IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 16, 2015 Session

RANDY SHELTON v. JOSEPH CONSTRUCTION COMPANY ET AL.

Appeal from the Chancery Court for Davidson County
No. 09-1118-II Thomas W. Brothers, Judge, sitting by interchange

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No. M2014-01743-SC-R3-WC – Mailed April 27, 2015
Filed June 3, 2015

The employee injured his back while performing heavy lifting at work. His workers' compensation claim was settled with open medical benefits. Several years later, the employee's authorized physician recommended a surgical procedure. The employer's utilization review provider declined to approve the procedure, and the Department of Labor ("DOL") sustained the denial. The employee then brought this action to compel the employer to provide the surgery. The trial court applied the Uniform Administrative Procedures Act ("UAPA"), pursuant to Tennessee Code Annotated section 4-5-101 *et seq.* (2005), and upheld the decision of the DOL. The employee has appealed. The appeal was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Upon our review of the record and the applicable law, we reverse the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded

JEFFREY S. BIVINS, J, delivered the opinion of the Court, in which DON R. ASH and BEN H. CANTRELL, JJ., joined.

John P. Dreiser, Knoxville, Tennessee, for the appellant, Randy Shelton.

D. Andrew Saulters, Nashville, Tennessee, for the appellees, Joseph Construction Co. and Associated Builders and Contractors Workers' Compensation Insurance Fund.

OPINION

Factual and Procedural Background

In February 2008, Randy Shelton ("Employee") injured his back lifting construction supplies while working for Joseph Construction Company ("Employer"). He was diagnosed with a small disc herniation, and Dr. Paul Johnson performed an L4-5 discectomy in May 2008. Dr. Johnson assigned Employee a 10% permanent partial impairment to the body as a whole, and Employee was able to return to work. On June 8, 2009, the Chancery Court for Davidson County[1] approved a settlement of Employee's claim for workers' compensation benefits. The settlement provided that Employee would be awarded $20,000 for 13.43% permanent partial disability to the body as a whole[2] and that he would continue to receive reasonable and necessary medical benefits.

Dr. Patrick Bolt, an orthopedic surgeon, became Employee's authorized treating physician. Employee also received nonsurgical treatment from Dr. Lisa Bellner, a pain management specialist. In March 2013, after several years of nonsurgical care, Dr. Bolt recommended surgery to address Employee's chronic pain. He proposed a single-level fusion of the L4 and L5 vertebrae because "[Employee] had a disk injury at L4-5. He had continued pain. Dis[c]ectomy failed to relieve the pain. Years of conservative therapy failed to relieve the pain. And the idea [was] to just remove the disk in its entirety and to stop it from moving."

Employer submitted the recommendation to its utilization review provider, as required by Tennessee Code Annotated section 50-6-124 (Supp. 2013). The utilization review provider twice declined to approve the proposed surgery, on the grounds that it was not medically necessary because "guideline criteria [had] not been met." The utilization review provider, Dr. Larry Johnson, explained his reason for declining to approve the proposed procedure in a notice dated August 23, 2013:

> As per the ODG in regards to spinal fusion, [n]ot recommended for patients who have less than six months of failed recommended conservative care unless there is objectively demonstrated severe structural instability and/or acute or progressive neurologic dysfunction, but recommended as an

[1] It is unclear why the parties settled the claims in Davidson County, given that the injury occurred and the Plaintiff resides in Knox County.

[2] When an employee recovers permanent partial disability to the body as a whole, he is compensated in an amount 66.66% of his average weekly wage, for a number of weeks calculated by multiplying 400 weeks by the percentage loss of the use of the body as a whole. Tenn. Code Ann. § 50-6-207(3)(F) (Supp. 2007). According to the record, Employee's average weekly wage was $558.26. 66.66% of that is $372.17. At 13.43% permanent Partial Disability to the body as a whole, he would have been compensated just under $20,000 [($372.17 x 400) x 13.43% = $19,992.97].

option for spinal fracture, dislocation, spondylolisthesis or frank neurogenic compromise . . . .

> The guideline criteria have not been met. There is no medical record provided for review that reveals any structural instability or fractures. There is no documentation provided which shows that conservative measures have been attempted for the suggested amount time referenced in the guidelines. Therefore, the service as requested, a re-exploration of the bilateral L4-L5 laminotomies with left-sided total facetectomy, a posterior spinal fusion with a transforaminal lumbar interbody fusion at L4-L5 and a posterior ICBG at L4-L5 and two days of inpatient stay are not medically necessary or appropriate.

(emphasis added).

Employee appealed this decision to the DOL pursuant to Official Compilation Rules and Regulations of the State of Tennessee 0800-02-06-.07 (2013). The DOL affirmed the decision of the utilization review provider without explanation. Employee then filed a motion to compel medical treatment in the Chancery Court for Davidson County on December 31, 2013.

At the hearing on the motion, the trial court had before it the utilization review and DOL records. It also had the evidentiary deposition of Dr. Bolt, which was taken after the Motion to Compel Treatment had been filed. Dr. Bolt explained that the "ODG" in the notice probably referred to the Office of Disability Guidelines, which were not placed into evidence. In his deposition, Dr. Bolt set out his reasons for recommending surgery in this case:

> I am recommending a fusion surgery at L4-5 for Mr. Shelton. And the reason is, is that he had a disk injury at L4-5. He had continued pain. Dis[c]ectomy failed to relieve the pain. Years of conservative therapy failed to relieve the pain. And the idea is to just remove the disk in its entirety and to stop it from moving.
>
> . . . .
>
> There is some controversy in the spine community regarding fusion surgery. Most of the controversy surrounds the fusion of degenerative disk disease. Often degenerative disk disease has multiple disks that are affected, and certainly the fusion successes for multi-level degenerative disk disease are poor. However, both in the literature and in my experience, single-level degenerative disk disease, particularly when there's an identifiable event, such as an injury and herniation, in other words, the

> pain has a start, a discreet start, that those patients really are, in some ways, the best candidates for fusion surgery and typically do fairly well.

Dr. Bolt testified that he spoke directly with Dr. Johnson concerning the reasons for the proposed surgery and the reasons for the denial. He stated that Dr. Johnson "acknowledged that we had done everything that we could for Mr. Shelton short of surgery and did agree that this was a difficult case." Although Dr. Johnson felt that he had to "follow the guidelines as closely as possible," Dr. Bolt noted that Dr. Johnson did not specify the guidelines to which he was referring. On cross-examination, Dr. Bolt agreed that Employee did not have structural instability of the spine, to which the utilization review notice of denial referenced.

The trial court took the case under advisement and issued its findings in a written order, which stated:

> In determining the standard of review applicable to the instant case, this Court finds the Uniform Administrative Procedures Act [("UAPA")] to be applicable. The Tennessee Department of Labor meets the definition of an "agency" pursuant to Tenn. Code Ann. § 4-5-102(2). Consequently, the factors contained in Tenn. Code Ann. § 4-5-322(h) are applicable here. Applying the factors from subsection (h), this Court finds that the utilization review decision is well reasoned and not arbitrary or capricious. Moreover, the utilization review decision is supported by substantial and material evidence in light of the entire record.[3]

On this basis, the trial court denied the motion to compel medical treatment. Employee has appealed, asserting that the trial court erred by finding that the UAPA should be applied in this case. Employee also argues that the preponderance of the evidence shows that the proposed medical procedure is "reasonable and necessary" for the treatment of his work injury.

Analysis

Employee argues that the standard of review for a trial court when it hears a case arising out of a utilization review denial is de novo and that the court must determine whether the treatment is "reasonable and necessary" under Tennessee Code Annotated section 50-6-204(a) (Supp. 2007). Employer agrees but argues that, regardless of the words the trial court used, Employee received a de novo hearing of the evidence.

[3] Neither party took the position in the trial court that the UAPA applied to this case.

Our standard of review of issues of fact in a workers' compensation case is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When credibility and weight of 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., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). When 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. 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).

Employee's first contention is that the trial court erred by upholding the utilization review decision under the UAPA's standard of review. We agree. Typically, the UAPA will apply when a party is aggrieved by a final decision of a state agency. See Tenn. Code Ann. § 4-5-322(a)(1) (2005). Although we note that the DOL is an "agency" as defined in the UAPA, see Tenn. Code Ann. § 4-5-102(2) (2005), the judicial review provisions of the UAPA apply only to agency decisions resulting from "contested cases," Id. § 4-5-322(a)(1). A contested case is "a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing." Id. § 4-5-102(3).

Tennessee Code Annotated section 50-6-124, which establishes the utilization review process, does not provide "an opportunity for a hearing" for injured workers.[4] The regulations governing utilization review also do not provide an "opportunity for a hearing." See Tenn. Comp. R. & Regs. 0800-02-06-.01 *et. seq.* (2013). Rather, utilization review determinations are made unilaterally by an agent selected by the employer. Id. at .02. Moreover, during oral argument in this case, Employer's counsel conceded that he could not in good faith argue that the UAPA applied to utilization review contests. As a result, we hold that utilization review cases are not governed by the UAPA. The central issue we now must determine is under what standard the trial court should review evidence when an injured employee is denied treatment by his employer's utilization review program.

Utilization review is a process directed at evaluating the necessity, appropriateness, efficiency, and quality of health care services. Tenn. Code Ann. § 50-6-102(18) (2005). Nearly all medical insurers have some sort of utilization review process

[4] The statute does require an opportunity for a hearing for a health care provider who has been found to have rendered excessive or inappropriate services. See Tenn. Code Ann. § 50-6-124(e).

for claims. The Tennessee General Assembly created the utilization review process for workers' compensation claims in 1992 in an attempt to control costs while providing appropriate medical care for injured workers. Kilgore v. NHC HealthCare, 134 S.W.3d 153, 157 (Tenn. 2004) (citing Tenn. Code Ann. § 50-6-122(a)(1) (1999)). Utilization review is mandatory whenever a dispute arises as to the medical necessity of a treatment. Tenn. Comp. R. & Regs. 0800-02-06-.05. An employer may provide its own utilization review, or it may utilize the utilization review process developed by the Division of Workers' Compensation. See Tenn. Code Ann. § 50-6-124(d).

In utilization review, a patient's treating physician provides the utilization review agent or operator with the recommended treatment, including the reasons for the recommendation, as well as the necessary records and reports. See Tenn. Comp. R. & Regs. 0800-02-06-.03(2). The utilization review agent reviews the records and makes an objective evaluation of the recommended treatment as it relates to the employee's condition. Id. at .03(1). The utilization review agent then makes a decision regarding the medical necessity of the recommended treatment. Id.

If a claim is denied by a utilization review agent, the injured worker must exhaust his or her administrative remedies before filing suit. Robertson v. Roadway Exp., Inc., No. E2011-01384-WC-R3-WC, 2012 WL 2054170, at *3 (Tenn. Workers Comp. Panel June 8, 2012). First, the worker must appeal to the Workers' Compensation Division of the DOL. Tenn. Comp. R. & Regs. 0800-02-06-.07(1). The DOL or its designated contractor reviews the treatment request and makes a determination as to whether the treatment is medically necessary. Id. at .07(2)(a). If the worker disagrees with the DOL's decision, he must either have his claim mediated before a Benefit Review Conference or request to waive the Benefit Review Conference. Id. at 07(4). After a worker has gone through his DOL appeal and a Benefit Review Conference has been mediated or waived, he may file suit in state court. Robertson, 2012 WL 2054170 at *3; Kilgore, 134 S.W.3d at 158 (interpreting Tenn. Code Ann. § 50-6-225(a)(1) (Supp. 2003)). "In the event the parties are unable to reach an agreement at the benefit review conference as to all issues related to the claim, . . . either party may file a civil action as provided in § 50-6-203[5] in the circuit or chancery court in the county in which the employee resides[6] or in which the alleged injury occurred." Tenn. Code Ann. § 50-6-225(a)(2)(A) (footnotes not in original).

[5] Tennessee Code Annotated section 50-6-203 is the statute of limitations for such actions, which is not at issue in this case.

[6] In this case, the employee resided in Knox County and the injury took place in Knox County. However, the venue provision in this statute was waived when the parties settled the initial dispute in Davidson County Chancery Court in 2009.

In Kilgore, the plaintiff filed a "petition for contempt" after her employer's utilization review program denied her physician's request for an MRI two months after the parties had settled the dispute. 134 S.W.3d at 156. The settlement required two years of medical treatment. Id. The trial court treated the petition for contempt as a motion to enforce the settlement and ordered the employer to provide the treatment. Id. It is unclear what evidence the trial court reviewed in reaching its decision, and it is unclear what standard of review the trial court used. The Supreme Court affirmed the decision of the trial court and ordered the employer to provide the medical care sought by the employee. Id. at 159; see also Harville v. Emerson Elec. Co., No. W2010-01011-WC-R3-WC, 2011 WL 11745136, at *4 (Tenn. Workers Comp. Panel July 6, 2011) (holding that Kilgore applies even when an employee's settlement provides for lifetime benefits). Since Kilgore, in cases arising out of utilization review denials, trial courts traditionally have reviewed the case de novo, which this Court regularly has upheld. See, e.g., Bragg v. Beach Oil Co., Inc., No. M2012-02256-WC-R3-WC, 2013 WL 4505291, at *10 (Tenn. Workers Comp. Panel Aug. 21, 2013); Harville, 2011 WL 11745139; Mayes v. Peebles, Inc., No. E2009-02030-WC-R3-WC, 2010 WL 3323742, at *1 (Tenn. Workers Comp. Panel Aug. 23, 2010).

In C.H. Guenther & Son, Inc. v. Head, the Court of Appeals considered how a trial court should treat an appeal from a final order by DOL to enforce a workers' compensation settlement. No. M2012-00417-COA-R3-CV, 2012 WL 6156390, at *5 (Tenn. Ct. App. Dec. 10, 2012). In that case, an employee settled his workers' compensation claim with his employer, only to later be denied care when no physician approved by the employer would agree to treat the employee. Id. at *1. The employee filed a Request for Assistance ("RFA") with the DOL, requesting the DOL to enforce the settlement agreement. Id. The DOL ordered the employer to provide the employee with an acceptable physician and also awarded the employee attorney's fees. Id. The employer sued the employee and the DOL in chancery court, requesting judicial review of the DOL's findings. Id. at *2. On appeal from the trial court, the Court of Appeals held that the UAPA did not apply. Id. at *3. The statute at issue set out an explicit administrative review process for a party who disagrees with a specialist's order, which the parties had followed. Id. at *3 (citing Tenn. Code Ann.§ 50-6-238(d), amended by 2013 Tennessee Laws Pub. Ch. 289 (S.B. 200)). Further, the trial court held that the RFA hearing was not a "contested case," as defined in the UAPA, and, thus, the trial court had no jurisdiction to hear the case under traditional judicial review grounds. Id. According to the Court of Appeals, the trial court did have jurisdiction over an action to enforce the settlement agreement. Id. at *5. The Court of Appeals interpreted the Supreme Court's decision in Kilgore as saying that, barring statutory language proscribing judicial review, the fact that an employee undertakes the permissive administrative process does not waive the employee's right to seek judicial review later. Id.

Like the RFAs in Guenther, utilization review processes are not contested hearings. Regulations set out an administrative process when utilization review denies a

prescribed treatment or test. See Tenn. Comp. R. & Regs. 0800-02-06-.07. Here, as in Guenther, Employee is seeking to enforce a settlement agreement with his employer over his workers' compensation benefits.

Furthermore, the workers' compensation statute also suggests that the trial court should hear the case de novo. See Tenn. Code Ann. § 50-6-225. According to the statute, the trial court must act as fact-finder because neither party may demand a jury. Id. § 50-6-225(a)(3). The Tennessee Rules of Civil Procedure and Evidence are used in this type of proceeding. Id. § 50-6-225(b). The fact that the Rules of Civil Procedure apply implies that discovery is to be taken and that the court may review evidence not considered by the utilization review agent. See, e.g., Smith v. Nestle Waters N. Am., Inc., No. M2011-00908-WC-R3-WC, 2012 WL 3628779, at *2 (Tenn. Workers Comp. Panel Aug. 23, 2012) (holding that the trial court may consider relevant deposition testimony even if such testimony is outside the scope of what may be considered by the DOL). The judge or chancellor even may embark on independent fact-finding, visiting the site of the injury if desired. Id. § 50-6-225(d).

Lastly, the general standard for workers' compensation benefits requires that, when an injury is compensable, the employer must provide the employee with care that is reasonably required to treat the injury. Id. § 50-6-204(a)(1). In the settlement agreement in this case, Employer agreed to continue providing medical care that was reasonably required to treat Employee's injury.

In light of the statutory language, the Supreme Court's decision in Kilgore, and the Court of Appeals' decision in Guenther, we hold that, when a trial court is hearing a motion to compel medical treatment which results from an employee being denied care by utilization review, the trial court must consider the evidence before it and make a de novo decision about whether the proposed treatment is reasonably necessary for the treatment of the employee's compensable injury. Therefore, the trial court should have applied a de novo standard in reviewing this case.

Employer argues that the trial court, in fact, gave the parties the requisite de novo hearing and made the necessary determination. We disagree.

The trial court's order in this case offers a very brief analysis: "Applying the factors from [the UAPA], this Court finds that the utilization review decision is well reasoned and not arbitrary or capricious. Moreover, the utilization review decision is supported by substantial and material evidence in light of the entire record." Employer relies on the second sentence to assert that the trial court reviewed and relied on the entire record when reaching its conclusion. However, both of the standards mentioned by the trial court, "arbitrary and capricious" and "substantial and material," are standards of review contained in the UAPA judicial review provision. See Tenn. Code Ann. § 4-5-322(h)(4), (5)(A) (2005 & Supp. 2013). Both of these standards of review require that

the reviewing court give deference to a prior administrative ruling. See Ogrodowczyk v. Tenn. Bd. for Licensing Health Care Facilities, 886 S.W.2d 246, 252 (Tenn. Ct. App. 1994) ("In order to invalidate the decision of an administrative agency, there must be a showing that the decision is arbitrary and capricious, characterized by abuse of authority, clearly and unwarranted exercise of authority, or unsupported by substantial and material evidence"). In contrast, when a court hears an issue de novo, it hears the matter as if no other hearing had occurred and as if the matter originated in that court. See Ware v. Meharry Med. Coll., 898 S.W.2d 181, 184 (Tenn. 1995) (discussing how a circuit court hears an appeal from a general sessions court).

By reviewing the case under the standards of review listed under the UAPA, the trial court made its determination granting undue deference to the utilization review agent's determination, rather than looking at the evidence anew, which is what is required by a de novo standard. See id. Thus, the trial court erred by treating the motion to compel as an appeal of the utilization review board's determination, rather than determining on its own whether the treatment was reasonably necessary. Therefore, we must conduct the requisite de novo review to determine whether to uphold the decision of the utilization review board.

Accordingly, we turn our attention to the merits of Employee's petition. The trial court was presented with the deposition of Dr. Bolt and documents from the utilization review provider. Because all of the medical evidence was presented in documentary form, we are able to evaluate it and reach our own conclusions concerning its credibility and weight. Foreman, 272 S.W.3d at 571. Dr. Bolt described the procedure he recommended and his reasons for making that recommendation in detail. The utilization review provider referred to "guidelines," but those guidelines were not included with his materials. The reviewer's decision specifically referred to "patients who have less than six months of failed recommended conservative care" in its description of the guidelines upon which he relied. In oral argument, Employer's counsel argued that the guidelines required the patient to have "structural instability or fractures" in order to approve spinal fusion. Dr. Bolt "admitted" that Employee did not have any structural instability, and, thus, Employer argues that the spinal fusion was unnecessary. However, a finding of structural instability was not necessary in this instance. Dr. Johnson's utilization review report provided the following discussion of the guidelines: "As per the ODG in regards to spinal fusion, Not recommended for patients who have less than six months of failed recommended conservative care unless there is objectively demonstrated severe structural instability. . . ." (emphasis added).

Without the guidelines actually in the record, we must rely on Dr. Johnson's recitation of the guidelines. From the statement above, we can adduce two points. First, the guidelines do not recommend spinal fusion for patients who have had less than six months of failed conservative care, absent structural instability. Second, the guidelines

may support a recommendation of spinal fusion for patients who have had more than six months of conservative care.

Here, Dr. Bolt recommended surgery on June 12, 2013. By that point, Employee had been receiving conservative care since December 15, 2008, when Dr. Bolt first recommended ongoing nonsurgical care. This is far more than the requisite six months of conservative care. In the absence of any additional explanation of the guidelines relied upon by the utilization review provider, we conclude that Dr. Bolt's testimony is persuasive. The spinal fusion surgery is reasonably necessary for Mr. Shelton's treatment. Thus, we vacate the trial court's decision in this case.

Conclusion

The decision of the trial court upholding the utilization review board's determination is reversed. The case is remanded for entry of an order compelling Employer to provide the medical treatment recommended by Dr. Bolt. Costs are taxed to Joseph Construction Co. and Associated Builders and Contractors Workers' Compensation Insurance Fund, for which execution may issue if necessary.

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JEFFREY S. BIVINS, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
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AT NASHVILLE

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Chancery Court for Davidson County
No. 09-1118-II

No. M2014-01743-SC-R3-WC - Filed June 3, 2015

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 Joseph Construction Co. and Associated Builders and Contractors Workers' Compensation Insurance Fund , and his surety, for which execution may issue if necessary.

PER CURIAM