

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

November 20, 2017 Session

LOUIS GARASSINO v. WESTERN EXPRESS, INC., ET AL.

**Appeal from the Workers' Compensation Appeals Board
Appeal from the Court of Workers' Compensation Claims
No. 2014-07-0013 Joshua Baker, Judge**

**No. M2016-02431-SC-R3-WC – Mailed January 3, 2018
Filed February 8, 2018**

Louis Garassino (“Employee”) sustained a compensable lower back injury in the course of his work as a truck driver for Western Express (“Employer”). After a compensation hearing, the trial court awarded benefits to Employee. The order also awarded discretionary costs, in an unspecified amount. The parties disagreed over the issue. Employee filed a motion to award discretionary costs, including the fees of his examining doctor for reviewing records and conducting the examination. The trial court awarded those fees. Employer appealed to the Workers’ Compensation Appeals Board, which reversed the trial court as to the award of those two items. Employee has appealed, and the appeal has been assigned to this Panel pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(a) (2014 & 2017 Supp.) Appeal as of Right;
Judgment of the Court of Workers’ Compensation Claims Affirmed**

ROBERT E. LEE DAVIES, SR. J. delivered the opinion of the court, in which CORNELIA A. CLARK, J. and DON R. ASH, SR. J., joined.

Julie A. Reasonover, Nashville, Tennessee, for the appellant, Louis Garassino.

D. Andrew Saulters, Nashville, Tennessee, for the appellees, Western Express, Inc., and PMA Management Group.

OPINION

Factual and Procedural Background

On July 3, 2014, Louis Garassino injured his back while extending the trailer legs on his tractor-trailer rig. Employer, Western Express, Inc., accepted the injury as compensable and paid medical expenses and temporary disability benefits in accordance with the Workers' Compensation law. Dr. Robert Weiss was authorized as the treating physician. On September 17, 2014, Dr. Weiss performed back surgery at L5-S1. On January 19, 2015, Dr. Weiss found that Mr. Garassino had reached maximum medical improvement and opined that he retained an anatomical impairment rating of six percent (6%) to the whole person. Mr. Garassino requested an Independent Medical Evaluation which was performed by Dr. David West on December 1, 2015. Dr. West found that Mr. Garassino retained a permanent impairment rating of thirteen percent (13%) to the whole person.

Both Dr. Weiss and Dr. West were deposed, and the transcripts of their testimony were submitted to the Court of Workers' Compensation Claims to determine which impairment rating should be used to determine the award of permanent partial disability benefits. On June 3, 2016, the trial court issued its order in which it made findings of fact and conclusions of law. Garassino v. Western Express, No. 2014-07-0013 (Tenn. Ct. Workers' Comp. Claims Jun. 3, 2016).¹ The court agreed with the method used by Dr. West and adopted Dr. West's impairment rating of thirteen percent (13%) impairment to the whole body. In its order awarding benefits to Mr. Garassino, the court also stated: "The court further exercises its discretion pursuant to Tennessee Code Annotated § 50-6-239(c)(8) (2015) to award any and all costs related to Dr. West's examination of [Employee] and the costs incurred in securing his testimony via deposition." Employer paid the judgment, including costs associated with the deposition of Dr. West; however, it declined to pay Dr. West's charges for reviewing medical records and conducting the examination of Employee. The total of these charges amounted to \$1,000.

On June 15, 2016, Employee filed a motion for discretionary costs requesting the trial court to order Employer to pay the additional \$1,000. On June 20, 2016, Employer filed its response in opposition to the motion for discretionary costs. In its response, Employer contended that charges for a records review and a medical examination were not recoverable under Tennessee Code Annotated § 50-6-239(c)(8) (2014 and 2017 Supp.) or Rule 54.04 of the Tennessee Rules of Civil Procedure. On August 8, 2016, the

¹ The trial court order is available at http://trace.tennessee.edu/utk_workerscomp/439/. The University of Tennessee database of Tennessee Court of Workers' Compensation Claims and Workers' Compensation Appeals Board Decisions is available at http://trace.tennessee.edu/utk_workerscomp/.

trial court entered an order granting Employee's motion for discretionary costs and ordered Employer to pay the remaining \$1,000.

On August 9, 2016, Employer filed his notice of appeal, and on November 7, 2016, the Workers' Compensation Appeals Board issued its opinion. Garassino v. Western Express, No. 2016-05-0277 (Tenn. Workers' Comp. App. Bd. Nov. 7, 2016).² The first issue addressed by the Appeals Board was whether Employer's appeal was timely since the notice was filed more than thirty days after the June 3, 2016 compensation order.

The Board then turned to the issue of discretionary costs. It concluded that the trial court erred in awarding as discretionary costs the fees of the Employee's medical expert for reviewing medical records and conducting a physical examination of the Employee. Employee has appealed, contending that the Employer's appeal to the Appeals Board was not timely, and in the alternative, that the expert's preparation costs are recoverable.

Standard of Review

Employee raises two issues in this appeal: 1) whether the notice of appeal filed by Employer from the trial court's compensation order was timely; and 2) whether an expert's charges for a medical records review and a physical examination should be included as discretionary costs. Since there are no disputed issues of fact, there is no presumption of correctness to the conclusions of law reached by the trial court. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009). Decisions to award or deny costs are reviewed on an abuse of discretion basis. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 902 (Tenn. 1992).

Analysis

Timeliness of Appeal

The first issue raised by Employee is whether this Court has jurisdiction to consider this appeal. Employee asserts that the filing of the notice of appeal sixty-seven days after the trial court's entry of its compensation order was not timely, and therefore should be dismissed. We begin our analysis with the trial court's compensation order regarding discretionary costs. The order did not set out the exact amount to be recovered. Instead, it provided that Employee was awarded "any and all costs related to Dr. West's examination of [Employee] and the cost incurred in securing his testimony via deposition." Employee then filed a motion for the trial court to determine the amount owed. Employer responded and the court entered an order awarding \$1,000 to Employee

² The Appeals' Board order is available at http://trace.tennessee.edu/utk_workerscomp/601/.

for Dr. West's charges to review Employee's records and perform an examination. One day later, Employer appealed. We agree with the Appeals Board that the trial court's original compensation order was ambiguous on the issue of discretionary costs. Both parties submitted their respective positions to the trial court, and by order entered August 8, 2016, the trial court awarded \$1,000 to Employee.

Whether this appeal was timely depends on the type of motion filed after the entry of the trial court's compensation order. In making that determination, the court will "look to the substance rather than form." Bemis Co., Inc. v. Hines, 585 S.W.2d 574, 576 (Tenn. 1979). We agree with the Appeals Board that Rule 52.02 of the Tennessee Rules of Civil Procedure controls in this case. Employee's motion requested the trial court make an additional finding regarding the amount of the discretionary cost award. Tennessee Rule of Civil Procedure 59.01 provides that a motion made pursuant to Rule 52.02 extends the time for initiating an appeal. Accordingly, we affirm the Appeal Board's conclusion that Employer's appeal was timely.

Discretionary Costs

We begin our analysis with Tennessee Code Annotated § 50-6-239(c)(8) which provides: "the worker's compensation judge may, in his discretion, assess discretionary costs including reasonable fees for depositions of medical experts against the employer upon adjudication of the employee's claim as compensable."

"Discretionary costs" are not further defined in the statute; however, Tennessee Code Annotated § 50-6-239(c)(1) specifies that the Tennessee Rules of Civil Procedure "shall govern proceedings at all hearings" in the Court of Workers' Compensation Claims. Rule 54.04 of the Tennessee Rules of Civil Procedure governs awards of discretionary costs for expert witnesses generally and guides our interpretation of Tennessee Code Annotated § 50-6-239(c)(8), which addresses discretionary costs awards for medical experts in workers' compensation cases. Rule 54.04 provides:

Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees not paid pursuant to Tennessee Supreme Court Rule 42, and guardian ad litem fees; travel expenses are not allowable discretionary costs.

Tenn. R. Civ. P. 54.04(2). Our courts have held that parties cannot recover discretionary costs for expert witness fees for preparing for depositions or trial, no matter how reasonable and necessary these fees are. Miles v. Marshall C. Voss Health Care Ctr., 896 S.W.2d 773, 776 (Tenn. 1995). Tennessee Rule of Civil Procedure 54.04(2) limits the

types of expenses related to expert witnesses that can be recovered as discretionary costs only to those fees for depositions and trial, Mass. Mut. Life Ins. Co. v. Jefferson, 104 S.W.3d 13, 38 (Tenn. Ct. App. 2002), and expert witness preparation fees have been disallowed as discretionary costs under this Rule. Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 216 (Tenn. Ct. App. 2008). Additionally, nothing in the language of Tennessee Code Annotated § 50-6-239(c)(8) supports the notion that the General Assembly intended to add witness preparation fees, not included in Rule 54.04, to the list of recoverable costs.

Employee argues that Tennessee Code Annotated § 50-6-204(k)(7) (2017 Supp.), which grants a rebuttable presumption of correctness to the opinions of an authorized treating physician, imposes an additional burden on employees which merits inclusion of expert preparation time in the list of recoverable costs. He contends this language requires employees to obtain their own expert witnesses in order to dispute the opinions of authorized physicians. However, this argument fails to recognize that employees have always carried the burden of proof of every element of their workers' compensation claims. Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (citing Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992)). Section 50-6-204(k) does not impose any additional obligations upon employees. It has always been required that an employee who is dissatisfied with the opinion of his treating physician concerning causation or impairment must obtain expert medical proof in order to prevail on those issues. Brewer v. Dillingham Trucking, Inc., No. M2016-00611-SC-R3-WC, 2017 WL 1328629, at *6 (Tenn. Ct. Workers' Comp. Claims Apr. 11, 2017). While 50-6-239(c)(8) provides that the fee charged by the authorized treating physician for his or her deposition will be charged against the employer when the employee is the prevailing party, neither this section nor Tennessee Code Annotated § 50-6-204(k) add any provision for reimbursement for the preparation time spent on a medical examination or records review. Since there is no indication that the General Assembly intended to add expert preparation time to the list of recoverable costs, we agree with the Appeals Board that Dr. West's charges for reviewing records and examining Employee are not recoverable as discretionary costs.

Conclusion

The judgment of the Workers' Compensation Appeals Board is affirmed. Costs are taxed to Employee, Louis Garassino and his surety, for which execution may issue if necessary.

ROBERT E. LEE DAVIES, SR. JUDGE