IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 16, 2012 Session

ALTON B. KEPHART, JR. v. HUGHES HARDWOOD INTERNATIONAL, INC. ET AL.

Appeal from the Chancery Court for Wayne County
No. 11355 Robert L. Jones, Judge

FILED AUGUST 15, 2012
No. M2011-01568-WC-R3-WC - Mailed June 14, 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 sustained a compensable injury to his lower back in August 2002 which was settled in May 2006. Thereafter the employee continued to be treated by his authorized treating physician. In 2009 the employer requested and the employee consented to an independent medical examination. Thereafter the employer requested another independent medical examination. The employee declined. In April 2011, the employer filed a motion seeking to require the employee to submit to a medical examination pursuant to Tennessee Code Annotated section 50-6-204(d)(1) and Tennessee Rule of Civil Procedure 35. The trial court denied the motion, and the employer has appealed. We affirm the judgment.

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

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which WALTER C. KURTZ, SR. J., joined. CORNELIA A. CLARK, C. J., not participating.

Clifford Wilson and Colin W. Turner, Nashville, Tennessee, for the appellants, Hughes Hardwood International, Inc. and Berkley Risk Administrators Co., LLC.

Ben Boston and Ryan P. Durham, Lawrenceburg, Tennessee, for the appellee, Alton B. Kephart, Jr.

MEMORANDUM OPINION

Factual and Procedural Background

Alton Kephart, Jr. ("Employee") filed a complaint alleging that he sustained a compensable injury to his lower back on August 19, 2002, while employed by Hughes Hardwood International ("Employer"). The employer denied the allegation. Ultimately, the parties reached a settlement which was approved by the Wayne County trial court on May 1, 2006. The settlement judgment provided that the employee suffered 85% permanent partial disability to the body as a whole resulting in a payment to the employee of $125,477 and also provided for the payment of $27,650.76 for past medical expenses. The judgment also provided that Employer "agrees to pay any future medical expenses for non-invasive treatment [Employee] may incur for the reasonable and necessary treatment of his injury from Dr. Gregory Bowers[1] or other health care providers authorized by [Employer] pursuant to [Tenn. Code Ann.] § 50-6-204." The employee has not returned to work since the injury.

Prior to the settlement of 2006, Employee was treated and evaluated by numerous physicians. The treating physicians were Dr. Joe Hall, General Practitioner, Dr. Mallick General Practitioner, and Dr. Armetta, General Practitioner. Dr. Hall referred the employee to Dr. Frederick Wade, Orthopedic Surgeon. Dr. Wade, after treatment, referred him to Dr. Gary Bowers, a pain management specialist. Evaluating physicians were Dr. Darrel Rhinehart, Social Security Consulting Physician, and Dr. David Gaw, Orthopedic Surgeon. In addition, Employer requested independent medical examinations of Employee from Dr. George Lien, Neurosurgeon and Dr. Tarik Elalayli, Orthopedic Surgeon. Employee did not object. As indicated, Dr. Gregory Bowers became employee's authorized treating physician and has continued to treat Employee since the settlement.

In September 2009, Employee was examined, at Employer's request, by Dr. Jeffrey Hazlewood, a pain management specialist. Employee did not object. Dr. Hazlewood reported as follows: that the employee initially had a lumbar strain injury and now has chronic low back pain.

> Multiple MRI's have shown only bulging discs, which are not symptomatic . . . and are probably just an age related finding in a patient who is obese. . . . There is no evidence of radiculopathy on examination or herniation, and he has some generalized weakness and sensory deficits non-anatomical.

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[1]Dr. Bowers is a pain management specialist. (See, generally, exhibit "u")

> [He has] chronic opioid dependency without any obvious abuse that I have seen or any obvious addiction.

Regarding the treatment options available to Employee, Dr. Hazlewood stated:

> It is really a difficult situation here. . . . If I were treating this patient, I would not have escalated the opioids to this level given the lack of objective pathology, but certainly there are different philosophies among different pain specialists. I feel he is not showing any significant improvement. . . . Therefore, the only chance he has in my opinion is an aggressive weight loss program, an aggressive strengthening program in his lumbar spine in combination with the weight loss program, and an attempt to wean off opioid medications. It would be very difficult though, given the length of time his symptoms have been present.

Dr. Hazlewood also recommended an EMG study concerning Employee's reported left leg symptoms. The employee did not object to the EMG study which was administered in December 2009. The results showed no evidence of radiculopathy in either leg. However, the results were "consistent with the possibility of a generalized sensorimotor polyneuropathy, primarily demyelinating." Dr. Hazlewood recommended "generalized polyneuropathy blood work and stated another option includes referral to a neurologist for peripheral neuropathy blood work up. Such a finding and work up would not be related to [Employee's] injury of 8/19/2002." Employer then requested that Employee be evaluated by Dr. Steven Graham, a neurologist. Employee declined, and Employer filed the subject motion in April 2011 pursuant to Tennessee Code Annotated 50-6-204(d)(1) to require Employee to be examined by Dr. Graham.

Employee argued at the hearing that Employer's request for still another medical examination was unreasonable and that Employer was relitigating issues that had been resolved in the 2006 settlement judgment.

The trial court took the matter under advisement. It issued its findings in the form of a written memorandum and order.

> The record indicates that there had already been disputes [prior to the settlement] about Dr. Bowers' treatment of [Employee's] pain conditions and whether work injuries were the cause of that continuing pain. The settlement order is final and the doctrine of *res adjudicata* applies as to the location and type of pain being treated at that time by Dr. Bowers and as to the types of medication and the procedures for applying medication being used at that time.

Based on that finding, the trial court denied Employer's motion. Employer has appealed, contending that the trial court abused its discretion and its decision conflicts with section 50-6-204(d)(1). In addition, employee asserts that the trial court erred by failing to award attorneys' fees.

Standard of Review

The applicable standard of review in this case is abuse of discretion. The standard contemplates that before finding an abuse of discretion the record must show that a judge applied an incorrect legal standard or reached a decision which is against logic or reasoning that caused an injustice to the party complaining. State v. Ferrell, 277 S.W. 3d 372, 378 (Tenn 2009). When 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. Madden v. Holland Group of Tenn., 277 S.W.3d 896, 900 (Tenn. 2009). When the issues involve expert medical testimony that is contained in the record by deposition or documents, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the deposition or documents, 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). 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).

Analysis

Employer has filed a motion based on T.C.A. § 50-6-204(d)(1) to require Employee to submit to a medical evaluation by Dr. Steven Graham, a neurologist. Tennessee Code Annotated section 50-6-204(d)(1) requires "[t]he injured employee [to] submit to examination by the employer's physician at all reasonable times if requested to do so by the employer." The Supreme Court addressed this section in Overstreet v. TRW Commercial Steering Division, 256 S.W.3d 626, 636 (Tenn. 2008), stating, "[i]n our view, a plain reading of . . . section 50-6-204 gives the employer a right to compel the employee to undergo an independent medical evaluation, so long as the request is 'reasonable.'"

In Irons v. K & K Trucking, Inc., No. M2010-01280-WC-R3-WC, 2011 WL 2732475, *4 (Tenn. Workers' Comp. Panel July 14, 2011), the Special Workers' Compensation Panel further examined the standard for evaluating an employer's request for a medical examination pursuant to section 50-6-204(d)(1):

> In Trent v. American Service Co., 185 Tenn. 298, 206 S.W.2d 301 (Tenn.1947), the Supreme Court observed that one of the purposes of section 50–6–204(d)(1), as then codified, was to permit an employer to "ascertain [ ]

whether the ailments from which the employee suffers at some period subsequent to the injury is due to that injury or to some other cause not connected with his or her employment." 206 S.W.2d at 303. This principle was reaffirmed by the Court in Overstreet. 256 S.W.3d at 637. In Myers v. Vanderbilt University, No. M2008–02009–WC–R3–WC, 2010 WL 1854141 (Tenn. Workers Comp. Panel May 11, 2010), the Special Workers' Compensation Appeals Panel evaluated the reasonableness of a trial court's denial of an employer's request for an examination under section 50–6–204(d)(1). It stated:

> In light of the continuing disagreement among the physicians regarding the precise cause of Ms. Myers's allergies, and therefore, the means to treat them, we have concluded that the trial court erred by finding that Vanderbilt's request for a medical examination was unreasonable. Simply stated, the Tennessee Supreme Court has set the bar for unreasonableness of an employer's request significantly higher than the trial court did in the present case. [2010 WL 1854141 at *6]

2011 WL 2732475 at *4.

The premise of the trial court's decision, as set out above, was that the reasonableness and necessity of all non-invasive treatment to Employee's lower back rendered or recommended by Dr. Bowers is conclusively established by the terms of the settlement agreement.

We find that the trial court correctly found that the employer's request for an additional medical evaluation was unreasonable. We, however, reach that conclusion on a different basis. We observe that, in general, treatment rendered by an authorized physician, as was the case here, and the physician's charges for that treatment, are presumed to be reasonable and necessary. See Crump v. B & P Const. Co., 703 S.W.2d 140, 145-46 (Tenn. 1986). Nevertheless, it is also true that "the causal relationship between the need for a particular medical procedure or course of treatment should be considered at the time such treatment is sought." Hegger v. Ford Motor Co., No. M2007-00759-WC-R3-WC, 2008 WL 4072047 (Tenn. Workers' Comp. Panel Sept. 2, 2008) (citing Underwood v. Liberty Mut. Ins. Co., 782 S.W.2d 175, 176 (Tenn. 1989))

The employee had consented prior to the settlement to employer's request for medical evaluations by an orthopedic surgeon and a neurosurgeon. In 2009, the employee consented to employer's request for two evaluations by Dr. Hazelwood.

Dr. Hazlewood's examination raised two questions concerning Employee's medical treatment. The first was the effectiveness of the medication regimen prescribed by Dr. Bowers, the authorized treating physician. The second is the possible existence of a second cause for some of Employee's ongoing symptoms.

Dr. Hazelwood suggested an alternative treatment plan but his statement on the subject was clearly a suggestion and not a recommendation. He candidly acknowledged that pain management specialists have reasonable differences of opinion concerning the treatment of conditions such as Employee's and he also expressed skepticism of the alternative treatment plan he suggested. Moreover, Employer's motion did not propose a change in the treatment plan of Dr. Bowers.

Instead the purpose of employer's motion was a referral to a neurologist based upon the second issue raised by Dr. Hazelwood. In his evaluation of Employee on December 16, 2009, Dr. Hazelwood reported that there was no electro diagnostic evidence of lumbosacral radiculopathy involving either lower extremity. He stated these findings were consistent with the possibility of a generalized sensorimotor polyneuropathy, primarily demyelinating. He thought further extremity testing would need to be done to clarify this. He concluded that "possibly, his generalized polyneuopathy could explain some of his symptoms, but such findings would not be related to the injury of August 19, 2002. Dr. Hazelwood also pointed out in his report that Employee continued to suffer chronic mechanical back pain as he had since the original injury. In addition there was no evidence that Dr. Bowers had proposed any new or additional treatment.

In light of the above considerations, the proposed examination was immaterial to any issue concerning Employee's original injury except the possibility of a new medical condition which if it existed might possibly explain some but not all of Employee's symptoms.

Employer argues that the case of Irons is persuasive given the similarity of the facts of the case and the issues. However, Dr. Hazelwood in that case determined that the employee's low back pain complaints "are much more likely than not to be due to the degenerative spine disease shown on the MRI and not related to the injury of June 10, 2004." In the subject case, the same Dr. Hazelwood points out that the Employee continues to suffer chronic mechanical back pain since the original injury. Employer's request is for a new neurosurgeon to explore the possibility of the existence of a medical condition, which if it exists might possibly explain some but not all of Employee's symptoms. These possibilities are a far cry from the "much more likely than not" causation proof in Irons and the facts and the issues are not similar to this case. We therefore conclude that the trial judge did not abuse his discretion in finding the request for an independent medical examination unreasonable in light of all the circumstances. We therefore affirm the trial court's denial of Employer's motion.

Attorney's Fees

Employee contends that the trial court erred by failing to award attorney's fees incurred in his opposition to Employer's motion. In his brief, Employee does not point out when or how this issue was raised or decided in the trial court. We have closely examined the record and have not found any reference to this issue nor does the trial court's order mention attorneys' fees. We therefore find that the matter of attorneys' fees was not raised in the trial court. "[I]ssues not raised in the trial court cannot be raised for the first time on appeal." Simpson v. Frontier Cmty. Credit Union, 810 S.W.2d 147, 153 (Tenn. 1991). We conclude that Employee waived this issue by failing to raise it in the trial court.

Moreover, we observe that even if the issue had been properly raised in the trial court, the workers' compensation statute does not provide for an award of attorneys' fees incurred in connection with an employer's motion for a medical examination. Employee relies on Tennessee Code Annotated section 50-6-204(b)(2) to support his position. That section reads:

> In addition to any attorney fees provided for pursuant to § 50-6-226, a court may award attorney fees and reasonable costs to include reasonable and necessary court reporter expenses and expert witness fees for depositions and trials incurred *when the employer fails to furnish appropriate medical, surgical and dental treatment or care*, medicine, medical and surgical supplies, crutches, artificial members and other apparatus to an employee provided for pursuant to a settlement or judgment under this chapter.

Tenn. Ann. Code § 50-6-204(b)(2) (Emphasis supplied.)

By its explicit terms, this section applies to cases in which an employer denies medical treatment, and the employee is forced to resort to judicial proceedings to obtain that care. That did not occur here. There is no statutory language relating to an employer's request for a medical examination. Moreover, the separate section which grants employers the right to seek medical examinations, section 50-6-204(d)(1), makes no mention of attorneys' fees. The Workers' Compensation Law is entirely a creature of statute. In the absence of explicit statutory authority, the trial court could not award attorney's fees, even if Employee had properly raised the issue in the trial court.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Hughes Hardwood International, Inc., Berkley Risk Administrators Co., LLC, and their surety, for which execution may issue if necessary.

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E. RILEY ANDERSON, Special Judge

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Hughes Hardwood International, Inc. and Berkley Risk Administrators Company, LLC 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 Hughes Hardwood International, Inc., Berkley Risk Administrators Co., LLC, and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

CORNELIA A. CLARK, J., NOT PARTICIPATING