

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 23, 2011 Session

PAUL E. KENNEDY v. LAKEWAY AUTO SALES, INC.

Appeal from the Circuit Court for Hamblen County
No. 05CV261 Kindall T. Lawson, Judge

No. E2010-02422-WC-R3-WC-FILED-AUGUST 30, 2011

When the employer refused to provide another panel of physicians following the employee's negative drug screen result, the employee filed a motion to compel medical treatment. The trial court ordered the employer to provide a panel of three doctors for pain treatment and granted the employee's request for attorney's fees. The Supreme Court referred the employer's appeal to the Special Workers' Compensation Appeals Panel pursuant to Tennessee Code Annotated section 50-6-225(e)(3) (2008) and Tennessee Supreme Court Rule 51. The judgment of the trial court is affirmed and the cause is remanded for modification of the trial court's order.

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

GARY R. WADE, J., delivered the opinion of the court, in which JON KERRY BLACKWOOD, SR. J., and JERRI S. BRYANT, SP. J., joined.

Evan E. Hauser and Michael J. Mollenhour, Knoxville, Tennessee, for the appellant, Lakeway Auto Sales, Inc.

James Madison Davis, Morristown, Tennessee, for the appellee, Paul E. Kennedy.

MEMORANDUM OPINION
Facts and Procedural History

Paul E. Kennedy (the "Employee") was employed by Lakeway Auto Sales, Inc. (the "Employer") as a mechanic. On September 13, 2004, the Employee suffered a back injury in the course and scope of his employment. The Employee did not return to work and obtained Social Security disability as a result of the injury. In July of 2006, a surgeon

performed back surgery and, several months later, released the Employee for pain management treatment. On June 27, 2007, the Employer settled the Employee's workers' compensation claim, agreeing to pay future medical costs related to his back injury. Afterward, the Employee was treated by several doctors who prescribed hydrocodone for pain management.

On January 28, 2010, Dr. Fady Tohme, one of the Employer's authorized physicians, administered a drug test as a part of the Employee's course of treatment. When results were negative for the presence of opiates, including hydrocodone, Dr. Tohme, in accordance with his office policy, sent the Employee a letter discharging him from further treatment for non-compliance with the prescribed treatment. He advised the Employee to find another physician "since [his] medical condition require[d] continued medical attention."

Thereafter, the Employee wrote the Employer asking for "continued pain management and . . . a referral to a pain management specialist and . . . payment for his medications." The Employer declined to provide another panel of physicians because of the negative drug screen, explaining that "we met our duty to authorize and pay for care but it was up to [the Employee] to make it work" and stating its intention not to "be drawn into any illegal use or diversion of narcotic pain medications."

On May 13, 2010, the Employee filed a motion asking the trial court to order the Employer to provide all reasonable and necessary medical treatment, including pain management, as agreed in the original settlement, as well as attorney's fees and costs incurred in bringing the motion. The Employee also sought to have the Employer held in contempt of court for refusing to authorize treatment.

At the hearing on the motion, the Employee testified that he had to have help dealing with his pain and had "never done anything wrong with his . . . prescription medication." He contended that he had taken his medication as prescribed and had never sold or misused the drug. The Employee claimed that the results of the drug screen were incorrect, or, in the alternative, that the wrong test was administered. The Employee's wife, Ida, corroborated his claims, testifying that he had taken his medication as prescribed and that he had not distributed his drugs to anyone else.

Dr. Tohme, who testified by deposition, confirmed that he had discharged the Employee from treatment based upon the results of the drug screen. While acknowledging that the Employee did not exhibit any behavior that led him to believe that the Employee was misusing his prescriptions, he explained that he routinely ordered such tests. Dr. Tohme testified that the testing process was reliable because he had "[n]ever seen a mistake," and, while he had verified the accuracy of the test by telephoning LabCorp, he also acknowledged

that an incorrect result was “possible.”¹ Further, Dr. Tohme and his nurse, Margaret Clevenger, who also testified by deposition, stated that prior to administering the drug screen test to the Employee, there was some confusion about which of the various tests should be administered, and that, after discussion, they ultimately settled on the synthetic opiate bundle test.

At the conclusion of the hearing, the trial court first observed that numerous physicians had treated the Employee with pain medication over a period of five years, and that all had determined that such treatment was reasonable and necessary for the nature of his injury. After specifically finding that the Employee and his wife were “both very credible witnesses,” the trial court inferred that the discussion between Dr. Tohme and Nurse Clevenger regarding which test should be ordered cast doubt on the accuracy of the test results. The trial court further commented that physicians should not assume that a patient is guilty of dealing drugs based upon a single drug test result without affording the patient the opportunity to explain. Because the original settlement required the Employer to provide all future medical expenses, the trial court admonished the Employer for discontinuing treatment without first seeking relief from the judgment, ordered the Employer to provide the Employee with a panel of three doctors to treat his pain, and ruled that the Employer was responsible for finding three doctors who would be willing to treat the Employee despite the negative drug result. Finally, the trial court awarded the Employee attorney’s fees and costs in the amounts of \$10,115.40 and \$365.40, respectively.

Standard of Review

In workers’ compensation cases, the standard of review upon the record of the trial court is de novo, with a presumption of the correctness of the factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). Considerable deference should be accorded to the trial court’s factual findings pertaining to the credibility of witnesses testifying in court. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). However, the Court may draw its own conclusions regarding the weight and credibility of expert testimony when all the medical proof is contained in the record by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997).

Analysis

The Employer filed this appeal contending that (1) continued treatment of the Employee’s pain is not a reasonable and necessary medical expense; (2) the Employer should

¹ Furthermore, the accuracy of drug screen results may be disputed. Mark Collen, Opioid Contracts and Random Drug Testing for People with Chronic Pain – Think Twice, 37 J.L. Med. & Ethics 841, 842 (2009) (“There are many potential sources of problems that could compromise test results including the collection of specimens, handling, and laboratory methodologies.”) (footnote omitted).

not be required to pay for pain management expenses; and (3) the Employee was not entitled to attorney's fees.

I.

We first address whether, under Tennessee Code Annotated section 50-6-204 (2008 & Supp. 2010), the Employer's obligation to provide reasonable and necessary medical expenses terminated when Dr. Tohme discharged the Employee based upon the results of the drug screen test. The employer "shall furnish free of charge to the employee such medical care and treatment made reasonably necessary" for a work-related injury, Tenn. Code Ann. § 50-6-204(a)(1)(A), and "shall designate a group of three (3) or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee shall have the privilege of selecting," Tenn. Code Ann. § 50-6-204(a)(4)(A).

In Carter v. Shoney's, Inc., our Supreme Court considered whether an employee's continuing chiropractic treatment was a reasonably necessary medical expense. 845 S.W.2d 740 (Tenn. 1992) (per curiam). As a result of a work-related injury, the employee had received chiropractic treatment, which was initially authorized by her employer. Id. at 741. Later, when the employer notified the chiropractor that she was no longer authorized to treat the employee, the employee filed a motion to compel a continuation of the treatment. Id. A neurosurgeon, who examined the employee, did not specifically refer the employee back to the chiropractor, but recommended that the employee continue a home-exercise program with physical therapy and testified that because the chiropractor had provided a "very good basi[c] physical therapy," he had no objections to a continuation of chiropractic treatment. Id. at 741-42. Recognizing that "[t]here is a presumption that treatment furnished by designated physicians is necessary and reasonable," our Supreme Court ruled that "[i]n the absence of evidence directed specifically to the issue" of termination of treatment, "the employer must provide [the employee with] future, free reasonably necessary medical, including chiropractic, treatment" Id. at 742-44.

In the case before us, the Employer terminated medical benefits due to a negative drug screen result based upon the assumption that because the Employee had failed to test positive for the prescribed medication (hydrocodone), his treatment was no longer reasonably necessary. The Employer relies upon cases where the claimant was required to present expert testimony to prove that the need for future medical treatment was causally related to the original injury. See, e.g., Griffin v. Walker Die Casting Co., No. M2009-01773-WC-R3-WC, 2010 WL 4513336, at *2 (Tenn. Workers' Comp. Panel Nov. 10, 2010) (finding that a causal relationship between the claimed injury and the employment activity must be established by expert medical testimony, as supplemented by lay testimony). Because, however, the Employee was not seeking new treatment and the treatment for his pain had

been ongoing for approximately five years under supervision of the Employer's designated physicians, those cases do not apply.

As in Carter, the Employee's treatment was provided by doctors authorized by the Employer and, when the Employer refused to pay for further treatment, the Employee filed a motion to compel. The facts differ slightly from those in Carter because here, the Employer refused to authorize further medical treatment after the physician discharged the Employee, whereas in Carter, the employer instructed the chiropractor not to provide further treatment. See Carter, 845 S.W.2d at 741. Dr. Tohme indicated in his testimony, however, that while he discharged the Employee as his patient, he also advised the Employee to continue his previously prescribed pain management treatment with another physician. Moreover, Dr. Tohme stated that he believed the Employee's complaints of pain were genuine, and that the Employee had not otherwise given Dr. Tohme any reason to believe that he was not taking his drugs as prescribed or that he was engaging in the illegal sale of his prescription medicine.²

It is significant that Dr. Tohme did not testify that pain management treatment was no longer reasonably necessary. It is also significant that the trial court specifically accredited the testimony of both the Employee and his wife that he was taking his medication regularly and had not misused the drugs. The trial court observed that "[t]hey answered quickly and without hesitation all questions, didn't equivocate or beat around the bush or anything to any amount, and were consistent," whereas the trial court expressed doubts about whether the correct drug screen was administered. Under these circumstances, the evidence does not preponderate against the trial court's ruling that further medical treatment for the Employee is reasonably necessary.

II.

Next, we address whether the trial court exceeded its authority by ordering the Employer to provide a panel of physicians to treat the Employee with pain management. Unlike Carter, where the trial court ordered the employer to provide any and all future, reasonably necessary medical treatment, *including* chiropractic treatment, the trial court here ordered the Employer to "provide a panel of three doctors *who will treat [the Employee] with pain management*," holding that "it is the responsibility of [the Employer] to provide a panel of doctors that will treat [him]." (Emphasis added). The Employer contends that the type of medical treatment that is reasonably necessary should be determined by an authorized treating physician, and that by prescribing in its order the exact treatment the Employer must provide – pain management – the trial court exceeded its authority under Tennessee Code

² The Employer was unable to provide any evidence that the Employee was involved in drug diversion.

Annotated section 50-6-204(a)(1)(A). In addition, the Employer claims that an order requiring an employer to ensure that physicians will provide a specific type of treatment to an employee would be impossible to enforce.

The argument is persuasive. An authorized physician should determine the course of treatment. Further, the Employee has recourse if he becomes dissatisfied with the authorized panel of physicians or the treatment recommended by those physicians. For example, under our statute, if an employee, who is receiving treatment for a compensable injury from an authorized physician, becomes dissatisfied with the physician's findings, the employee may

(1) move the court to appoint a neutral physician, whose expense would be borne equally by the parties, (2) consult with his employer and make other arrangements suitable to both parties, or (3) go to a physician of his own choice, without consulting with the employer, and thus be liable for such services.

Goodman v. Oliver Springs Mining Co., 595 S.W.2d 805, 808 (Tenn. 1980). Because the judgment, as written, could limit the Employee's future treatment to pain management, even if complications arose that required some other course of reasonable and necessary medical treatment, it should be modified to require the Employer to provide all reasonably necessary medical treatment, which may include pain management.

III.

The final issue is whether the trial court properly awarded the Employee reasonable attorney's fees. Trial courts have the discretion to award attorney's fees and reasonable costs whenever an employer fails to furnish appropriate medical care pursuant to a settlement or judgment. Tenn. Code Ann. § 50-6-204(b)(2). The Employee's request for attorney's fees incurred in defending this appeal is also consistent with the purpose of this statute. See Tharpe v. Emerson Elec. Co., No. W2007-01037-SC-WCM-WC, 2008 WL 3892029, at *3 (Tenn. Workers' Comp. Panel, Aug. 22, 2008) (holding that the statute's purpose includes the award of attorney's fees incurred in pursuing an appeal).

In this instance, the Employer failed to furnish reasonable and necessary medical treatment by arbitrarily withholding treatment upon notification of the negative drug test result from the treating physician. It was, therefore, within the trial court's discretion to award attorney's fees and costs. The judgment is affirmed in that regard and the cause is remanded to the trial court for a determination of attorney's fees and costs on appeal.

Conclusion

The judgment of the trial court granting the Employee's motion to compel medical

treatment is affirmed, but modified to the extent that the Employer is required to provide all reasonably necessary medical treatment, which may include the expense of pain management. The costs of this appeal are taxed to the Employer, Lakeway Auto Sales, Inc., and its surety, for which execution may issue if necessary.

GARY R. WADE, JUSTICE

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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 appeals 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 of this appeal are taxed to the Employer, Lakeway Auto Sales, Inc. and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM