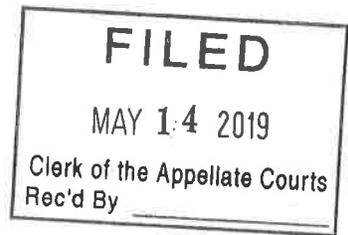


IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

February 25, 2019 Session

SHIRLEY KEEN v. INGLES MARKETS, INC.

**Appeal from the Chancery Court for Campbell County
No. 14,545 Elizabeth C. Asbury, Chancellor**



No. E2018-00306-SC-R3-WC – Mailed April 9, 2019

In 1997, an employee sustained a workers' compensation injury. In 1999, the chancery court approved a settlement of the claim, which in part required the employer to pay for reasonable and necessary future medical treatment. In 2016, the employer declined to provide certain treatment based on the results of a utilization review under Tennessee Code Annotated section 50-6-124. The chancery court granted the employee's motion to compel the medical treatment and held in abeyance her request for attorney fees under Tennessee Code Annotated section 50-6-204(b)(2). The employee filed a second motion to compel because of a dispute about whether the first order to compel required the employer to provide the employee with a particular medication. The chancery court granted the second motion to compel and awarded the employee attorney fees, but in a lesser amount than the employee had requested. Both parties appealed. The employee contends that the chancery court erred in awarding attorney fees by failing to make findings based on the factors in Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.5(a) (RPC 1.5(a)). The employer contends the chancery court erred by granting the second motion to compel treatment. The 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 under Tennessee Supreme Court Rule 51. We vacate the chancery court's award of attorney fees and remand for a determination of attorney fees in accordance with the factors set forth in RPC 1.5(a). We affirm the chancery court's judgment granting the second motion to compel.

Tenn. Code Ann. § 50-6-225(a) (2014) (applicable to injuries occurring before July 1, 2014) Appeal as of Right;

Judgment of the Chancery Court Affirmed in Part, Vacated in Part, and Remanded for Further Proceedings Consistent with this Opinion

SHARON G. LEE, J., delivered the opinion of the Court, in which DON R. ASH, SR.J., and ROBERT E. LEE DAVIES, SR.J., joined.

J. Anthony Farmer and John P. Dreiser, Knoxville, Tennessee, for the appellant, Shirley Keen.

T. Joseph Lynch, David J. Otten, and Rebecca B. Murray, Knoxville, Tennessee, for the appellee, Ingles Markets, Inc., d/b/a Ingles Store 103.

OPINION

I.

On April 23, 1997, Shirley Keen injured her right wrist when cans fell from a shelf onto her wrist while she was working for Ingles Markets, Inc., d/b/a Ingles Store 103 (Ingles). Dr. Jeffrey Uzzle diagnosed Ms. Keen as having a median nerve injury and performed surgery. Dr. Uzzle subsequently determined that Ms. Keen had Reflex Sympathetic Dystrophy, which is now known as Complex Regional Pain Syndrome.

Ms. Keen sued Ingles in the Campbell County Chancery Court for workers' compensation benefits. In 1999, the parties settled the claim. The court-approved settlement provided that Ingles would provide Ms. Keen with reasonable and necessary future medical treatment with Dr. Jeffrey Uzzle. In 2001, Dr. Uzzle referred Ms. Keen to Dr. Edward Workman for continued treatment and non-narcotic pain management.

Dr. Workman diagnosed and treated Ms. Keen for pain from her work injury; depression, panic disorder, and anxiety related to her work injury (resulting also in stress gastritis); and medication-related dyspepsia. Dr. Workman prescribed Ms. Keen different medications from 2001 through 2016, changing and adjusting them as needed. These medications included Xanax, Ultram, Cymbalta, Fioricet, Neurontin, Theramine, Sentra AM, Sentra PM, Zantac, Nexium, Zanaflex, and Voltaren gel. Dr. Workman also treated Ms. Keen's pain with trigger point injections.

After a utilization review was completed in April 2016,¹ Ingles declined to authorize and pay for the trigger point injections and several medications prescribed by

¹ "Utilization review" is the "evaluation of the necessity, appropriateness, efficiency and quality of medical care services . . . provided to an injured or disabled employee based on medically accepted standards and an objective evaluation of those services provided . . ." Tenn. Code Ann. § 50-6-102(17) (2014) (applicable to injuries occurring prior to July 1, 2014). The workers' compensation statute

Dr. Workman. The utilization review determined from Ms. Keen's medical records that the trigger point injections were not medically necessary and that she should discontinue Zantac, Zanaflex, Nexium, Voltaren gel, Cymbalta, Theramine, Sentra PM, and Sentra AM. The utilization review further recommended that Ms. Keen be weaned from Neurontin, Ultram, Xanax, and Fioricet so that these medications could also be discontinued. Ms. Keen appealed the utilization review determination. In May 2016, the Office of the Medical Director of the Bureau of Workers' Compensation affirmed the decision.

