IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 24, 2006 Session

BOBBIE JANE T. HAGEWOOD v. AMERICAN CASUALTY COMPANY OF READING, PA., ET AL.

Direct Appeal from the Criminal Court for Macon County
No. 04-244 John D. Wootten, Jr., Circuit Judge

No. M2005-02003-WC-R3-CV - Mailed - October 27, 2006
Filed - November 29, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer, Sprint Corporation (Sprint), and its insurer, American Casualty Company of Reading, PA., appeal from the trial court's determination that the claim of the employee, Bobbie Jane T. Hagewood (Hagewood), for benefits relating to a carpal tunnel injury was not barred by the statute of limitations, res judicata, or the last injurious injury rule. Appellee, Second Injury Fund (Fund), joins the statute of limitations argument and further claims that the trial court erred in apportioning the award between Sprint and the Fund. After reviewing the record, we have determined that the evidence does not preponderate against the findings of the trial court concerning the statute of limitations and the last injurious injury rule. We decline to review the res judicata issue because it was not decided by the trial court. We do, however, find that the trial court erred in its apportionment of the award and modify the award to reflect the correct apportionment.

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court Affirmed as Modified

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and FRANK F. DROWOTA, III, SP.J., joined.

Dale A. Tipps, Nashville, Tennessee, for Appellants, American Casualty Company of Reading, Pennsylvania, and Sprint Corporation.

William Joseph Butler and Frank D. Farrar, Lafayette, Tennessee, for Appellee, Bobbie Jane T. Hagewood.

Paul G. Summers, Attorney General & Reporter, Michael E. Moore, Solicitor General; Lauren S. Lamberth, Nashville, Tennessee, for Appellee, Tennessee Department Labor and Workforce Development, Workers' Compensation Division, Second Injury Fund.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

The Appellee, Bobbie Jane T. Hagewood, worked as a Senior Specialist in Sprint's customer call center in Nashville, Tennessee, from January 2000 until March 1, 2004. Sprint sold the call center to Convergys effective March 1, 2004. Ms. Hagewood continued to work at the call center under its new owner until Convergys closed the center on March 2, 2005. Her main duties consisted of answering consumer questions and fielding complaints concerning Sprint's wireless service. The job required Ms. Hagewood to spend much of her day typing at a computer terminal. Ms. Hagewood has remained unemployed since the closing of the call center.

Beginning in May or June, 2003, Ms. Hagewood began to experience pains in her neck and shoulders. She reported these symptoms to her supervisor, Christie Martin. Ms. Hagewood also told Ms. Martin about pains shooting down her arms to her hands and that the more she used her computer, the worse the problems with her hands and wrists became. Ms. Hagewood then took three months off from work due to the problems with her neck and shoulders. When she returned to work in September 2003, she had no problems with her hands, fingers, numbness or tingling. Then in November 2003, Sprint changed the way it operated the call center. The change resulted in Ms. Hagewood working at a computer keyboard continuously for her entire eight-hour shift where previously she used a keyboard about fifty percent of her day. Ms. Hagewood was also required to work overtime and worked two to six hours of overtime each week. When the change occurred, Ms. Hagewood=s problems with her hands and wrists returned and worsened over time.

Sprint sent her to be examined by Dr. Roy C. Terry on January 6, 2004. During that visit Dr. Terry told her she could have carpel tunnel syndrome that could be caused by the repetitive motion of operating a computer keyboard. The next day, January 7, 2004, Ms. Hagewood informed her supervisors, Corey Romero and Ian Wash, that she suffered from carpal tunnel syndrome.[1]

Ms. Hagewood filed suit in July 2003 for her neck and shoulder injuries. The parties settled that suit on October 12, 2004, for 51.8% permanent partial disability to the body as a whole. Ms. Hagewood filed her second suit for her carpal tunnel injuries on October 11, 2004. Sprint filed a Motion to Dismiss, claiming that the suit was barred by the statute of limitations. That motion was heard by the court on November 24, 2004, and was denied. The case was tried July 13, 2005.

[1] Dr. Terry never actually diagnosed Ms. Hagewood with carpal tunnel syndrome.

The trial court found Ms. Hagewood to be a "credible lady" and "unshakably unimpeached." The trial court found the last injurious injury rule did not apply and that Ms. Hagewood had sustained a 90% permanent partial disability to her right arm and a 60% permanent partial disability to her left arm. This equated to a 75% permanent partial disability rating to the body as a whole. Combined with her previous 51.8% disability rating to the body as a whole, the total exceeded 100% and resulted in a finding of liability against the Second Injury Fund. The trial court apportioned the award, including discretionary costs, 48.2% to Sprint and 51.8% to the Fund. From this judgment Sprint and the Fund have appealed.

II. STANDARD OF REVIEW

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989). Where credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Long v. Tri-Con Indus. Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). Where 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. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

III. ANALYSIS

A. Statute of Limitations

Appellant Sprint, joined by the Second Injury Fund, first argues that Ms. Hagewood's claim is barred by the statute of limitations. Sprint contends that Ms. Hagewood's June 2003 notice to Christie Martin concerning problems with her hands was sufficient to begin running the statute of limitations. Ms. Hagewood's second suit, filed on October 11, 2004, would, therefore, come outside the one-year statute of limitations. See Tenn. Code Ann. § 50-6-203(a) (1999).[2] Ms. Hagewood contends and the trial court found, that the actual date of notice was January 7, 2004, when she notified her two supervisors following her meeting with Dr. Terry. We agree.

Gradually occurring injuries, while compensable as accidental injuries under the Workers' Compensation Law, are difficult, if not impossible, to link to a particular accident or event. See Mahoney v. NationsBank of Tennessee, N.A., 158 S.W.3d 340, 344 (Tenn. 2005);

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[2] Tennessee Code Annotated section 50-6-203(a) was amended by the legislature in 2004. The changes became effective as of January 1, 2005. As Ms. Hagewood=s injury occurred sometime in 2003-2004, the previous version of the statute governs her claim.

Lawson v. Lear Seating Corp., 944 S.W.2d 340, 341 (Tenn. 1997). For that reason, the date of the injury has been held, for purposes of determining the limitations period, to be the date the employee becomes unable to perform his or her job. Lawson, 944 S.W.2d at 343; Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65, 69-70 (Tenn. 1961). In Bone v. Saturn Corp., 148 S.W.3d 69, 73 (Tenn. 2004), the Tennessee Supreme Court reasoned that the purpose of the last-day-worked rule "is to fix a date certain when the employee knows or should know he or she sustained a worked-related injury so that workers with gradual injuries will not lose the opportunity to bring claims due to time limitations." Therefore, the Bone court held "[t]he last day worked rule does not apply when determining an employee's compensation rate if the employee has given actual notice of a gradually occurring injury prior to missing time from work on account of the injury." Id. at 74.

The Appellant urges we use the same rationale as applied in *Bone* and hold the statute of limitations began to run when Ms. Hagewood first reported problems with her hands to her supervisor in June 2003. That argument has recently been rejected by the Tennessee Supreme Court in Barnett v. Earthworks Unlimited Inc., 197 S.W.3d 716, 720-721 (Tenn. 2006). The Barnett court held, in effect, that in order for notice to commence the running of the statute of limitations it must be "notice" that is required by the Workers' Compensation Law. Id. The requirements for notice in the case of gradually occurring injuries is set out in Tennessee Code Annotated section 50-6-201(b) as follows:

> (b) In those cases where the injuries occur as the result of gradual or cumulative events or trauma, then the injured employee or such injured employee's representative shall provide notice to the employer of the injury within thirty (30) days after the employee:
>
> (1) Knows or reasonably should know that such employee has suffered a work-related injury that has resulted in permanent physical impairment; or
>
> (2) Is rendered unable to continue to perform such employee's normal work activities as the result of the work-related injury and the employee knows or reasonably should know that the injury was caused by work-related activities.

There is no evidence Ms. Hagewood knew, in June 2003, that she had a permanent physical impairment in her hands and wrists. There is no evidence she ever missed a day of work on account of carpel tunnel syndrome or the problems with her hands. The trial court found that Ms. Hagewood gave notice on January 7, 2004, after her consultation with Dr. Terry concerning her symptoms. At this consultation, Dr. Terry told Ms. Hagewood she could have carpal tunnel caused her work and restricted restricted her from working overtime. It was only after this meeting with Dr. Terry that Ms. Hagewood reported to her two supervisors that she suffered from carpal tunnel syndrome. The evidence does not preponderate against the trial court's

determination that the date of notice, as required by the Workers' Compensation Law, was not prior to January 7, 2004. Appellant's argument that Ms. Hagewood's workers' compensation claim is barred by the statute of limitations is without merit.

B. Res Judicata

Appellant Sprint next contends that Ms. Hagewood's second suit is barred by the doctrine of res judicata. Sprint asserts that the settlement in Ms. Hagewood's first suit entered into on October 12, 2004, bars her current action. Alternatively, Sprint argues that Ms. Hagewood could have or should have litigated the injuries to her hands and wrists in her first suit and that her failure to do so bars this second suit.

Res judicata is a judicial doctrine that "bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit." Goeke v. Woods, 777 S.W.2d 347, 349 (Tenn. 1989) (quoting Massengill v. Scott, 738 S.W.2d 629, 631 (Tenn. 1987)). We note that the plain language of the settlement to the first suit, contained in the record, states that it is for injuries to Ms. Hagewood's "neck and shoulders on May 1, 2003." The issue of res judicata was not raised in Appellants' Motion to Dismiss filed in the trial court. The issue was raised in Appellants' Answer to Complaint filed in the trial court, but our review of the record reveals that neither the final order of the trial court nor the transcript contains a ruling by the trial judge on this issue. Appellants have not cited us to such a ruling. Tennessee appellate courts generally do not address issues that were not decided at trial. As has been stated by the Tennessee Supreme Court, this court "is a court of appeals and errors, and we are limited in authority to the adjudication of issues that are *presented and decided* in the trial courts, and a record thereof preserved as prescribed in the statutes and Rules of this Court." In Re: The Adoption of Female Child E.N.R., 42 S.W.3d 26, 31-32 (Tenn. 2001) (quoting Dorrier v. Dark, 537 S.W.2d 888, 890 (Tenn. 1976)). Because the record before us does not indicate the trial judge made a ruling concerning the application of res judicata, we decline to address the issue for the first time on appeal.

