IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
October 18, 2001 Session

CLINT LOWE v. WAL-MART STORES, INC.

Direct Appeal from the Chancery Court for Davidson County
No. 99-1118-III Ellen Hobbs Lyle, Chancellor

No. M2001-00513-WC-R3-CV - Mailed - January 15, 2002
Filed - February 15, 2002

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann.§ 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. After being informed by his employer that he could see no more physicians, the plaintiff nevertheless sought additional treatment for a neck injury which resulted in a surgical correction. The trial judgment ordered these unauthorized expenses to be paid by the employer. We affirm.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and HOWELL N. PEOPLES, SP. J., joined.

M. Scott Ogan, Nashville, Tennessee, for the appellant, Wal-Mart Stores, Inc.

Joseph L. Mercer, III, Nashville, Tennessee, for the appellee Clint Lowe.

MEMORANDUM OPINION

The sole issue in this case is whether the employer is liable for unauthorized medical expenses. The issue is squarely drawn; the employee, age 52, was knowledgeable and commendably candid, as will hereafter appear.

By way of background, the appellee sustained an injury to his low back in 1988 while working for Wal-Mart. Two disc were removed, with fusion. The parties agreed upon a settlement of 53 percent to the body as a whole.

He returned to work at Wal-Mart. In May 1997, while on the job, the plaintiff was struck on the head by a large flower pot and he was thrown off, or knocked off, a ladder. He was seen by

several physicians, and it is here that the saga begins. He was awarded benefits for 50 percent permanent partial disability, 90 weeks of temporary total disability, and all medical expenses. As we have stated, only the latter benefit is at issue.

The plaintiff was initially seen by a Dr. Burns, who released him the same day. He was then seen by Dr. Strickland "who left the practice of medicine". Wal-Mart thereupon provided him with another panel of physicians and he selected Dr. Weiss, who, according to the unrefuted testimony of the plaintiff, made a cursory examination of five minutes in length and instructed him to return to work.

The plaintiff, claiming to be symptomatic, thereupon reported to his supervisor, Ms. Baker, and asked for another physician.[1] According to the plaintiff, the request was refused. He testified that he called a Melissa Black, in Arkansas, who was identified as an adjuster.

The plaintiff testified that after talking to Ms. Black "my understanding was that I had already seen all doctors they was going to let me see and that was it".[2]

The plaintiff thereupon saw Dr. David Gaw, who had treated him in 1988 for his first injury. Dr. Gaw recommended a leave of absence for the plaintiff, who was later referred by his family physician to Dr. M. J. McNamara, orthopedic surgeon.

A physical examination of the plaintiff revealed a 50 percent decrease in range of motion in all planes. Dr. McNamara obtained the flexion-extension films previously taken and reviewed a myelogram and MRI which demonstrated degenerative disc disease. Cervical traction was prescribed, followed by a two-level anterior cervical discectomy and fusion with a plate fixation anteriorly, which afforded a measure of relief to the plaintiff.

The plaintiff testified that he did not confer with he employer after being told by Ms. Baker and Ms. Black that "there will be no more doctors for you". In context, he testified:

> Q: Do you know the difference between a company-authorized doctor and an unauthorized doctor?
>
> A: Yes, I do.
>
> Q: Could you briefly tell us what the difference is, essentially?

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[1] The trial judge found "the plaintiff testified that Ms. Baker [supervisor] laughed at the plaintiff". In fairness to Ms. Baker, the plaintiff testified that after he told her about Dr. Weiss' "run the roller across my hand and foot" that she "laughed about it". The plaintiff *did not* testify that Ms. Baker *laughed at him*, but only about Dr. Weiss' running a roller across his hand and foot as some sort of diagnostic test.

[2] This testimony was not objected to. Neither was it explored, explained, or refuted. The trial court referred to Black as an adjuster and treated the plaintiff's testimony as a direct quote, which, of course, was not the case.

A: As long as they authorize you to go to one, they'll pay for it; unauthorized, they won't

Q: Back then, after the accident you knew that Wal-Mart would pay for company-authorized doctors and not for unauthorized doctors, correct?

A: Right.

Q: Do you recall the name of the doctor that signed your leave of absence request?

A: Dr. Gaw.

Q: Was he a Wal-Mart authorized physician?

A: He was on my back.

Q: Was he a Wal-Mart authorized physician regarding the 1997 injury?

A: No, he wasn't.

Q: You were seeing him on your own?

A: The reason I done it on my own is because they refused me any more help.

Q: Did you know at the time that he was an unauthorized doctor and that you would have to pay those bills yourself?

A: I had put that on my personal insurance.

Q: So the answer to my question is yes or no?

A: I paid the bill.

Q: So you knew you would be responsible for those bills?

A: Right.

The trial judge "ordered that all medical bills related to the treatment of the May 1, 1997 injury shall be reimbursed to the providers by the defendant employer," without further comment. The defendant appeals and our review is *de novo* with a presumption of correctness unless the evidence otherwise preponderates. Rule 13(d) T.R.A.P.

Tenn. Code Ann. § 50-6-204(a)(4), as relevant here, requires the employer to furnish medical services to the injured employee and to give the employee the statutory privilege of choosing from at least three physicians. The employee is required to accept the medical services provided by the employer.

Decisional law dealing with the issue at Bar is all over the place. As stated, in ***Dorris v. INA Ins. Col***, 764 S.W.2d 538 (Tenn. 1989), "[i]t has long been held that the intent of TCA § 50-6-204 is for the employee to do no less than to consult with his employer before incurring expenses called for by the statute if the employee expects the employer to pay for them", *citing* ***P & G Def. Corp v. West***, 310 S.W.2d 175 (Tenn. 1958), and ***Buchanan v. Mission Ins. Co.***, 713 S.W.2d 654 (Tenn. 1986). ***Dorris*** does not, however, prescribe a course of action to be taken by the employee if consultation with the employer is unsuccessful. We believe the rule is one of reasonableness, since ***Dorris*** holds "the record does not reflect any reasonable excuse or justification for the plaintiff unilaterally seeking additional services". *See, e.g.,* ***Emerson Elec. Co. v. Forrest***, 536 S.W.2d 343 (Tenn. 1976). Whether an employee is justified in seeking additional medical services to be paid by the employer depends on the circumstances of each case. ***Buchanan***, *supra.*

The circumstances of the case at Bar clearly reveal that the plaintiff was justified in seeking additional medical services. The cervical surgery was necessary and reasonable, and directly attributable to the job-related accident.

The judgment is affirmed at the cost of appellant and the case is remanded for all appropriate purposes.

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WILLIAM H. INMAN, SENIOR JUDGE

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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 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 the appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM