

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 29, 2012 Session

AMY MCGHEE v. TOTS AND TEENS PEDIATRICS, ET AL.

**Appeal from the Chancery Court for Campbell County
No. 07-013 Billy Joe White, Chancellor**

**No. E2011-02210-WC-R3-WC-MAILED-AUGUST 7, 2012
FILED-OCTOBER 17, 2012**

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. The Employee alleged that she was injured in the course and scope of her employment with Employer¹ in December 2005. Employee retained the law firm of PryorParrott PC in December 2005 to represent her. They filed a claim with the Department of Labor, but benefits were denied. An action was then filed on Employee's behalf in the Chancery Court of Campbell County in January 2007. In March 2009, the Chancery Court granted PryorParrott's motion for leave to withdraw and granted it a lien for expenses in the amount of \$1,146.38 and a lien for attorney's fees in the amount of 10% of any benefits recovered by Employee. Employee then retained attorney David H. Dunaway to represent her. Dunaway ultimately settled Employee's workers' compensation claim for a lump sum payment of \$100,000. In December 2010, the case was set for settlement approval in Chancery Court. Dunaway, on Employee's behalf, voluntarily dismissed her Chancery Court case and immediately filed a joint petition for approval of the settlement in the Circuit Court of Campbell County. The Circuit Court approved the settlement, awarded total attorney's fees in the amount of 20% of Employee's recovery, and ordered Dunaway to hold in trust the fees pending resolution of PryorParrott's lien claim. PryorParrott later moved the Chancery Court to set aside the voluntary dismissal, and that court granted the motion. At a later hearing in September 2011, PryorParrott and Dunaway submitted to the jurisdiction of the Chancery Court to determine disputes related to PryorParrott's lien and the division of fees. The Chancery Court determined that PryorParrott was entitled to a fee of 10% of the settlement, or \$10,000, and expenses of \$1,146.38, and ordered Dunaway to

¹ Employer was insured for workers' compensation by Ohio Farmers Insurance Company.

satisfy PryorParrott's lien from the settlement funds held in trust. Employee² appeals, challenging the jurisdiction of the Chancery Court and its division of attorney fees. We affirm the judgment.

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

E. RILEY ANDERSON, SP. J., delivered the opinion of the court, in which GARY R. WADE, J. and JERRI S. BRYANT, SP. J., joined.

David H. Dunaway, LaFollette, Tennessee for the appellant, Amy McGhee.

Kathy Parrott, Jacksboro, Tennessee for the appellees, PryorParrott PC.

MEMORANDUM OPINION

Factual and Procedural Background

Amy McGhee, the "Employee" alleged that she suffered injury by accident or occupational disease due to exposure to latex products while working for Tots and Teens Pediatrics, PLLC "Employer" in December 2005. The Employee retained the law firm of "(PryorParrott)" in December 2005 to represent her in her workers' compensation claim against Employer and its insurer. PryorParrott filed a claim for benefits to the Tennessee Department of Labor, but after a Benefit Review Conference, benefits were denied. PryorParrott then filed suit on Employee's behalf in the Chancery Court of Campbell County in January 2007. After PryorParrott worked on the case for over three years, a disagreement occurred between it and Employee regarding Employee's failure to attend several independent medical evaluations ("I.M.E.") requested by Employer. PryorParrott moved for leave to withdraw as counsel, and for a lien for expenses and attorney's fees, in March 2009. The Chancery Court granted PryorParrott's motion, including a lien for expenses in the amount of \$1,146.38 and a lien for attorney's fees in the amount of 10% of any benefits recovered by Employee.

The Employee thereafter retained attorney David Dunaway to represent her. Dunaway advised PryorParrott that he would resist the award of any attorney's fees to them because of their withdrawal and abandonment of their client. Dunaway pursued the case on Employee's behalf and ultimately settled her workers' compensation claim for a lump sum payment of \$100,000. On December 8, 2010, the case was set in Chancery Court for

² Although this appeal has been filed on behalf of Employee Amy McGhee, it pertains solely to the division of fees between her former counsel, PryorParrott, and her current counsel, Dunaway. Because the resolution of this case will have no effect on the amount of Employee's recovery or the total amount of fees for which she is liable, it is clear that Dunaway is in fact the only interested party for purposes of this appeal.

settlement approval. Dunaway, on Employee's behalf, voluntarily dismissed her Chancery Court case and on the same day, filed a joint petition for approval of the settlement in the Circuit Court of Campbell County. The Circuit Court, Judge John McAfee, entered a final decree approving a lump sum payment to Employee in the amount of \$100,000 on December 8, 2010. The Circuit Court also granted an attorney's lien in an amount equal to 20% of the judgment, or \$20,000, and ordered Dunaway to hold that amount in trust pending final resolution of any claim for attorney's fees or expenses which might be claimed by Employee's prior counsel, PryorParrott.

On December 21, 2010, PryorParrott, in its capacity as lien holder, moved the Chancery Court to set aside its December 8, 2010 order of voluntary dismissal pursuant to Tennessee Rule of Civil Procedure 60.02(2). The Employee, through her counsel, opposed this motion. Kathy Parrott contended that she attended Chancery Court on December 8, 2010, to resolve the attorney's fee issue, but when she arrived, Dunaway was not there. She had no notice that Dunaway had already dismissed the Chancery Court case and had immediately gone upstairs and petitioned the Circuit Court for approval of the settlement. Dunaway contended his reason for going to the Circuit Court was that the Clerk and Master had advised him that the Chancery Court was not hearing contested matters on that day. However, the settlement hearing in the Circuit Court was not contested. By order entered January 4, 2011, the Chancery Court set aside the prior voluntary dismissal "due to issues pending to be resolved," namely, PryorParrott's lien for fees and expenses. Employee and Employer thereafter filed motions to alter or amend or to rescind the Chancery Court's order setting aside the prior voluntary dismissal.

On September 14, 2011, the Chancery Court held a hearing to determine the issues of jurisdiction, the attorney's lien of PryorParrott, and the division of attorneys' fees. Attorney Kathy Parrott of PryorParrott filed an affidavit in support of the attorney's fees, with an attached detail of time and expenses.

The Chancery Court entered a hand written order dated September 14, 2011, which provided as follows:

The firm of PryorParrott had a contract to represent Mrs. McGhee in a workman's compensation case. Due to the refusal of plaintiff to undergo an IME on three different occasions the firm withdrew after securing an attorney's lien for 10% of recovery. The court approved this lien.

Attorney Dunaway nonsuited the Chancery case; refiled in Circuit Court and settled the case on the same day. This was an apparent attempt of defeat the lien of PryorParrott.

The court finds and holds that PryorParrott is entitled to 10% of the settlement plus expenses. Mr. Dunaway knew of the attorneys' lien before taking the case and is therefore bound by it.

This 14 of September, 2011.

Billy J. White
Chancellor

The Chancery Court entered an additional order dated September 22, 2011, regarding the September 14th hearing. It provided that

[a]nnouncement was made that unresolved issues were disputes related to an Attorney's Lien of PryorParrott Attorneys; the division of attorney's fees, if any, between previous and current counsel for the Plaintiff; and a dispute related to the court of jurisdiction to hear the unresolved issues arising out of an Agreed Order of Voluntary Dismissal that was set aside.

Further, according to this order, before the hearing, the parties stipulated and the Chancery Court found from the bench, that the terms of the original settlement approved by the Circuit Court were undisputed and resolved. According to the order, "[d]uring argument, the parties further stipulated and submitted to the judicial jurisdiction of the Chancery Court to determine disputes related to the Attorney's Lien and the division of attorney's fees, if any." The entry of this order was approved and the order was signed by both Kathy Parrott and David Dunaway, as well as by counsel for Employer.

In the order, the Chancery Court approved a total fee of 20% or \$20,000. The Chancery Court further determined that PryorParrott was entitled to a fee of 10% or \$10,000, plus expenses in the amount of \$1,146.38, in full and final satisfaction of its lien. Finally, the Chancery Court ordered Dunaway to satisfy PryorParrott's lien from the settlement funds which he was holding in trust, with the remainder to be released to Dunaway for payment of his services and expenses.

On October 25, 2011, PryorParrott filed a motion in Chancery Court to require the attorney's fees being held in trust by David Dunaway to be paid into the registry of the Clerk and Master during the pendency of the Supreme Court appeal by Dunaway. PryorParrott argued that Dunaway had filed an appeal bond only for costs and had not filed an appeal bond for the attorney's fees lien and that he had provided no security. In addition, PryorParrott alleged that David Dunaway's previous bankruptcy made him a questionable surety. Accordingly, PryorParrott asserted that the appeal had not been properly perfected.

David Dunaway responded through his attorney Johnny Dunaway that the Chancery

Court had no jurisdiction since the case was on appeal, and even if the Chancery Court had jurisdiction, it could not give relief because PryorParrott was not a party to the litigation and had only an attorney's lien and not a judgment, which would require the filing of a separate law suit seeking to enforce the lien.

PryorParrott responded that David Dunaway had not satisfied the attorney's lien as required by the Chancery Court's order, nor had he stayed the order on appeal by executing a proper appeal bond.

After hearing the above arguments, the court announced its decision on November 7, 2011.

THE COURT: The Court has heard this matter originally Pryor/Parrott attorneys moved to withdraw and for a lien to be declared on the proceeds of the case. The Court heard their argument and their proof at that time and held that they were entitled to a ten percent fee. That was a matter of public record. Mr Dunaway came in at the time set out here in these documents, and nonsuited in Chancery Court, went straight upstairs to Circuit Court, and I understand, on the same day filed the same complaint and put down a settlement.

The Court has previously found that that was an attempt to avoid the attorneys' fees set out in the lien in Chancery Court. Counsel had knowledge of them and was attempting to circumvent the Court's judgment.

I think this is a matter of ethics. I think it is unethical, with knowledge, to do that. I think the money ought to be paid into court and that's the judgment of the Court.

Standard of Review

The standard of review of questions of fact in a workers' compensation appeal is de novo upon the record, with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825 (Tenn. 2003). The standard of review for questions of law is de novo without a presumption of correctness. Perrin, 120 S.W.3d at 826.

Analysis

1. Introduction

As noted, although this appeal is brought by Employee, it relates solely to the division of fees between Employee's former and current counsel.³ The resolution of this appeal, therefore, will not affect the award to Employee, or her liability for fees or expenses. Nor will it affect the total amount of fees determined to be appropriate in this case. Rather, it will affect solely the division of the total fees awarded between the respective counsel. Perhaps it is due to this somewhat unique context, and to their personal stakes in the outcome of this appeal, that both counsel, but particularly Dunaway, have peppered their respective briefs in this Court with such vitriolic hyperbole. This is neither appropriate nor helpful to our resolution of the issues raised. We caution counsel against such conduct and urge greater restraint and civility.

2. Jurisdiction

Dunaway first contends that the Chancery Court was without jurisdiction to determine the division of fees in this case. According to Dunaway, Employee exercised her absolute right to voluntarily dismiss her case in the Chancery Court and to re-file it in the Circuit Court. Further, according to Dunaway, the Chancery Court acted improperly in setting aside the voluntary dismissal. Dunaway, therefore, contends it was only the Circuit Court which had the jurisdiction to determine the fee issue.

We need not address this issue, however, as Dunaway expressly waived it. As reflected in the Chancery Court's September 22, 2010 order, which Dunaway approved and signed, the parties "stipulated and submitted to the judicial jurisdiction of the Chancery Court to determine disputes related to the Attorney's Lien and the division of attorney's fees, if any." Accordingly, Dunaway has no grounds to complain about the Chancery Court's exercise of jurisdiction over the division of fees in this case.

3. Division of Fees

Dunaway contends that the Chancery Court erred in its division of fees between him and PryorParrott. He asserts that PryorParrott is not entitled to a fee because it abandoned its client and withdrew from the case. PryorParrott responds that it withdrew because its client refused to attend required independent medical examinations. In addition, Dunaway contends the division of fees was not proportionate to the services performed and the responsibility assumed by each counsel. Dunaway takes issue with the value of the services provided by PryorParrott between December 2005 and March 2009. In his brief, he attacks in vitriolic terms the performance of PryorParrott, and details his own superior performance. What Dunaway does not do is point to any specific item from the time records submitted by PryorParrott and show that work performed was unnecessary or unreasonable. Those records show a total of 64 and one-half hours which demonstrate significant work by PryorParrott on behalf of Employee over a period of several years. Dunaway filed an affidavit listing a total

³ For this reason, we hereinafter refer to the contentions in this appeal as those of prior counsel, PryorParrott, or current counsel, Dunaway.

of 30 hours spent on the case.

Attorney's fees in a workers' compensation case are subject to review and approval by the court. Tenn. Code Ann. § 50-6-226(a)(1). The court may decline to approve a fee that does not appear to be reasonable, even if it falls within the statutory 20% cap. Sowell v. Christy, No. M2004-02186-COA-R3-CV, 2006 WL 568238, at *3 (Tenn. Ct. App. Mar. 8, 2006). This same determination regarding the reasonableness of fees applies in the context of the division of fees between former and current counsel. Id. Based upon the record before us, the evidence does not preponderate against the Chancellor's decision, and we affirmatively find that the division of fees by the Chancery Court was reasonable under the facts and circumstances of this case.⁴ Because Mr. Dunaway has withheld the fees and costs to which PryorParrott is entitled since December 8, 2010, the cause is remanded to the chancery court to consider an award of interest.⁵

Conclusion

The judgment of the trial court is affirmed. The cause is remanded to the chancery court to consider an award of interest to PryorParrott. Costs of this appeal are taxed to Amy McGhee and her surety, David Dunaway, for which execution may issue if necessary.

E. RILEY ANDERSON, SPECIAL JUDGE

⁴ Our resolution of this issue pretermits the need to address Dunaway's challenge to the Chancery Court's jurisdiction to enter its November 2011 order directing Dunaway to deposit the disputed attorney's fees into the registry of the court.

⁵ In Swearengin v. Pac. Employers Ins. Co., No. 01S01-9704-CH-00090, 1998 WL 426544 (Tenn. Workers' Comp. Panel July 30, 1998), the trial court ordered that the plaintiff's attorney's fees be paid in a lump sum. Id. at *2. Although the Second Injury Fund paid its percentage in lump sum, the employer/insurance carrier failed to do so. Id. The Panel "conclude[d] . . . that the employer shall be liable for interest on the attorneys fees . . . in accordance with the percentage of interest fixed by statute on the amount of the employer's total liability in this case." Id. It further held that "[t]he trial judge on remand shall enter whatever orders that are fair and equitable to the parties to carry out this holding on counsel fees." Id.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

AMY MCGHEE v. TOTS AND TEENS PEDIATRICS PLLC ET AL.

**Chancery Court for Campbell County
No. 07013**

No. E2011-02210-SC-WCM-WC-FILED-OCTOBER 17, 2012

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Amy McGhee 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 Amy McGhee and her surety, David Dunaway, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

GARY R. WADE, CJ., NOT PARTICIPATING