C. Last Injurious Injury Rule

Sprint finally argues that Ms. Hagewood's claim should have been brought against her last employer, Convergys, rather than Sprint. Sprint contends that it is undisputed that Convergys was the owner of the call center where Ms. Hagewood worked when she filed the current suit; therefore, the last injurious injury rule operates to place the responsibility for any award on Convergys.

The last injurious injury rule requires an employer to take "an employee as he finds him." Baxter v. Smith, 364 S.W.2d 936, 942 (Tenn. 1962). The rule provides that

> [t]he most recent injury causally related to the employment renders the employer at the time liable for full compensation for all of the resulting disability even

> though increased by aggravation of a previous condition of disease or injury of such employee.

Id. However, in order for the rule to apply, there must be some showing that the employee=s condition worsened, either by aggravation or advancement of the injury, because of working conditions at the second employer. See Mahoney, 158 S.W.3d at 346. First we note, as admitted by Appellants in their brief, that the trial court failed to make a specific finding with regard to this issue. We are satisfied, however, that this issue was sufficiently raised and argued before the trial court. In finding Sprint liable for Ms. Hagewood's injury, it impliedly found that her condition was not aggravated during her tenure with Convergys and, thus, the "last injurious injury" rule would not apply. Ms. Hagewood testified that her condition did not worsen after the transfer of the call center=s ownership from Sprint to Convergys. Appellants direct us to a report[3] of Dr. C. Rob Dyer dated February 1, 2005, which contains a statement that Ms. Hagewood's carpal tunnel injury was caused by her keyboard activities at Convergys. Dr. Dyer also reported, however, that Ms. Hagewood had been working at Convergys for two years and clearly relates that her condition developed during the period from November 2003 until January 2004. It cannot be disputed that Ms. Hagewood was an employee of Sprint during that period. There is no indication in Dr. Dyer's report and no opinion given by any other physician that Ms. Hagewood's condition worsened after January 2004. The trial court apparently found that the last injurious injury rule does not apply. The evidence does not preponderate against this finding.

D. Apportionment of the Award

Appellee, Second Injury Fund, contests the trial court=s apportionment of the award, including discretionary costs. Based upon the prior judgement awarding Ms. Hagewood a 51.8% permanent partial disability, the trial court apportioned the award, including discretionary costs, 48.2% to Sprint and 51.8% to the Fund. The Fund asserts that under the applicable statutes, it should only be responsible for the portion of the award by which Ms. Hagewood's first and second workers' compensation awards when combined exceed 100%. The Fund asserts Sprint would be liable for the remainder. We agree.

The Fund incurs liability in this action because the sum of the disability judgments from Ms. Hagewood's first and second suits total more than 100%. Tennessee Code Annotated section 50-6-208(b) provides, in part:

> (A) In cases where the injured employee has received or will receive a workers' compensation award or awards for permanent disability to the body as a whole, and the combination of such awards equals or exceeds one hundred percent (100%) permanent disability to the body as a whole, the employee shall not be entitled to receive from the employer or its insurance carrier any compensation for permanent disability to the body as a whole that would be in

[3] This report was attached as an exhibit to the deposition testimony of Dr. Walter W. Wheelhouse.

> excess of one hundred percent (100%) permanent disability to the body as a whole, after combining awards.
>
> (B) Benefits that may be due the employee for permanent disability to the body as a whole in excess of one hundred percent (100%) permanent disability to the body as a whole, after combining awards, shall be paid by the second injury fund.

The settlement in Ms. Hagewood's first suit was for 51.8% permanent partial disability to the body as a whole. The trial court assigned a 75% disability rating to the body as a whole in the current action. These two awards total 126.8%. The Fund is therefore responsible for 26.8/75 of the award or 35.73 % with Sprint responsible for the remaining 48.2/75 or 64.27%. Discretionary costs shall be apportioned in the same manner.

IV. Conclusion

The judgment of the trial court is affirmed in all respects except as to the apportionment of the award between Appellants and the Second Injury Fund. The award, including discretionary costs, is modified so that Appellants are responsible for 64.27% of the award and the Second Injury Fund is responsible for the remainder. Costs of this appeal are taxed to the Appellants, American Casualty Company of Reading, Pennsylvania, and the Sprint Corporation.

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DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
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JULY 24, 2006 SESSION

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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 appeals 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 the Appellants, American Casualty Company of Reading, Pennsylvania and Sprint Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM