ceco’s small parts department. This job required Ms. Fly to sit on a swivel stool. While seated, she placed door hinges onto a machine, pushed a foot pedal that caused screw holes to be drilled into the hinge, and removed the hinge from the machine. Sherry Hinson, Ceco’s human resources manager, and Lee Cannon, the plant nurse, told Ms. Fly to inform them if she experienced pain or discomfort while performing this job.

Ms. Fly’s back became sore after she worked in the small parts department, and she reported that information to Ms. Cannon on the morning of April 5, 2004. Ms. Hinson and Ms. Cannon met with Ms. Fly on the Thursday afternoon prior to Good Friday and told Ms. Fly to go home until she consulted a doctor. Although Ms. Hinson agreed that the meeting occurred, she could not recall the precise wording of the conversation.

Dr. Waggoner examined Ms. Fly on April 16, 2004, and concluded that she had sustained a temporary flare-up of her pre-existing lower back problems. Dr. Waggoner placed an additional restriction on Ms. Fly’s activities, including that “she shouldn’t be repetitively using the pedal with her right or left leg.” Ceco was unable to accommodate the additional restriction, and Ms. Fly was placed on leave. Ms. Fly’s last day of work for Ceco occurred in April 2004, and Ms. Fly was terminated in October 2004. On April 14, 2005, Ms. Fly filed this action against Ceco’s insurer and the Second Injury Fund (“the Fund”), alleging that she had sustained a new, compensable injury on April 4, 2004, and that she was permanently and totally disabled by that injury.

Ceco filed a motion to dismiss based on the statute of limitations. That motion was subsequently converted into a motion for summary judgment on the same grounds, which the

trial court denied. The trial of this matter occurred on March 22 and 23, 2011, the trial court issued its findings from the bench at the conclusion of the trial. The trial court found that Ms. Fly had sustained a new, compensable injury in April 2004 and that she had become permanently and totally disabled as a result of that injury. Since Ms. Fly had previously received workers' compensation benefits equal to 100% permanent partial disability to the body as a whole, liability for the permanent total disability benefits was assigned to the Fund. The trial court entered a judgment in accordance with its findings on April 27, 2011. The Fund has appealed, contending that the trial court erred by finding that Ms. Fly suffered a compensable injury. Ceco's insurer also asserts on appeal that the trial court erred by denying its motion for summary judgment. This appeal has been referred to a special workers' compensation panel for a report on its findings of fact and conclusions of law. See Tenn. Sup. Ct. R. 51, § 1.

Analysis

The Fund contends that the evidence preponderates against the trial court's finding that a compensable injury occurred, asserting that there was no evidence presented that the job performed by Ms. Fly on April 4 and 5, 2004, caused any anatomical change or permanent injury. Instead, the Fund submits that the evidence shows that Ms. Fly suffered only a non-compensable temporary increase in pain from her previous back injury. Ms. Fly argues that Dr. Waggoner's decision to place additional restrictions on her activities is sufficient to establish that a new injury occurred.

We review findings of fact in a workers' compensation case "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). A trial court's conclusions of law are reviewed de novo with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Ms. Fly acknowledged that she had pre-existing lower back problems. Dr. Waggoner performed surgery on her lower back in July 2003 to treat the pre-existing problems. Ceco and Ms. Fly therefore settled the workers' compensation claim that arose from Ms. Fly's October 2002 back injury on a "doubtful and disputed" basis. An employer is liable under the workers' compensation law for an aggravation of a pre-existing condition that occurs in the course of and arises from the employment, whether or not the underlying condition is related to the employment. See Hill v. Eagle Bend Mfg. Co., 942 S.W.2d 483, 488 (Tenn. 1997). The question of whether or not a particular event constitutes a compensable aggravation of a pre-existing condition has been the subject of numerous appellate decisions. See Hill, 942 S.W.2d at 488; Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993); Townsend v. State, 826 S.W.2d 434, 436 (Tenn. 1992); Cunningham v. Goodyear Tire & Rubber Co., 811 S.W.2d 888, 891 (Tenn. 1991); Talley v. Virginia Ins. Reciprocal, 775 S.W.2d 587

(Tenn. 1989); Smith v. Smith's Transfer Corp., 735 S.W.2d 221 (Tenn. 1987). Recently, our Supreme Court revisited the issue in Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598 (Tenn. 2008) and restated the applicable standard:

We reiterate that the employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain. However, if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable.

273 S.W.3d at 607. We analyze the evidence in this case in accordance with the Trosper standard.

Dr. Waggoner's deposition was the only medical evidence introduced in this case. "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). The crucial issue is whether or not Dr. Waggoner's testimony preponderates against the trial court's finding that a new, compensable injury occurred in April 2004. We conclude that it does.

Dr. Waggoner testified that Ms. Fly continued to have symptoms from her 2002 back injury and resulting surgery when he released her from his care in November 2003. Dr. Waggoner described the results of his April 16, 2004 examination of Ms. Fly and stated that his findings on that date were similar to the results of prior examinations of Ms. Fly he had preformed. When asked if Ms. Fly had suffered a new injury to her back, Dr. Waggoner testified that, "I felt she had acute onset of back and neck pain, but it was more of a flare-up, I thought, of just her degenerative condition that she has in her spine, and I felt that it would improve with time." When asked if that flare-up was "a new injury or a new aggravation or advancement in her back," Dr. Waggoner stated, "I mean, I guess it was a new — her pain had gotten worse. I don't know if there was . . . any specific injury present. It was just something that had aggravated her back temporarily, and I thought she would probably improve by giving her some anti-inflammatories and letting her rest, and thought she would get back to the way she was." Dr. Waggoner testified that the additional restrictions he had placed on Ms. Fly's back were not an indication of a new injury but that he placed the new restrictions because the activity being restricted "was aggravating her . . . [and] causing her to have more pain in her back" and "[he] thought she shouldn't do [those] things." Dr. Waggoner also testified that Ms. Fly had been his patient for a long time and that he had told

her that if something hurts “don’t do it.” Dr. Waggoner testified that he had examined Ms. Fly several times after April 16, 2004, and his observations on those occasions were consistent with his diagnosis of a temporary flare-up of her pre-existing back condition. Dr. Waggoner also testified he found no basis to assign Ms. Fly any additional impairment for the April 2004 injury she alleged.

This court gives deference to the trial court’s determinations when an employee’s in-court testimony impacts out-of-court deposition testimony. See Cunningham v. City of Savannah, No. W2010-02411-WC-R3-WC, 2012 Tenn. LEXIS 145, at *17-*18 (Tenn. Workers’ Comp. Panel Feb. 28, 2012). In this case, however, Ms. Fly did not discuss any increase in pain nor did Ms. Fly’s testimony contradict Dr. Waggoner’s assessment of her injury.

Dr. Waggoner testified that the physical requirements of Ms. Fly’s job in Ceco’s small parts department, specifically repetitive turning on a swivel chair and repetitive use of a foot pedal, caused the level of pain from Ms. Fly’s earlier back injury to temporarily increase. Although Dr. Waggoner did place additional restrictions on Ms. Fly’s activities, these restrictions were imposed because Dr. Waggoner had more information about what activities were aggravating Ms. Fly’s underlying back condition, rather than because of any actual advancement of that pre-existing condition. Taken as a whole, we find nothing in Dr. Waggoner’s testimony to support a finding that Ms. Fly suffered a new injury in April 2004. Instead, the evidence shows that the job Ms. Fly was performing in Ceco’s small parts department in April 2004 only increased the pain associated with her prior lower back injury. A mere increase in pain due to a pre-existing condition is not compensable. Trosper, 273 S.W.3d at 607

We conclude that the evidence preponderates against the trial court’s finding that Ms. Fly sustained a new compensable permanent injury in April 2004. In light of this conclusion, we find it is unnecessary to address Ceco’s arguments concerning the statute of limitations.

Conclusion

The judgment of the trial court is reversed, and this case is remanded for the entry of a judgment dismissing the complaint. Costs are taxed to Gail Fly, for which execution may issue, if necessary.

TONY A. CHILDRESS, SPECIAL JUDGE

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ORDER

This case is before the Court upon the motion for review filed on behalf of Gail Fly pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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.

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 Gail Fly, for which execution may issue if necessary.

PER CURIAM

JANICE M. HOLDER, J., not participating