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

DAVID AMADO v. BRIDGESTONE FIRESTONE AMERICAS TIRE OPERATIONS, LLC ET AL.

Appeal from the Chancery Court for Coffee County
No. 09-394 and 10-101 L. Craig Johnson, Chancellor

No. M2012-00094-WC-R3-WC - Mailed: December 28, 2012
FILED JANUARY 30, 2013

In this workers' compensation action, the employee alleged that he sustained compensable injuries to both shoulders. His employer conceded the compensability of the right shoulder injury, but denied the left shoulder claim. An examination was done by a physician through the Medical Impairment Registry ("MIR") regarding the right shoulder claim. The trial court found that the presumption of correctness of the MIR impairment opinion had been overcome by clear and convincing evidence as to the right shoulder injury. The trial court also concluded that the left shoulder injury was compensable and awarded benefits accordingly. The trial court also denied employer's claim that it was entitled to an offset pursuant to Tennessee Code Annotated section 50-6-114(b) for benefits paid under its accident and sickness policy. We hold and find that the trial court erred by failing to apply the offset sought by the employer, and affirm the judgment in all other respects.[1]

Tennessee Code Annotated section 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part and Remanded

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J. and DONALD P. HARRIS, SP. J., joined.

B. Timothy Pirtle, McMinnville, Tennessee, for the appellants, Bridgestone Firestone Americas Tire Operations, LLC, Old Republic Insurance Company, and Bridgestone Firestone North American Tire, LLC.

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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.

Barry H. Medley, McMinnville, Tennessee, for the appellee, David Amado.

MEMORANDUM OPINION

Factual and Procedural Background

David Amado ("Employee") was employed by Bridgestone Firestone Americas Tire Operations ("Employer") as a factory worker beginning in 1992. It is undisputed that he injured his right shoulder on December 15, 2006, while picking up a tire. He was treated for that injury by Dr. Sean Kaminsky, an orthopaedic surgeon. Dr. Kaminsky performed a surgical repair of the right rotator cuff on January 8, 2007. Employee was off work for a short period of time, then was permitted to return to work with a restriction of no use of his right arm. Gradually, he was permitted to increase his use of the arm, and was released to full duty work in May 2007.

Employee testified that he "beg[an] to have trouble with [his left] shoulder" in the fall of 2007. He reported "trouble raising my arm, doing anything that I had to do away from my body . . . and overhead." His symptoms worsened over time. In April 2008, he gave notice of his symptoms to Employer. He received treatment through Employer's on-site clinic. In late May, Employer formally denied that the injury was work-related. He was eventually referred to Dr. Calvin Dyer, an orthopaedic surgeon, for treatment. Dr. Dyer performed surgery on the left shoulder on January 19, 2009, and released Employee from his care on May 19, 2009. Employee returned to work for Employer in his previous position. He testified that he received accident and sickness benefits from Employer while he was off work for his shoulder injuries. Copies of the insurance plans were placed into evidence by stipulation of the parties.

Neither Dr. Kaminsky nor Dr. Dyer testified concerning Employee's injuries or impairment. It appears from the record that a dispute arose concerning the extent of impairment resulting from Employee's compensable right shoulder injury. The parties invoked the MIR process established by Tennessee Code Annotated section 50-6-204(d)(5). Dr. McKinley Lundy was selected to perform the evaluation, which occurred on October 17, 2007. His C-32 report was placed in the record on motion of the Employer. In his report, Dr. Lundy opined that Employee retained a 1% permanent impairment to the body as a whole due to his right shoulder injury. Dr. Lundy arrived at this conclusion by measuring and comparing the range of motion of Employee's right and left shoulders. Dr. Lundy was not

called as a witness, nor was his deposition taken.[2]

Dr. Richard Fishbein, an orthopaedic surgeon, testified in person at trial. Dr. Fishbein examined Employee in December of 2010, and after reviewing the records of treatment he opined that Employee retained an 8% impairment to the body as a whole from his right shoulder injury. Dr. Fishbein testified that he had performed "thousands of impairments" and had never seen the method used by Dr. Lundy. He further opined that Dr. Lundy's decision to base his impairment rating on a comparison of the ranges of motion of both of Employee's shoulders was incorrect, because both shoulders were injured at the time of the examination.

Dr. Fishbein also evaluated Employee's left shoulder. He opined that Employee retained a 5% impairment to the body as a whole, based upon the Sixth Edition of the American Medical Association Guidelines. His diagnosis was that Employee had a labral tear. He concurred with Employee's treating physicians that no permanent activity restrictions were required. On cross-examination, he agreed that various doctors had found Employee to have full range of motion of the left shoulder during earlier examinations. Finally, Dr. Fishbein opined that Employee's left shoulder injury was work-related and caused by "overcompensation from his right shoulder."

Insurance documents for the relevant period were placed into the record by agreement of the parties. In each document, the description of "non-occupational accident and sickness benefits" begins with the statement "Benefits will be paid because of an accident or sickness not covered by a workers' compensation act while under the care of a doctor licensed to practice medicine."

The hearing in this case was held on two separate days, March 8, 2011, and again on September 6, 2011. The trial court entered its decision on November 28, 2011.

The trial court issued its decision in an eleven page opinion and order. It found that Dr. Fishbein's testimony had overcome the presumption of correctness attached to Dr. Lundy's MIR rating and adopted Dr. Fishbein's impairment rating of 8% to the body as a whole for the right shoulder injury. The trial court further concluded that the left shoulder injury was compensable, and adopted Dr. Fishbein's impairment rating of 5% to the body as a whole for that injury. The trial court awarded a total of 19.5% permanent partial disability to the body as a whole and denied Employer's request for an offset of the accident and sickness benefits paid to Employee.

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[2]Either party could have taken his deposition. Tennessee Code Annotated section 50-6-204(f).

Employer appealed, raising the following issues:

(1) Did the trial court correctly find proof sufficient to overcome the presumption of correctness accorded the opinion of the assigned Medical Impairment Registry physician?

(2) Did the trial court err in considering evidence outside the record, specifically the medical records of Dr. Walter Wheelhouse?

(3) Did the trial court err in finding that the left shoulder injury was compensable?

(4) Was the employer entitled to an offset for accident and sickness benefits paid to the employee?

Standard of Review

We are statutorily required to review the trial court's factual findings "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tennessee Code Annotated section 50-6-225(e)(2). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

Analysis

MIR Impairment Rating

Employer's first argument is that the trial court erred by finding that Employee, through the testimony of Dr. Fishbein, overcame the presumption of correctness attached to Dr. Lundy's impairment rating for the right shoulder injury. That presumption is established by Tennessee Code Annotated section 50-6-204(d)(5), which provides that a rating obtained

through the MIR process "shall be presumed to be the accurate impairment rating; provided, however, that this presumption may be rebutted by clear and convincing evidence to the contrary." In Beeler v. Lennox Hearth Products, Inc., No. W2007-02441-SC-WCM-WC, 2009 WL 396121 (Tenn. Workers' Comp. Panel Feb. 18, 2009), the panel explained that the presumption may only be overcome by evidence "which raises a 'serious or substantial doubt' about the evaluation's correctness." Id. at *4.[3] Furthermore, in Tuten v. Johnson Controls, Inc., No. W2009-1426-SC-WCM-WC, 2010 WL 3363609, *4 (Tenn. Workers' Comp. Panel Aug. 25, 2010), the panel elaborated on the statute's 'clear and convincing evidence' standard by providing that the burden can be overcome by affirmative presentation of evidence that an MIR physician had used an *incorrect* method or an *inappropriate* interpretation of the AMA Guidelines, not simply a situation where physicians disagree with a properly founded MIR evaluation. See Brooks v. Corr. Med. Servs., No. W2010-00266-WC-R3-WC, 2011 WL 684600, *5 (Tenn. Workers' Comp. Panel Feb. 25, 2011) (trial court found, and panel affirmed, that employee rebutted the presumption of correctness of the MIR by clear and convincing evidence).

In the present case, Employee presented evidence, through the testimony of Dr. Fishbein, that Dr. Lundy used an incorrect method. Dr. Lundy did not testify, and Employer presented no other evidence to contradict Dr. Fishbein's assertion. We therefore conclude that the evidence does not preponderate against the trial court's finding that the presumption of correctness was overcome by clear and convincing evidence.

Consideration of Medical Evidence Not Contained in the Record

Employer's next assertion is that the trial court erred by considering evidence outside the record, specifically a report by Dr. Walter Wheelhouse of an evaluation he conducted of Employee at some point in the course of the litigation. In its decision, the trial court discussed Dr. Wheelhouse's report at length. This report was considered by Dr. Fishbein in his evaluation of the case, but was not made an exhibit.[4]

The record on this issue is somewhat confusing. Employer filed a pretrial motion in limine to exclude the "permanent anatomical impairment" of Dr. Wheelhouse and several other doctors, which were contained within the written report of Dr. Fishbein.

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[3] Beeler contains a good description of the MIR process and its purpose. 2009 WL 396121, *3-4.

[4] Although not mentioned by Employer, Dr. Wheelhouse's evaluation is set forth in summary form by Dr. Lundy in his report at page 6. The Lundy report was entered into evidence by Employer. Thus, Employer objects to information that it placed in evidence. This fact, however, was not addressed by either party before this Court.

On the first day of trial (March 8, 2011), Employer's counsel objected to the "introduction of the opinions of other experts who have not been deposed, not submitted opinions in the form of a C-32, or not stipulated by counsel into evidence as being inadmissible hearsay." The trial court stated that these opinions would be admissible if used by the testifying doctor in "formulating an opinion of his own," or for use in determining the medical history of Employee. His opinion is consistent with Tenn. R. Evid. 703. See generally, COHEN, SHEPPARD, & PAINE, *Tennessee Law of Evidence* Sec. 7.03[5] (6th ed. 2011) (information relied upon by experts).

Dr. Fishbein mentioned Dr. Wheelhouse's materials only once, and then only in passing. Dr. Wheelhouse's records were placed before the court when Employee's counsel filed a brief on September 2, 2011 (four days before the trial was reconvened on September 6, 2011), which attached Dr. Wheelhouse's detailed range of motion study. The record indicates no further objection to the attached exhibit at the September 6, 2012 hearing. The trial judge extensively cited Dr. Wheelhouse's records in his opinion, and used the records far beyond their authorized limited use pursuant to Tennessee Rules of Evidence 703.

Dr. Wheelhouse's report, attached to the brief, was never offered into evidence. Significantly, however, Dr. Fishbein barely mentioned Dr. Wheelhouse's opinion in his trial testimony, and therefore the trial court's error in this regard was harmless. The trial court plainly based its finding regarding the correct impairment rating for Employee's right shoulder on Dr. Fishbein's unrefuted testimony that Dr. Lundy used an incorrect method. Any error was, therefore, harmless. See Tennessee Rules of Appellate Procedure 36(b) (error will not require reversal unless the error "more probably than not affected the judgment").

Left Shoulder Injury

Employer's next contention is that the trial court erred by finding Employee's left shoulder injury to be compensable. The only expert medical testimony on this subject came from Dr. Fishbein. He opined that Employee's left shoulder injury was work-related and the result of overuse of the left arm while Employee was recovering from his admittedly compensable right shoulder injury. There is no evidence in this record to the contrary. We therefore conclude that the trial court correctly found Employee's left shoulder injury to be compensable.

Benefit Payment Offset

It is undisputed that Employee received payments from Employer's non-occupational accident and sickness plan during his recovery from his left shoulder surgery. The terms of

that plan specifically exclude accidents or sicknesses "covered by a workers' compensation act." The language is unequivocal. Tennessee Code Annotated section 50-6-114(b) provides in pertinent part, "Any employer may set off from temporary total, temporary partial, permanent partial and permanent total disability benefits any payment made to an employee under an employer funded disability plan for the same injury; provided, that the disability plan permits such an offset."

The trial court denied Employer's application for an offset because the terms of the accident and sickness plan did not specifically refer to an offset. We believe this construes the statutory language too narrowly. The contractual language clearly and unequivocally expresses the intention that an injured employee is not to recover benefits from the accident and sickness program if he also recovers benefits for the same injury through workers' compensation. There is no reasonable interpretation of the contract that would permit Employee to recover from both programs for the same injury. See Simpson v. Frontier Comty. Credit Union, 810 S.W.2d 147, 152 (1991) (intentions and expectations of parties as expressed in employer-funded disability plan contract should control in determining whether employer is entitled to setoff amount of benefits paid under disability insurance policy against workers' compensation award). We conclude that the trial court erred by failing to award an offset in this case.

Conclusion

The portion of the judgment denying Employer's claim for an offset of benefits paid through its accident and sickness program is reversed. The judgment is affirmed in all other respects. The case is remanded to the trial court for entry of an order consistent with this opinion. Costs are taxed two-thirds to Bridgestone Firestone Americas Tire Operations, LLC, Old Republic Insurance Company, Bridgestone Firestone North American Tire, LLC and their surety, and one-third to David Amado.

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WALTER C. KURTZ, SENIOR 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 shall be taxed two-thirds to Bridgestone Firestone Americas Tire Operations, LLC, Old Republic Insurance Company, Bridgestone Firestone North American Tire, LLC and their surety, and one-third to David Amado, for which execution may issue if necessary.

PER CURIAM