In June 2016, Ms. Keen, through her attorney, filed in the chancery court a motion to compel treatment, seeking to require Ingles to authorize and pay for the reasonable and necessary treatment prescribed by Dr. Workman. In August 2017, the chancery court held an evidentiary hearing. Testimony at the hearing showed that Ingles was continuing to provide Xanax, Neurontin, Ultram, and Fioricet. Ms. Keen testified that she was paying out of pocket for Cymbalta, Zanaflex, and Voltaren gel, and that she was no longer receiving the trigger point injections. After hearing testimony and reviewing the depositions of Dr. Joe Browder² and Dr. Workman, the chancery court ordered Ingles to pay for the trigger point injections and certain specified medications—Zanaflex, Cymbalta, and Voltaren gel. The chancery court held in abeyance a ruling on Ms. Keen's request for attorney fees under Tennessee Code Annotated section 50-6-204(b)(2)³ pending a later hearing.

In September 2017, Ms. Keen filed a second motion to compel treatment, seeking to require Ingles to provide the medication, Nexium. The chancery court's order granting the first motion to compel did not mention Nexium, but according to Ms. Keen, Dr. Workman had prescribed Nexium.

provides for the establishment by the commissioner of labor and workforce development of a system of utilization review of selected health care providers providing medical services to workers' compensation claimants. *Id.* § 50-6-124(a). An employer may also elect to provide utilization review, as Ingles did here. *Id.* § 50-6-124(d). The purpose of utilization review is to balance the legislature's intent to ensure quality medical services to injured and disabled employees with the legislature's intent "to control increasing medical costs in workers' compensation matters." *Id.* § 50-6-122(a)(1).

² Dr. Browder, a board-certified anesthesiologist and pain management physician, evaluated Ms. Keen on behalf of Ingles to determine whether she met the criteria for Complex Regional Pain Syndrome.

³ "[A] court may award attorney fees and reasonable costs . . . when the employer fails to furnish appropriate medical, surgical and dental treatment or care, medicine, medical and surgical supplies, crutches, artificial members and other apparatus to an employee provided for pursuant to a settlement or judgment under this chapter." Tenn. Code Ann. § 50-6-204(b)(2) (2014) (applicable to injuries occurring prior to July 1, 2014).

In December 2017, the chancery court heard Ms. Keen's motion for attorney fees and her second motion to compel. Ms. Keen supported her request for attorney fees with an affidavit from her attorney, John Dreiser, summarizing his time on the case—sixty-six attorney hours from June 20, 2016, to December 14, 2017—at a rate of \$400 per hour.⁴ Ms. Keen also presented the testimony of Mr. Dreiser, Knoxville attorney John B. Dupree, and former Knox County Chancellor Daryl Fansler. These witnesses testified about Dreiser's qualifications and his expertise in workers' compensation matters, the complexity of the medical issues, the risk of handling such matters on a contingent fee basis, and the reasonableness of the attorney fees sought by Mr. Dreiser.

Ingles did not dispute the testimony about Mr. Dreiser's qualifications or the complexity of the case, but presented the testimony of two expert witnesses to rebut the reasonableness of Mr. Dreiser's requested \$400 per hour attorney fee. Nashville attorney Terri Bernal testified that in her statewide workers' compensation defense practice, she had never received a fee request from a plaintiff's attorney for \$400 per hour and that the highest amount she had ever seen requested was \$220 per hour. LaFollette attorney Stephen Hurst testified that in his law practice in Campbell County and surrounding counties, handling various types of civil and criminal matters (but not workers' compensation), he typically charged an hourly rate of \$175.

The chancery court found that Mr. Dreiser had a very good reputation and had done an excellent job for Ms. Keen. The chancery court stated that it had carefully looked at the ten factors set forth in RPC 1.5(a), but made no specific findings about each of those factors. The chancery court determined that a reasonable attorney fee for a case of this type in Campbell County was \$200 per hour, and awarded attorney fees based on the \$200 per hour rate.

On the second motion to compel,⁵ Ms. Keen argued that the chancery court's August 2017 order did not list Nexium among the medications that Ingles had to provide, but Nexium had been at issue in Ms. Keen's first motion to compel and was included in Dr. Workman's deposition testimony as a medication that was reasonable, necessary, and related to Ms. Keen's work injury. Ingles contended that the chancery court's previous order excluding Nexium from the list was *res judicata*, that Ms. Keen's gastroenterologist outside the workers' compensation case had prescribed Nexium, and that Nexium was never authorized as part of the workers' compensation claim. The chancery court ruled

⁴ Paralegal time was billed at \$120 per hour.

⁵ The second motion to compel focuses specifically on Nexium, but in the final paragraph requests that Ingles be required to pay for the reasonable and necessary medical treatment prescribed by Dr. Workman, "including, but not limited to, prescriptions for Nexium or other similar medications."

that if Dr. Workman, as Ms. Keen's authorized treating physician, prescribed Nexium and stated that it was reasonable and necessary, Ingles had to provide it.

II.

We review a trial court's findings of fact de novo with a presumption of correctness, unless the preponderance of the evidence is otherwise. *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 399 (Tenn. 2013) (citing Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2012)). Considerable deference is given to a trial court's findings when the judge has observed in-court witness testimony. *Id.* (citing *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009)). We draw our own conclusions, however, about medical testimony presented by deposition. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002) (citing *Cooper v. Ins. Co. of N. Am.*, 884 S.W.2d 446, 451 (Tenn. 1994)). Generally, a trial court's award of attorney fees is reviewed under an abuse of discretion standard, with a presumption of correctness. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011) (citing *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010); *Keisling v. Keisling*, 196 S.W.3d 703, 726 (Tenn. Ct. App. 2005)). We "will find an abuse of discretion only if the [trial] court 'applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employ[ed] reasoning that causes an injustice to the complaining party.'" *Id.* (quoting *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008)).

Attorney Fees

Ms. Keen asserts that the chancery court erred in awarding attorney fees based on \$200 per hour, arguing that the chancery court failed to analyze the reasonableness of the attorney fees under the ten factors set out in RPC 1.5(a). Those factors are

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;

- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

Tenn. Sup. Ct. R. 8, RPC 1.5(a).

In its oral ruling from the bench, the chancery court stated that it had “carefully looked at the ten factors set forth in the [*Grissom*] case,⁶ but made no findings about each of the factors. Instead, after observing that Mr. Dreiser had done an excellent job for his client and was a person of fine reputation, the chancery court determined that the reasonable fee for counsel in a Campbell County workers’ compensation case was \$200 per hour. The chancery court’s attorney fee order states that the only issue before the court about attorney fees “was whether \$400 per hour was a reasonable hourly rate in Campbell County for the Plaintiff’s Case.” The order awards Ms. Keen \$16,460 for 73.4 hours of attorney fees at \$200 per hour.⁷

In making an award of attorney fees, a trial court should develop an evidentiary record and clearly and thoroughly explain its findings concerning each of the factors and the particular circumstances supporting its determination of a reasonable fee in each case. *Wright*, 337 S.W.3d at 185–86 (citing *White v. McBride*, 937 S.W.2d 796, 800 (Tenn. 1996); *Hoffert v. Gen. Motors Corp.*, 656 F.2d 161, 166 (5th Cir. 1981); *Ex parte Peck*, 572 So. 2d 427, 429 (Ala. 1990)). Here, the chancery court had an evidentiary hearing, but failed to make the required findings about the RPC 1.5(a) factors. *See Wright*, 337 S.W.3d at 185–86. It is insufficient for a trial court merely to allude to the factors. The chancery court did not explain or discuss either in its oral ruling or in its written order factors one, two, four, five, six, eight, or nine. Thus, this Court cannot give deference to the chancery court’s decision as required by the abuse of discretion standard of review. *See First Peoples Bank of Tenn. v. Hill*, 340 S.W.3d 398, 410 (Tenn. Ct. App. 2010).

⁶ *Grissom v. United Parcel Serv., Inc.*, No. M2016-00127-SC-R3-WC, 2017 WL 77108 (Tenn. Workers’ Comp. Panel Jan. 9, 2017), designated as not for publication under Supreme Court Rule 4, lists the ten factors in RPC 1.5(a) as the “correct legal standard” for awarding attorney fees. *Id.* at *2 (quoting *Wright*, 337 S.W.3d at 169–70). The chancery court also noted that *Wright*, a Fentress County case, was well known in the Eighth Judicial District.

⁷ The order awards \$832 for 10.4 hours of paralegal time at \$80 per hour, rather than \$120 per hour as requested. The order also awards Ms. Keen \$3,668.46 in expenses, which Ingles does not contest.

Therefore, we must vacate the attorney fee award and remand the case for the chancery court to apply the factors and determine a reasonable attorney fee under the facts and circumstances of this case.⁸ See *Rivera v. Westgate Resorts, Ltd., L.P.*, No. E2017-01113-COA-R3-CV, 2018 WL 1989620, at *5 (Tenn. Ct. App. Apr. 27, 2018) (quoting *Ferguson Harbour, Inc. v. Flash Mkt., Inc.*, 124 S.W.3d 541, 553 (Tenn. Ct. App. 2003)); *Pintaure v. Farmer*, No. E2017-01940-COA-R3-CV, 2018 WL 5962811, at *3 (Tenn. Ct. App. Nov. 14, 2018) (quoting *First Peoples Bank*, 340 S.W.3d at 410).

Nexium

Ingles contends that the chancery court erred when it granted the second motion to compel because the chancery court ordered Ingles to pay for all treatments and medications prescribed by Dr. Workman without evidence of their causal relationship to Ms. Keen's work injury. "Except in the most obvious, simple and routine cases," expert medical testimony is required to establish a causal relationship between an injury and the claimant's employment. *Lambdin v. Goodyear Tire & Rubber Co.*, 468 S.W.3d 1, 9 (Tenn. 2015) (quoting *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991)). This expert proof may be supplemented by the testimony of lay witnesses. *Lambdin*, 468 S.W.3d at 9 (citing *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598, 604, 609 (Tenn. 2008)).⁹

At the December hearing, the chancery court noted Dr. Workman's previous testimony that the prescription regimen that Ms. Keen had been on for sixteen years was reasonable, necessary, and causally related to her work injury. Counsel for Ms. Keen and Ingles disagreed about whether Dr. Workman had prescribed Nexium to Ms. Keen. The chancery court held that Ingles was to pay for anything that Dr. Workman prescribed.

Dr. Workman's medical records, included with his deposition, show that Dr. Workman has been prescribing Nexium to Ms. Keen since July 1, 2004.¹⁰ In his deposition, Dr. Workman was asked a general, "catch-all" question—whether the

⁸ In remanding this case to the chancery court, we express no opinion about the correctness of the award of \$16,460 in attorney fees.

⁹ Ms. Keen testified at the evidentiary hearing on the first motion to compel treatment that Dr. Workman "started giving [Nexium] to me and then Zantac – Zantac because I had reflux – and that would help me."

¹⁰ The medical records show that a few times Dr. Workman briefly discontinued Nexium and replaced it with another medication to treat the same symptoms, but each time, he discontinued the replacement medication and added Nexium back to Ms. Keen's medication list. The last one of these brief discontinuations of Nexium was from February 24, 2016, to May 18, 2016.

medications that he had been prescribing for Ms. Keen for the past sixteen years were reasonable, necessary, and causally related to her work injury—to which Dr. Workman answered, “Well, yes.” We presume that the treatment prescribed by Dr. Workman as the authorized treating physician is reasonable and necessary. *Tenpenny v. Batesville Casket Co.*, 781 S.W.2d 841, 845–46 (Tenn. 1989) (quoting *Russell v. Genesco, Inc.*, 651 S.W.2d 206, 211 (Tenn. 1983)).

Based on Dr. Workman’s testimony that the medication regimen he has been prescribing for Ms. Keen for sixteen years has been reasonable, necessary, and causally related to her work injury and that Dr. Workman’s medical records show he had treated Ms. Keen with Nexium since July 2004, we hold that the evidence does not preponderate against the chancery court’s decision.

III.

After careful consideration, we vacate the chancery court’s award of attorney fees and affirm the chancery court’s order granting the second motion to compel. We remand to the chancery court to determine the appropriate attorney fee award under the ten factors in RPC 1.5(a). Costs of this appeal are taxed to Ingles Markets, Inc., d/b/a Ingles Store 103, for which execution may issue if necessary.

SHARON G. LEE, JUSTICE

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

SHIRLEY KEEN v. INGLES MARKETS INC.

Chancery Court for Campbell County
No. 14-545

No. E2018-00306-SC-R3-WC



JUDGMENT ORDER

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 are assessed to Ingles Markets, Inc., d/b/a Ingles Store 103, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM