

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT KNOXVILLE  
May 17, 2010 Session

**RICKY L. MAYES v. PEEBLES, INC.**

**Appeal from the Chancery Court for Knox County  
No. 164340-2 Daryl Fansler, Chancellor**

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**No. E2009-02030-WC-R3-WC - Filed August 23, 2010**

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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. Ricky Mayes ("Employee") sustained a compensable injury to his spine. His claim against Peebles, Inc. ("Employer") was settled in accordance with the workers' compensation statute. His authorized treating physician subsequently recommended a surgical procedure. Employer's medical utilization review provider declined to approve the procedure. After an initial administrative appeal was denied, Employee filed a motion in the trial court, seeking to compel Employer to authorize the procedure. The trial court granted the motion, and awarded attorney's fees to Employee. On appeal, Employer argues that the trial court did not have jurisdiction, because Employee did not exhaust his administrative appeals, and that the trial court erred by awarding attorney's fees. We affirm the judgment.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which GARY R. WADE, J., and WALTER C. KURTZ, SR. J., joined.

James T. Shea, IV, Knoxville, Tennessee, for the appellant, Peebles, Inc.

Tony Farmer, Knoxville, Tennessee, for the appellee, Ricky L. Mayes.

## MEMORANDUM OPINION

### Factual and Procedural Background

Employee sustained a compensable injury to his lumbar spine in June 2004. A settlement agreement was approved by the trial court in January 2009. The agreement provided that Employer would provide medical treatment for the injury in accordance with the workers' compensation law.

In May 2009, Employee's authorized treating physician, Dr. James Maguire, recommended a surgical procedure to treat Employee's ongoing symptoms. Employer's utilization review administrator was advised of the proposed treatment. The proposed procedure was reviewed by Dr. S. Joshua Szabo, who declined to approve the procedure, stating "[Employee] has not seen a psychiatrist to rule out any confounding factors which may adversely affect his outcome. Therefore, I would recommend this first and foremost prior to consideration of any surgical intervention at this time." Employee was notified of this decision by a letter from Employer's insurer dated June 1, 2009. The letter set out the procedures for appealing the decision.

Employee had been receiving psychiatric treatment from Dr. Michael Pool, beginning in June 2007. Dr. Pool's records had not been provided to Dr. Szabo. Dr. Maguire, whose deposition was placed in evidence, was unaware that Employee had been receiving psychiatric treatment.

On June 3, 2009, Employee's attorney initiated email correspondence with the adjuster handling the claim for Employer's insurer. In a message dated June 8, the attorney advised the adjuster that the Dr. Szabo's assumption that Employee had not received psychiatric treatment was incorrect. On June 9, Employee filed the motion to compel medical benefits that is the subject of this appeal. It appears that a first level utilization review appeal was also pursued. On June 29, Dr. Maguire's deposition was taken. He testified that he had reviewed Dr. Pool's records and had concluded that he "didn't see anything . . . that would say there is an absolute contraindication to proceeding."

On July 7, 2009, Employer's insurer sent a letter denying the utilization review appeal, because "[t]here is still no documentation the patient has been cleared from psychological perspective for surgical intervention." The letter stated that the internal appeals process was completed. Employee did not appeal that decision to the Commissioner of the Department of Labor and Workforce Development, as permitted by Tennessee Code Annotated section 50-6-124. However, Employee's attorney subsequently provided the insurer with a July 14 report from Dr. Pool that directly addressed the proposed surgery. The letter stated "I do not

see any psychiatric reason that he should not undergo surgery that is felt to have the potential to benefit him.” It appears that the insurer did not take any further action.

The motion was heard by the trial court on August 12. An order was entered compelling Employer to authorize the surgery. Employee then filed a motion for attorney’s fees pursuant to Tennessee Code Annotated section 50-6-204(b)(2) (2008 & Supp. 2009). The trial court issued a memorandum and order on September 8, 2009, which summarized the litigation, and granted the motion for fees. Employer has appealed from that judgment, contending that the trial court erred by granting the motion to compel it to provide medical care, and by awarding attorneys’ fees to Employee. Employee requests a finding that this appeal is frivolous, and an award of damages pursuant to Tennessee Code Annotated section 50-6-225(h) (2008).

### **Standard of Review**

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). 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., 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).

### **Analysis**

#### **1. Jurisdiction, Utilization Review**

Employer contends that the trial court did not have jurisdiction over this motion, because Employee did not appeal the denial of authorization by its utilization review to the Commissioner of Labor, as permitted by Tennessee Code Annotated section 50-6-124 (2008). That section directs the Commissioner to establish a program to review medical care recommendations related to compensable injuries. The section also permits employers and insurers to provide their own utilization review programs, but gives employees the right to appeal the decisions of such programs to the Commissioner. Tenn. Code Ann. § 40-6-124(d). Employer argues that the statute requires employees to exhaust administrative

appeals before seeking relief through the courts. On that basis, he contends that the trial court violated article II, section 2 (separation of powers) and article VI, section 1 (judicial power, authority of the legislature to assign jurisdiction of lower courts) of the Tennessee Constitution.

The Supreme Court directly addressed this issue in Kilgore v. NHC Healthcare, 134 S.W.3d 153 (Tenn. 2004). The Court held:

After examining the statute, we conclude that NHC’s argument that appeal of a medical services decision made by its utilization review program lies solely with the Commissioner’s utilization review program is not supported by the plain and ordinary meaning of section 50-6-124(d). The statute provides that an employee (or a medical provider or other party) who disagrees with a determination made by an employer’s utilization review “shall have recourse” to the Commissioner’s utilization review program. Although the phrase “shall have recourse” is not defined in this statutory section or elsewhere, the plain and ordinary meaning of the section does not replace or limit judicial review. For instance, section 50-6-124(d) could have but does not state that review by the Commissioner is the *sole* or *exclusive* means of appealing an employer’s utilization review decision, nor does the statute state that seeking recourse to the Commissioner is a *condition* to appealing to the court that had jurisdiction of the workers’ compensation claim. Indeed, had the legislature intended for recourse to the Commissioner’s utilization review program to be the *only* means of appeal, thereby divesting the trial court of jurisdiction to enforce its own judgment, it would have stated so in plain and ordinary language.

Id. at 158.

Employer contends that Kilgore was wrongly decided, requests that it be reviewed and overruled, which is outside the authority of this panel.<sup>1</sup> We conclude that the trial court correctly held that Employee was not required to appeal Employer’s denial of the proposed medical care through the administrative process.

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<sup>1</sup>We note that, as a result of revisions to Tennessee Code Annotated sections 50-6-203(a) and -239(a) (2008), parties are now required to present all disputed workers compensation issues to the Department of Labor, and exhaustion of the benefit review process is now a prerequisite to filing suit. We express no opinion concerning the effect of these amendments on the application of Kilgore to cases occurring on or after January 1, 2005.

## 2. Attorney's Fees

Employer also argues that the trial court erred by awarding attorney's fees to Employee for pursuing this action. Its argument is that it complied with Tennessee Code Annotated section 50-6-124, by submitting the medical necessity of the proposed surgery to utilization review, which determined that medical necessity had not been demonstrated. From that premise, it asserts that the underlying purpose of that section, i.e., the resolution of contested issues concerning post-judgment care through the administrative process, would be diminished by awarding fees when the result of that process (as far as it was pursued) was unfavorable to Employee. It also argues that an award of attorney's fees under these circumstances creates an incentive for attorneys representing Employees to short-circuit the appeals process established by the statute. There is some logic to this position. However, there is no case law to support it, and the facts in this record tend to undermine it.

First, the initial denial was based upon the utilization review physician's belief that Employee had not received a psychiatric evaluation. Inferentially, Employer's insurer failed to provide Dr. Pool's records to the reviewer. Putting that aside, Dr. Pool's letter of July 14, 2009 specifically addressed, and approved, the propriety of the proposed surgery from the psychiatric standpoint. Employer had no remaining basis to deny the proposed treatment after it received Dr. Pool's letter which was emailed on July 16, 2009 to Employer. However, it continued to do so. Employer's position is based upon equity principles, but its own course of action conflicts with the same principles. Based upon these factors, we conclude that the trial court did not err by awarding attorney's fees in this case.

## 3. Frivolous Appeal

Employee seeks a declaration that this appeal is frivolous, and requests an award of damages pursuant to Tennessee Code Annotated sections 27-1-122 (2000) and 50-6-225(h). Upon review of the entire record in this case, we decline to make such a finding.

## **Conclusion**

The judgment of the trial court is affirmed. Ricky Mayes' request for a finding that the appeal is frivolous is denied. Costs of this appeal are taxed to Peebles, Inc. and its surety, for which execution may issue if necessary.

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JON KERRY BLACKWOOD, Senior Judge