IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 19, 2011 Session

JUDY KILBURN EX REL ESTATE OF CHARLES KILBURN v. GRANITE STATE INSURANCE COMPANY ET AL.

Appeal from the Chancery Court for Williamson County
No. 37184 Robbie Beal, Chancellor

No. M2011-00011-WC-R3-WC - Mailed - October 25, 2011
Filed - November 30, 2011

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. The employee was seriously injured in the course of his employment in an automobile accident in November 2008. He suffered fractures of his neck and back and underwent a surgical fusion of his neck. Over the course of the next year, he suffered severe pain and was eventually referred to a pain management physician, who prescribed oxycodone. He filed suit against his employer for workers' compensation benefits. He died in January of 2010 of an accidental overdose of oxycodone over 14 months after his injuries. His widow was substituted as plaintiff in his workers' compensation suit and filed a motion to amend the complaint to allege that his death was related to his work injury and that she was entitled to death benefits. The employer opposed the motion to amend, contending the death was not compensable because it was not the "direct and natural result of a compensable injury" but rather, the result of an intervening cause, i.e., the employee's negligence in consuming an overdose of medicine. The trial court denied the motion to amend. The parties entered into a series of stipulations concerning the remaining issues in the case, and judgment was entered. The widow has appealed, contending that the trial court erred in denying her motion to amend the complaint. We agree, reverse the judgment, and remand the case to the trial court for further proceedings.

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

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and DONALD P. HARRIS, SR. J., joined.

Brian Dunigan, Goodlettsville, Tennessee, for the appellant, Judy Kilburn.

Desiree I. Hill and M. Neal Cope, Nashville, Tennessee, for the appellees, Granite State Insurance Company and Ryan T. Brown.

MEMORANDUM OPINION

Factual and Procedural Background

The employee, Charles Kilburn, was severely injured in a motor vehicle accident on November 6, 2008, in the course of his employment with his employer, Ryan Brown ("Employer"). He suffered fractures of the C3 and C4 vertebrae, disc herniations at the L4-5 and L5-S1 levels of his lower back, and other injuries. A surgical fusion of the C3 and C4 vertebrae was performed by Dr. Jacob Schwarz, a neurosurgeon. Because Mr. Kilburn continued to suffer pain, Dr. Schwarz eventually referred him to Dr. William Leone, a pain management specialist. Dr. Leone first examined Mr. Kilburn on January 4, 2010, and noted that Mr. Kilburn was taking fifteen milligrams of oxycodone four times per day. Dr. Leone recommended against increasing that dosage.

Mr. Kilburn died on January 28, 2010. The County Medical Examiner conducted an investigation and issued a report, which determined that the cause of death was an accidental overdose of oxycodone[1].

Before he died, Mr. Kilburn had filed this action for workers' compensation benefits in the Chancery Court of Williamson County. His widow, Judy Kilburn, was appointed administratrix of his estate and was substituted as plaintiff in this action. She then filed a motion to amend the complaint to allege that her husband's death was the direct and natural result of his work injury and to seek an award of workers' compensation death benefits. Employer opposed the motion. The trial court denied the motion on July 25, 2010. The trial court stated in its order that "Kilburn's negligent overdose of prescription pain medications breaks the chain of causation because

[1] The Medical Examiner's report states that Mr. Kilburn's blood contained 409 ng/mL of oxycodone, 199 ng/mL of noroxycodone and 79 mg/dL of ethanol. Apart from the report's general finding that the cause of death was "acute oxycodone toxicity" and that "alcohol use" was a "contributory" cause, the significance of the specific levels of these substances is not explained in the record.

it is an independent, intervening cause." The parties stipulated the remaining issues. The widow Kilburn has appealed, contending that the trial court erred by denying her motion.

Standard of Review

The grant or denial of a motion to amend a pleading is discretionary with the trial court. Harris v. St. Mary's Med. Ctr., Inc., 726 S.W.2d 902, 904 (Tenn. 1987). Generally, trial courts must give the proponent of a motion to amend a full chance to be heard on the motion and must consider the motion in light of the amendment policy embodied in Rule 15.01 of the Tennessee Rules of Civil Procedure that amendments must be freely allowed; and, in the event the motion to amend is denied, the trial court must give a reasoned explanation for its action. Henderson v. Bush Bros. & Co., 868 S.W.2d 236, 238 (Tenn. 1993). Although permission to amend should be liberally granted, the decision "will not be reversed unless abuse of discretion has been shown." Welch v. Thuan, 882 S.W.2d 792, 793 (Tenn. Ct. App. 1994).

Analysis

The motion to amend filed by Mrs. Kilburn alleged that "as a direct and proximate result of his workers' compensation injury Charles Kilburn accidentally took his own life when he consumed a fatal dose of the pain medication which had been prescribed by his authorized treating physician." The trial court denied this motion.

We begin our analysis by examining Tennessee Rule of Civil Procedure 15.01, which governs amendments to pleadings and provides as follows:

> A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it at any time within 15 days after it is served. Otherwise a party may amend the party's pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given when justice so requires.

Although the trial court has discretion to decide whether to allow an amendment, it is well settled that permission must be "liberally granted." Wilson v. Ricciardi, 778 S.W.2d 450, 453 (Tenn. Ct. App. 1989).

The Supreme Court has listed several factors the trial court should consider when deciding whether to allow an amendment. They are: "[u]ndue delay in filing; lack of notice to the opposing party; bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." Cumulus Broad., Inc. v. Shim, 226 S.W.3d 366, 374 (Tenn. 2007); Merriman v. Smith, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979).

Based on the record in this case, none of these factors apply, with the possible exception of futility of amendment. The trial court's denial appears to be based on a finding that amendment would be futile in that Employer was not liable for death benefits because Mr. Kilburn's medication overdose was a result of his own negligence, which was an independent intervening cause breaking the chain of causation, and therefore his death was not a direct and natural consequence of the work injury.

A trial court's denial of a motion to amend is similar to the granting of a motion to dismiss a complaint pursuant to Tennessee Rule of Civil Procedure 12.02(6) on the ground that it fails to state a claim upon which relief can be granted. "In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief." Stein v. Davidson Hotel Co., 945 S.W.2d 714, 716 (Tenn. 1997) (citing Cook v. Spinnaker's of Rivergate, Inc., 878 S.W.2d 934, 938 (Tenn. 1994)).

Employer argues that it is implicit in the allegation in the motion to amend that Mr. Kilburn's own negligence was in whole or in part the cause of his death, and the trial court was correct in finding that his negligence was an independent intervening cause, breaking the chain of causation and that his death was not a direct and natural consequence of his injury. Employer asserts that Tennessee has adopted a two-part test to determine whether an event breaks the chain of causation in a workers' compensation case. In Anderson v. Westfield Group, 259 S.W.3d 690, 699 (Tenn. 2008), the Court sets out this test, quoting from a well respected legal treatise as follows:

> "When the injury following the initial compensable injury arises out of a quasi-course [of employment] activity, such as a trip to the doctor's office, the chain of causation should not be deemed broken by mere negligence in the performance of that activity, but only by intentional conduct" by the employee. 1 Larson's Workers' Compensation Law §10.05 (2004). However, when "the injury following the initial compensable injury does not arise out of a quasi-course activity, as when a claimant with an injured hand engages in a boxing match, the chain of causation may be deemed broken by either intentional or negligent claimant misconduct."

Employer argues that taking an overdose of prescription medication is not a quasi-course activity. Employer relies on Simpson v. H.D. Lee Co., 793 S.W.2d 931 (Tenn. 1990), where an employee ignored his treating physician's instructions and overdosed on pain medication, and the Court noted that medication not taken in accordance with the doctor's orders broke the chain of causation and was an independent intervening cause.

The widow Kilburn contends that the trial court erred by concluding that her proposed amendment to the complaint was futile. She argues that, if proven, the allegation contained in the proposed amendment that her husband died as a result of an accidental overdose of medication prescribed by his authorized physician for treatment of his admittedly compensable work injury is sufficient to establish liability under the workers' compensation act. Neither party's contention is correct.

In Anderson v. Westfield Group, 259 S.W.3d 690, 696 (Tenn. 2008), our Supreme Court reaffirmed that "the general rule that a subsequent injury, whether in the form of an aggravation of the original injury or a new and distinct injury, is compensable if it is the 'direct and natural result' of a compensable injury." 259 S.W.3d at 696 (citing Rogers v. Shaw, 813 S.W.2d 397, 399-400 (Tenn. 1991)). The Court noted, however, that "the rule has a limit. That limit hinges on whether the subsequent injury is the result of independent intervening causes, such as the employee's own conduct." Id. The employee in Anderson argued "that only reckless or intentional misconduct [could] constitute an intervening cause." Id. at 698-99. The Supreme Court rejected this argument and held "that negligence is the appropriate standard for determining whether an independent intervening cause relieves an employer of liability for a subsequent injury purportedly flowing from a prior work-related injury." Id. at 699.

In Shelton v. Central Mutual Insurance Co., No. E2008-00553-WC-R3-WC, 2009 WL 1110476 (Tenn. Workers' Comp. Panel Apr. 24, 2009), the Panel applied Anderson to a set of facts similar to those alleged in this case. There, the employee had been found to be permanently and totally disabled as a result of a compensable injury and later died from an accidental overdose of prescription medication. His widow sought death benefits, alleging that her husband's death was a direct and natural result of the original work injury. The employer moved for summary judgment. The widow opposed the motion with the deposition of a treating psychiatrist, who testified, "if [the employee] was in a lot of pain, it's possible that he could have taken more medication to alleviate the pain, or if he was going through some severe anxiety, it's possible that he could have taken more of the anxiety medication to alleviate the anxiety symptoms and which could have resulted in that accidental overdose." Id. at *1. The trial court granted the employer's motion. The Panel reversed, finding that summary judgment was not appropriate. It found that, "standing alone," the medical testimony was insufficient "to support a conclusion that an accidental overdose was a direct and natural consequence of

the original injury." Id. at *5. Nevertheless, the panel observed that evidence "if supplemented by additional credible evidence, could be sufficient to support a finding that [the employee's] death was a natural and direct result of his original injury." Id. The employer did not present any contrary evidence and thereby failed to negate an essential element of the widow's claim. The Panel reversed the grant of summary judgment and remanded the case for further proceedings. Id. at *6. The Panel suggested that evidence that the decedent "had recently had episodes of severe pain or anxiety which had diminished his faculties to the extent that he was at risk to inadvertently take an overdose of medication," if such evidence existed, could support a finding that the death was a direct and natural consequence of the original injury. Id. at *5.

The existence of similar credible evidence in this case could possibly permit the widow Kilburn to prevail. At this early stage of the proceedings, it is impossible to determine whether such evidence exists. Unlike the cases cited by both parties, there was virtually no testimony presented in this case. The only evidence introduced was medical and other records; there is no proof of the mental and physical condition of Mr. Kilburn in the period leading up to his death. Neither the treating surgeon, the pain management physician, nor the independent examining physician testified about the 14-month interval between the accident and Mr. Kilburn's death, during which time Mr. Kilburn apparently suffered extreme pain. For example, the medical records show that on August 31, 2009, and November 2, 2009, Dr. Schwarz, the surgeon, found that Mr. Kilburn was plagued with lower extremity pain and lower back pain for which he recommended L4-S1 fusion surgery, but Employer denied treatment. The records also show that Dr. Leone, the pain management specialist, found that Mr. Kilburn had substantial lower back pain on January 4, 2010, which was just twenty-four days before his death. The stark numbers on Mr. Kilburn's death certificate showing blood toxicity do not explain the reason for Mr. Kilburn's overdose. We are therefore unable to conclude, based upon the record before us, that there is "no set of facts" upon which relief could be granted in this case. For that reason, we find that the trial court erred by denying the motion to amend to seek death benefits.

Conclusion

The order denying Judy Kilburn's motion to amend is reversed. The judgment is vacated, and the case is remanded to the trial court for further proceedings consistent with this opinion. Costs are taxed to Granite State Insurance Company and Ryan T. Brown, for which execution may issue if necessary.

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E. RILEY ANDERSON, SPECIAL JUDGE

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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 Granite State Insurance Company and Ryan T. Brown, for which execution may issue if necessary.

PER CURIAM