

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 26, 2012 Session

CYNTHIA SIMMONS v. KEN-KEL MANAGEMENT, INC. ET AL.

**Appeal from the Chancery Court for Shelby County
No. CH-09-0809-3 Kenny Armstrong, Chancellor**

No. W2011-01924-WC-R3-WC - Mailed April 25, 2012; Filed June 1, 2012

An employee filed a motion requesting that a former employer be ordered to provide post-judgment medical treatment. After a hearing, the trial court granted the employee's motion. The former employer has appealed, contending that the trial court erred in granting the employee's motion. We affirm the trial court's judgment.

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

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

Sean Antone Hunt, Memphis, Tennessee, for the appellants, Ken-Kel Management, Inc., d/b/a/McDonald's; Ken-Kel Management Services, Inc., d/b/a McDonald's; and Bridgefield Casualty Insurance Co., Inc.

Christopher L. Taylor, Memphis, Tennessee, for the appellee, Cynthia Simmons

MEMORANDUM OPINION

Factual and Procedural Background

Ms. Cynthia Simmons was injured on February 27, 2008, while working at her place of employment, a McDonald's restaurant ("Employer").¹ Dr. LaVerne Lovell was authorized

¹ There are three defendants in this action: Ken-Kal Management, Inc., d/b/a McDonald's, Ken-Kal
(continued...)

by the Employer to treat Ms. Simmons. Dr. Lovell diagnosed a partial disc herniation at the L4/L5 level of Ms. Simmons' spine. When Ms. Simmons' symptoms did not improve with treatment, Dr. Lovell performed a hemilaminectomy and discectomy at the L4/L5 level. Ms. Simmons later returned to Dr. Lovell complaining of leg pain that had begun after she had fallen at home. Dr. Lovell determined that she had sustained a re-herniation at the L4/L5 level. Another surgery was performed during which Dr. Lovell discovered that Ms. Simmons also had a fractured facet joint at the L4/L5 level. After Ms. Simmons reached maximum medical improvement on October 15, 2008, Dr. Lovell released her from his care. Dr. Lovell assigned an impairment rating of 8% to the body as a whole.

On April 16, 2009, Ms. Simmons filed a complaint for workers' compensation benefits. The case proceeded to trial on February 11, 2010. In its judgment entered on February 19, 2010, the trial court found that Ms. Simmons' injury was causally related to her employment and awarded permanent partial disability benefits based upon a 12% permanent partial disability to the body as a whole. The court also ordered that Employer had to provide Ms. Simmons with open future medical treatment by physicians that Employer authorized according to Tennessee Code Annotated section 50-6-204.

On October 5, 2010, Ms. Simmons returned to see Dr. Lovell complaining of low back pain with radiation down her right lower extremity. Ms. Simmons told Dr. Lovell that the pain had been present for the preceding two and one-half months. Dr. Lovell noted in Ms. Simmons' chart that she had been working full time.² Dr. Lovell also noted that Ms. Simmons had noticed increasing right lower extremity pain and numbness down her right leg and into her right great toe. More recently, she had begun to experience some urinary incontinence. Dr. Lovell testified that urinary incontinence can be a sign of a large disc herniation. He ordered a magnetic resonance imaging scan ("MRI"), which revealed a re-herniation of the disc at the L4/L5 level on the same level and side as the one he had repaired in 2008. Dr. Lovell recommended additional surgery to treat Ms. Simmons' re-herniated disc, but Employer denied the request for coverage of the additional surgery.

On April 6, 2011, Ms. Simmons filed a motion to require Employer to provide the medical treatment and for an award of her attorney's fees. The parties deposed Dr. Lovell, and on June 2, 2011, the trial court held a hearing on Ms. Simmons' motion. The only evidence introduced during that hearing was the deposition testimony of Dr. Lovell. The trial

¹(...continued)

Management Services, Inc., d/b/a McDonald's, and Bridgefield Casualty Insurance Company. For ease of reference in this opinion, we will refer collectively to the defendants as "Employer."

² Ms. Simmons no longer worked for Employer at the time.

court entered a written order wherein it found “that the requested back surgery is related to the Plaintiff’s original work injury[.]” The trial court therefore granted Ms. Simmons’ motion and ordered Employer “to approve and pay for all necessary and reasonable medical expenses related to Plaintiff’s requested back surgery[.]” The court also ordered Employer to pay Ms. Simmons’ attorney’s fees as well as her court reporter costs. Employer subsequently filed a motion to alter or amend the judgment, which the trial court denied. Employer then timely filed a notice of appeal. 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. Tenn. Sup. Ct .R. 51. A trial court’s conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009). We review findings of fact in a workers’ compensation case de novo, but presume the findings are correct unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008).

Analysis

An employer’s obligation to pay for medical treatment “made reasonably necessary” by a work-related accident extends to payments for *future* medical expenses. See Stephens v. Henley’s Supply & Indus., Inc., 2 S.W.3d 178, 179 (Tenn. 1999); Tenn. Code Ann. § 50-6-204(a)(1)(A) (Supp. 2011). Although an employer is liable for future medical expenses “made reasonably necessary” by the work-related injury, an employer is not liable for post-judgment medical treatment made necessary by an independent intervening cause created by an employee’s negligent conduct . See Anderson v. Westfield Grp., 259 S.W.3d 690, 99 (Tenn. 2008). Whether or not a particular medical treatment is made reasonably necessary by a work-related accident is a question “which must be answered based upon the proof presented at the time the treatment is proposed.” Hegger v. Ford Motor Co., No. M2007-00759-WC-R3-WC, 2008 WL 4072047 (Tenn. Workers Comp. Panel Sept. 2, 2008).

The only proof in the record consists of the deposition testimony of Dr. Lovell. Both parties assert that Dr. Lovell’s testimony supports their respective arguments concerning causation. “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). Employer advances two alternative arguments concerning Ms. Simmons’ most recent disc herniation. First, Employer asserts that when there is an anatomical change in an employee’s condition or an actual progression of the condition, the employee has suffered a new and different injury. Employer asserts that Ms. Simmons’ new employer is responsible for her medical treatment because her most recent injury occurred while she was employed with her new employer. Barker v. Home-Crest Corp., 805 S.W.2d 373, 375 (Tenn.

1991). Second, Employer contends that Ms. Simmons' disc re-herniation, which occurred more than two years after her work-related injury, was the result of an intervening cause and that Employer therefore is not liable for the medical expenses for treating the re-herniated disc.³

Employer's first argument is based on the last injurious injury rule. Pursuant to the last injurious injury rule, an employer must "take an employee as he finds him." Crew v. First Source Furniture Grp, 259 S.W.3d 656, 667 (Tenn. 2008) (quoting Baxter v. Smith, 364 S.W.2d 936, 942 (Tenn. 1962)). When determining which of two successive employers is liable in a workers' compensation case, the employer at the time of the employee's last injury is liable. Id. (quoting Bldg. Materials Corp. v. Britt, 211 S.W.3d 706, 713 (Tenn. 2007)). The inquiry does not turn upon who the employee's last employer was nor on when the last possible exposure to a hazard was; instead, courts must determine when the last incident that

³ Employer's arguments are primarily centered on the following questions and Dr. Lovell's responses to those questions:

Q: Okay. In your October 19, 2010 note, you have a paragraph here that says, I would consider this related to the patient's original injury. Can you read that for us?

A: Yes. I sometimes make a statement like this because that always becomes the issue for work comp patients. At the very bottom of her note on October 19, 2010, I stated I would consider this related to the original — to the patient's original work injury. And that is the same level and same side as her surgery, and recurrent disk herniations are known to occur after original injury followed by surgery.

Q: What did you mean by that?

A: Well, I am afraid I would just be repeating myself. The statement related to — means it is at the same site, the same spot. And it is — in other words, it didn't crop up at another level in her back on an opposite side. So there obviously was a relationship between her new disk herniation and her old disk herniation because they both appeared at the same place.

Q: Were you trying to say that — strike that. In that statement, were you indicating a causal relationship? In other words, the old injury caused the new injury?

A: No.

Q: Is this herniation an anatomical change from the condition she had when you last saw her for the old injury in October, 2008?

A: Yes.

Q: In your opinion, is this a new injury?

A: Yeah. Two years after, I think you would have to identify some new occurrence as causing this.

actually caused injury occurred. Id. In order for the last injurious injury rule to apply, the evidence must show that “the employee’s condition worsened due to the working conditions at the second employer, either by advancement or aggravation of the injury.” Id. at 668. If an employee’s symptoms from a workplace injury merely continue after the employee changes employers, the original employer will be liable for the injury. Id.

Dr. Lovell testified that Ms. Simmon’s re-herniated disc was related to her original injury, but Dr. Lovell also testified that “some new occurrence” caused Ms. Simmons to suffer this re-herniation. There is no evidence in the record, however, that this “new occurrence” occurred while Ms. Simmons was working for a new employer. In order to apply the last injurious injury rule, evidence must establish that Ms. Simmons’ condition was worsened because of her second employer’s working conditions. The evidence in the record does not support a conclusion that the last injurious injury rule applies in this case.

Employer’s second argument is that Ms. Simmons’ disc re-herniation was the result of an independent intervening cause. A subsequent injury to the employee is compensable if it is the “direct and natural result” of a compensable injury. Anderson v. Westfield Grp., 259 S.W.3d 690, 696 (Tenn. 2008) (quoting Rogers v. Shaw, 813 S.W.2d 397, 399–400 (Tenn. 1991)). When the employee’s original injury arises from his or her employment, “every natural consequence that flows from the injury likewise arises out of the employment” and is compensable. Id. (quoting 1 Larson’s Workers’ Compensation Law § 10 (2004)). However, this rule is dependant on a showing that the subsequent injury was actually caused by the original injury and not by an independent intervening cause, such as the employee’s own conduct. Id.

For example, the employee in Anderson v. Westfield Grp. had suffered a compensable injury to his elbow, which he settled. Id. at 693. The injury left the employee’s hand with a loss of sensation. Id. Since the employee was unable to feel, he was vulnerable to burn injuries. Id. at 694. The employee injured his hand when he placed it on a hot stove. Id. at 694. The Tennessee Supreme Court held that the employee “failed to exercise due care and thus was negligent in placing his hand on the hot burner of the stove in his kitchen. His negligence operate[d] to relieve the employer of liability for medical expenses incurred in treating the injuries resulting from that negligent act.” Id. at 699.

The pending case is markedly different from Anderson. In Anderson, there was evidence in the record that supported a conclusion that the employee’s own negligence caused his new injury. In this case, Dr. Lovell testified that “some new occurrence” caused Ms. Simmons to suffer a re-herniation. There is no evidence in the record, however, to

support a conclusion that Ms. Simmons' negligence caused her re-herniated disk.⁴ Although this case is markedly different from Anderson, it is similar to the case of Shirley v. Bi-Lo, LLC, No. E2008-02452-WC-R3-WC, 2009 WL 3272890, (Tenn. Workers Comp. Panel Oct. 14, 2009). In that case, the employer argued that the employee's need for additional surgery was the result of an independent intervening cause. Id. at *3-4. The court rejected that argument, however, finding that the record did not contain evidence of an independent intervening cause. Id.; see also, Cronan v. Cleveland Chair Co., No. E2006-01570-WC-R3-WC, 2007 WL 1710938, *4 (Tenn. Workers Comp. Panel June 13, 2007).

Finally, there is evidence in the record that supports the trial court's judgment. For instance, Ms. Simmons' points to testimony of Dr. Lovell discussing a person's susceptibility to disc re-herniation following an initial herniation and surgery. Dr. Lovell testified that "[b]ecause [the re-herniation] is related to the same site and same level in October 19, 2010, I stated that I would consider this related to the patient's original work injury in that it is the same level and the same site as her surgery. And recurrent disk herniations are known to occur after original injury followed by surgery." In addition to that testimony, Dr. Lovell also stated that the affected area of Ms. Simmons' spine was in a weakened condition as a result of her prior injuries and two prior surgeries and that Ms. Simmons' original injury and surgery placed her at risk for a "repeat injury."

The evidence in the record, in the form of Dr. Lovell's testimony, supports a conclusion of a causal link between the original work-related injury and the most recent disc re-herniation. The trial court found "that the requested back surgery is related to the Plaintiff's original work injury[.]" and after reviewing the record in its entirety, we conclude that the evidence does not preponderate against the trial court's decision. We therefore hold that the trial court did not err in ordering the Employer to pay for all necessary and reasonable medical expenses related to Ms. Simmons' requested back surgery.

Conclusion

For the foregoing reasons, we affirm the trial court's judgment. The costs are taxed to Ken-Kel Management, Inc., d/b/a McDonald's, Ken-Kel Management Services, Inc., d/b/a McDonald's, and Bridgefield Casualty Insurance Company, for which execution may issue, if necessary.

⁴ In its brief, the Employer cites to medical records attached to its motion to alter or amend. The trial court denied the Employer's motion to alter or amend, and the denial of that motion has not been appealed. Thus, those medical records will not be considered as having been part of the evidence in this case.

TONY A. CHILDRESS, SPECIAL JUDGE

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**Chancery Court for Shelby County
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No. W2011-01924-WC-R3-WC - Filed June 1, 2012

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 Appellants Ken-Kel Management, Inc., d/b/a McDonald's, Ken-Kel Management Services, Inc., d/b/a McDonald's, and Bridgefield Casualty Insurance Company, and their surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM