IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 24, 2012 Session

ANTHONY W. WELCHER v. CENTRAL MUTUAL INSURANCE COMPANY

Appeal from the Chancery Court for Franklin County
No. 18130 Jeffrey F. Stewart, Chancellor

No. M2012-00248-WC-R3-WC - Mailed February 12, 2013
FILED MARCH 21, 2013

This workers' compensation appeal arises from a petition for post-judgment medical care. The trial court initially found that the employee had sustained a compensable injury to his neck and awarded benefits, including future medical care. Shortly after the entry of a final judgment, which designated a treating physician, a dispute arose over employee's medical treatment and a proposed surgical procedure. The employee petitioned the trial court to direct his employer to pay for his medical treatment. The employer requested an independent medical evaluation. The surgery took place while the petition was pending. Several days later, the employee suffered a brain hemorrhage. The trial court ruled that the surgical procedure was reasonably related to the work injury, but the hemorrhage was not; thus, it directed the employer to pay for the former but not the latter. After additional proceedings, the trial court awarded attorneys' fees to the employee, but not the full amount requested. The employer has appealed, contending that the fee award is excessive. The employee contends that the trial court erred by finding that treatment of the hemorrhage was not related to his work injury and by not awarding the attorneys' fees requested. The 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 in accordance with Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court declining to order the employer to provide treatment for the hemorrhage. Because the record is insufficient to allow for review, we vacate the trial court's award of attorneys' fees and remand for further proceedings consistent with this decision.

Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2012) Appeal as of Right; Judgment of the Chancery Court Affirmed in Part; Vacated in Part; Remanded

C. CREED MCGINLEY, SP. J, delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SP. J., joined.

Stuart F. James and Anthony M. Kestner, Chattanooga, Tennessee, for the appellant, Central Mutual Insurance Company.

Floyd Don Davis and Norris A. Kessler, III, Winchester, Tennessee, for the appellee, Anthony W. Welcher.

MEMORANDUM OPINION

Factual and Procedural Background

Anthony Welcher ("Employee") sustained a work-related injury to his neck on October 4, 2005. In 2006, Dr. Gregory Lanford performed a two-level cervical spinal fusion surgery as treatment for the work-related injury. Employee sought workers' compensation benefits, and the case was tried on July 27, 2007. On March 18, 2008, the trial court entered a judgment awarding workers' compensation benefits and future medical benefits. A modified judgment entered May 2, 2008, designated Dr. Lanford as Employee's authorized physician for future medical treatment.

Less than two months after entry of this order, a dispute arose as to Employee's medical treatment. Dr. Lanford recommended that Employee undergo an "anterior cervical fusion up one level," which would result in a three-level fusion. Central Mutual Insurance Company ("Insurer"), the employer's workers' compensation insurer, declined to pay for the recommended surgery until Employee underwent a second opinion examination. Over the ensuing months, the second opinion examination was scheduled on several occasions but repeatedly delayed for a variety of reasons, primarily communication failures between counsel. Employee eventually decided to undergo the recommended surgery and to seek coverage through his wife's health insurer, Blue Cross Blue Shield.

Dr. Lanford performed the surgery on January 14, 2009. Employee was released to go home, and four days after the surgery, he suffered a subarachnoid hemorrhage. Insurer refused to pay for the medical expenses, and Employee filed a petition asking the trial court to require Insurer to pay the medical expenses related to both the surgery and the hemorrhage.

The trial court held a hearing on the petition on January 28, 2011, at which Employee and his wife testified as to their efforts to comply with Insurer's request for a second opinion examination, as well as Employee's medical bills and the events preceding the hemorrhage.

The trial court also admitted into evidence the deposition testimony of Employee, his wife, Dr. Lanford, and Dr. Timothy Strait, a neurosurgeon who performed an independent medical examination at Insurer's request after Employee's surgery. Dr. Lanford was first deposed on April 1, 2010, but a supplemental deposition, taken March 3, 2011, was also admitted as a late-filed exhibit.

Sarah Welcher, Employee's wife, testified at length about the Welchers' efforts to attend the second opinion evaluation prior to the surgery. Ms. Welcher also testified about the events following the surgery. She stated that the pain medication Dr. Lanford prescribed following surgery caused Employee to be constipated. Ms. Welcher attended church on January 18, 2009, the fourth day after surgery, leaving Employee at home. When she returned, Ms. Welcher discovered Employee lying on the living room floor, complaining of severe head pain. Employee was taken to a local emergency room and from there airlifted to Nashville for further observation and treatment.

Employee also testified at the hearing. He recalled that on January 18, 2009, he experienced a severe headache, which was a new symptom. Just before the headache began, Employee had gone to the bathroom to urinate, became dizzy, and felt excruciating pain in his head. Employee testified that the pain medication prescribed after surgery caused him to be constipated, as well as groggy and drowsy, but Employee said that he was not straining or defecating when his symptoms began in the bathroom on January 18, 2009.

In his April 1, 2010 deposition, Dr. Lanford testified that the January 14, 2009 surgery was needed because of "adjacent level disease which occurs about 5% of the time" after the initial cervical fusion surgery. Insurer has not challenged on appeal the trial court's finding that the January 14, 2009 surgery was related to the work-related injury and initial cervical fusion surgery. Concerning the subarachnoid hemorrhage, Dr. Lanford testified:

> It had nothing to do with the surgery in and of itself. I'll explain what happened to him though. He had taken some pain medicine and had become constipated and was having a great deal of straining with that, and therefore as part of his recovery from the operation he developed bleeding around the brain from straining. So if he'd not had surgery and required the pain medicine, he would not have had this condition.

Dr. Lanford testified that diagnostic testing showed that the hemorrhage was not caused by an aneurysm or other vascular abnormality.

In his August 10, 2010 deposition, Dr. Strait testified that vascular deformities, such as aneurysm or arteriovenous malformations, cause approximately 75% of subarachnoid hemorrhages, with another small percentage resulting from trauma, while the remainder have no known cause. Based upon his review of Employee's medical records and discovery deposition, Dr. Strait opined that Employee's hemorrhage was "spontaneous" and that "it had really no bearing to his cervical spinal surgery." Although Dr. Strait agreed that the pain medication prescribed for Employee can cause constipation, Dr. Strait had never had a case where a patient treated with pain medication became constipated and suffered a subarachnoid hemorrhage as a result of straining from constipation. Dr. Strait considered that possibility "highly remote." Dr. Strait had known Dr. Lanford for "several years," described him as a "good guy," and considered him a friend, but characterized Dr. Lanford's opinion as to the cause of the hemorrhage as "a stretch."

At Dr. Lanford's March 3, 2011 deposition, he was advised of Employee's testimony that he had not been straining or defecating when the headache and hemorrhage symptoms began on January 18, 2009. Dr. Lanford then testified that Employee's straining at an earlier time could have caused the hemorrhage because the time interval between a precipitating event, such as the straining, and the resulting hemorrhage was "totally unpredictable." Although Dr. Lanford was unable to provide a time frame, he stated that the hemorrhage "had happened in the recent past. It was still bright on the CT scan, meaning it was an acute hemorrhage." Dr. Lanford could not recall any specific case in which he had treated a patient for a subarachnoid hemorrhage caused by straining due to constipation. Dr. Lanford also acknowledged that he had not been the primary treating physician for Employee's hemorrhage; rather, one of his partners had treated Employee for that condition. When asked "would there be enough stress during urination to cause a subarachnoid hemorrhage," Dr. Lanford responded, "I don't think it's more likely than not that urination can cause subarachnoid hemorrhage, but again, if he were straining to urinate, same thing could happen."

Based upon this evidence, the trial court found that Employee's January 14, 2009 surgery was related to Employee's work injury, that the surgery was medically necessary and reasonable, and that Employee should not be faulted or denied medical treatment because "administrative" problems prevented a second opinion examination prior to the surgery. Accordingly, the trial court found Insurer liable for the expenses of the surgery. With regard to the hemorrhage, the trial court found that the evidence failed to establish Employee was straining before or during the onset of symptoms on January 18, 2009. Thus, the trial court found the hemorrhage unrelated to Employee's work injury and concluded that Insurer was not liable to pay for the medical treatment of it. The trial court reserved decision on Employee's request for attorneys' fees and directed counsel to submit an application detailing the time spent working on the case.

Employee's counsel submitted a spreadsheet listing 358 hours of work, together with affidavits supporting an hourly rate of $200, which amounted to a fee claim of $71,600. Insurer filed a response objecting to the claim generally and to particular portions of the fee application. In summary, Insurer argued that the attorneys' fees were limited to 20% of the recovery pursuant to Tennessee Code Annotated section 50-6-226 (2008). Thus, Insurer contended, attorneys' fees should be limited to 20% of $25,532.57, the amount Blue Cross Blue Shield had paid for the treatment associated with Employee's second cervical fusion surgery.[1] Insurer also challenged the amount of time Employee's attorney claimed for certain activities, such as claiming an hour of work for drafting a five-line letter. Following a hearing on November 30, 2011, the trial court ruled that attorneys' fees were not governed by the 20% limitation of section 50-6-226 and that the claim of $71,600 was excessive. However, after considering the application for attorneys' fees, "the testimony and arguments of counsel," and the factors set forth in Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.5, the trial court awarded attorneys' fees of $30,000 and found that this fee was "reasonable and necessary."

Insurer has appealed, contending that the trial court erred by awarding attorneys' fees in excess of 20% of the "recovery." Alternatively, Insurer asserts that the fee awarded is excessive. Employee raises three additional issues, namely that the trial court erred by (1) finding that the medical treatment for his subarachnoid hemorrhage was not related to his work injury, (2) failing to award less than the full amount of attorneys' fees sought, and (3) failing to order Employer to make direct payments to medical providers in addition to reimbursing Blue Cross Blue Shield.

Standard of Review

Appellate review of workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008 & Supp. 2012), which provides that appellate courts must review findings of fact "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding[s], unless the preponderance of the evidence is otherwise." As the Supreme Court has observed, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp*., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence, such as depositions. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts

[1] The charges were greater than this amount, but Blue Cross Blue Shield paid this lesser amount pursuant to its contractual arrangements with Employee's medical providers.

afford no presumption of correctness to a trial court's conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

Compensability of Hemorrhage Treatment

We address this issue first, because its resolution affects both parties' arguments concerning attorneys' fees. Employee asserts that the evidence preponderates against the trial court's finding that his January 18, 2009 subarachnoid hemorrhage was unrelated to his work injury. We disagree. In concluding the hemorrhage was unrelated to the work injury, the trial court considered Employee's deposition and trial testimony and Dr. Lanford's April 1, 2010 deposition. Fairly read, Dr. Lanford's testimony was that he believed the onset of symptoms of the hemorrhage occurred when Employee was straining to defecate due to constipation caused by pain medication. Based on that belief, Dr. Lanford opined that the January 14, 2009 surgery was causally connected to the hemorrhage. However, Employee testified that although he was constipated following the January 14, 2009 surgery, he was neither defecating nor straining when the symptoms of the hemorrhage began.

Employee now points to Dr. Lanford's March 3, 2011 deposition testimony that the hemorrhage could have occurred at some unspecified time prior to the onset of symptoms and thus still could have been caused by or related to straining. However, Dr. Lanford, who had been in practice for twenty-six years, had no recollection of a prior case in which a patient had suffered a hemorrhage in this manner. Additionally, Dr. Strait, who had been in practice since at least 1985, had never treated a patient whose subarachnoid hemorrhage was caused by straining from constipation. Dr. Strait considered that possibility "highly remote" and characterized Dr. Lanford's opinion as to the cause of Employee's hemorrhage as "a stretch." Additionally, both doctors agreed that many subarachnoid hemorrhages have no known cause. When, as here, expert opinions as to causation differ, the trial court generally has discretion to choose which expert to accredit. *Johnson v. Midwesco, Inc*., 801 S.W.2d 804, 806 (Tenn. 1990); *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Workers' Comp. Panel Sept. 5, 1996). Accordingly, we are unable to find either that the trial court erred by giving greater weight to Dr. Strait's opinion, or that the evidence preponderates against the trial court's finding that the hemorrhage was not related to the second cervical fusion surgery necessitated by Employee's 2005 work injury.

Attorneys' Fees

Both parties fault the trial court's award of attorneys' fees. Because we have affirmed the trial court's finding that Employee's subarachnoid hemorrhage was not related to his

work injury, Employee's argument that the trial court erred by not awarding attorneys' fees incurred in seeking recovery of medical expenses for treatment of the hemorrhage is without merit.

We next address Insurer's assertion that the award should have been limited to 20% of the $25,532.57 Insurer had reimbursed Blue Cross Blue Shield, which translates to no more than $5,106.51.

Attorneys' fees in workers' compensation cases are addressed in two statutes. The statute on which Insurer relies provides in relevant part:

> (a)(1) The fees of attorneys for services to employees under this chapter, shall be subject to the approval of the commissioner or the court before which the matter is pending, as appropriate; provided, that no attorney's fees to be charged employees shall be in excess of twenty percent (20%) of the amount of the recovery or award to be paid by the party employing the attorney.

Tenn. Code Ann. § 50-6-226(a)(1). The second, more specific, statute states:

> 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. Code Ann. § 50-6-204(b)(2) (2008 & Supp. 2012). The second statute, section 50-6-204(b)(2), applies in this case, because after benefits were awarded by a final judgment, Employee petitioned the Court to require Insurer to pay the medical expenses related to the surgery.

Although neither party has cited, nor has our research revealed, any prior Tennessee Supreme Court decision interpreting section 50-6-204(b)(2), Insurer's assertion that a 20% cap applies to attorneys' fees awarded pursuant to this statute has been rejected, either explicitly or implicitly, by prior decisions of the Special Workers' Compensation Appeals Panel. *See Dunn-Lindsey v. Wal-Mart Stores, Inc.*, No. W2002-02742-WC-R3-CV, 2003 WL 22351027, at *3 (Tenn. Workers' Comp. Panel Oct. 9, 2003) (explicitly rejecting the argument); *Seiber v. Methodist Med. Ctr.*, No.03S01-9801-CV-00006, 1999 WL 178627, at *5 (Tenn. Workers' Comp. Panel Mar. 25, 1999) (implicitly rejecting the argument).

In determining whether attorneys' fees awarded pursuant to section 50-6-204(b)(2) are limited to 20% of the medical expenses, we are guided by the familiar rules of statutory construction and are mindful that our role in construing statutes is to determine and effectuate legislative intent and purpose. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526-28 (Tenn. 2010). Fulfilling this role requires us to focus on the text of the statute and to give the words their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose. *Id.* at 526; *Hayes v. Gibson Cnty.*, 288 S.W.3d 334, 337 (Tenn. 2009); *Waldschmidt v. Reassure Am. Life Ins. Co.*, 271 S.W.3d 173, 176 (Tenn. 2008). When a statute's language is clear and unambiguous, we need look no further to ascertain the statute's meaning. *See Lee Med., Inc.*, 312 S.W.3d at 527; *Green v. Green*, 293 S.W.3d 493, 507 (Tenn. 2009).

Applying these principles, we conclude that attorneys' fees awarded pursuant to section 50-6-204(b)(2) are not capped at 20% of the recovery. The first sentence of section 50-6-204(b)(2) plainly states that attorneys' fees awarded for compelling an employer to provide appropriate medical treatment are "[i]n addition to any attorney fees provided for pursuant to § 50-6-226." This plain language dispenses with, rather than imposes, the 20% limitation on attorneys' fees. Additionally, as the Panel in *Dunn-Lindsey* explained, to limit attorneys' fees in this context to 20% "of the recovered medical expenses would make it virtually impossible for the injured worker to obtain the services of an attorney in cases involving a small amount of medical expenses." 2003 WL 22351027, at *3. Like the Panel in *Dunn-Lindsey*, we conclude "that it was not the intention of the General Assembly to impose such [a] limitation." *Id.* Rather, by enacting section 50-6-204(b)(2), the General Assembly intended to authorize trial courts to award all attorneys' fees reasonably necessary to compel an employer "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. Code Ann. § 50-6-204(b)(2).

Insurer also argues that the attorneys' fees awarded in this case are excessive, not reasonable. In *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166 (Tenn. 2011), the Tennessee Supreme Court addressed the factors and procedure a trial court should apply when determining a reasonable award of attorneys' fees. The Court declined to adopt the "lodestar" approach and instructed trial courts to consider the factors set forth in Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.5(a).[2] *Wright*, 337 S.W.3d at 180-81.

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[2] Rule of Professional Conduct 1.5(a) provides:
A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the
(continued...)

The Court declined to place special emphasis on any of these factors, however, and reiterated that "the determination of what constitutes a reasonable fee is still a subjective judgment based on evidence and the experience of the trier of facts and the reasonableness of the fee must depend upon the particular circumstances of the individual case." *Id.* (internal citations and quotation marks omitted). The Court also addressed the procedure a trial court should follow in assessing attorneys' fees:

> [T]he trial court should develop an evidentiary record, make findings concerning each of the [RPC 1.5(a)] factors, and then determine a reasonable fee that depends upon the particular circumstances of the individual case. To enable appellate review, trial courts should clearly and thoroughly explain the particular circumstances and factors supporting their determination of a reasonable fee in a given case.

337 S.W.3d at 185-86 (internal citations, quotation marks, and brackets omitted).

In this case, the order awarding attorneys' fees indicates that the trial court considered the RPC 1.5(a) factors, but the trial court neither developed an evidentiary record nor made findings concerning each relevant factor. Given the deficiencies in the record, we are unable to determine whether, as the Insurer argues, the fee awarded is excessive or reasonable. Accordingly, we remand to the trial court with instructions to determine a reasonable award of attorneys' fees pursuant to the principles and procedures articulated in *Wright*. Because we have affirmed the trial court's finding that Employee's subarachnoid hemorrhage was not related to his work injury, Employee is not entitled to attorneys' fees incurred in seeking recovery of medical expenses for treatment of that condition. However, Employee is entitled

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[2](...continued)
reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) whether the fee is fixed or contingent;
(9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
(10) whether the fee agreement is in writing.

to recover reasonable attorneys' fees incurred in this appeal. *See Seiber*, 1999 WL 178627, at *5.

Additional Payments to Medical Providers

Finally, Employee contends that the trial court erred by failing to direct Insurer to make direct payments to his medical providers in addition to reimbursing Blue Cross Blue Shield. We have examined the record and find that Employee did not raise this issue in the trial court. Moreover, the trial court's January 13, 2012 order specifically required Insurer to pay all medical expenses associated with the January 14, 2009 surgery and absolved Employee of responsibility for all of those charges. No evidence was introduced that a provider was seeking additional payment. Employee's contention is without merit.

Conclusion

The judgment of the trial court is affirmed in part, vacated in part, and this matter is remanded for further proceedings consistent with this decision. Costs of this appeal are taxed to Central Mutual Insurance Company and its surety, for which execution may issue, if necessary.

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C. CREED MCGINLEY, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

ANTHONY W. WELCHER v. CENTRAL MUTUAL INSURANCE COMPANY

Chancery Court for Franklin County
No. 18130

No. M2012-00248-WC-R3-WC - FILED MARCH 21, 2013

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 will be paid by Central Mutual Insurance Company and its surety, for which execution may issue if necessary.

PER CURIAM