IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 21, 2011 Session

BARBARA ANN HARVILLE v. EMERSON ELECTRIC COMPANY

Appeal from the Circuit Court for Henry County
No. 2009 Donald E. Parish, Judge

No. W2010-01011-WC-R3-WC - Mailed June 2, 2011; Filed July 6, 2011

The employee sustained a compensable injury to her arm in 2001. In 2003, she entered into a settlement with her employer that preserved her right to receive reasonable and necessary medical treatment for the injury. In April 2008, the employee's authorized treating physician recommended a diagnostic test. The employer submitted the recommendation to its utilization review provider, which declined to approve the recommended test. The employee and her physician were notified of the denial in May 2008. In June 2009, the employee filed a petition for contempt seeking to have the trial court order the recommended test. The trial court treated the petition as a motion for medical treatment pursuant to Tennessee Code Annotated section 50-6-204(b)(2) (2008). The trial court found the recommended test to be reasonably necessary for the treatment of the injury, ordered the employer to authorize it, and awarded the employee attorney's fees. The employer appealed. We affirm the judgment of the trial court.

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

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J. and WALTER C. KURTZ, SR. J., joined.

Robin H. Rasmussen and James O. Evans, Memphis, Tennessee, for the appellant, Emerson Electric Company.

Art D. Wells, Jackson, Tennessee, for the appellee, Barbara Ann Harville.

MEMORANDUM OPINION

Factual and Procedural Background

On February 14, 2001, Barbara Harville ("Employee") suffered a compensable injury to her right arm, and the ensuing workers' compensation claim against Emerson Electric ("Employer") was settled. The settlement agreement ("settlement") was approved by the Department of Labor and Workforce Development on June 27, 2003. The settlement provided that "Employer agrees to provide to Employee all authorized future medical treatment for this injury, which authorized treatment shall be provided in accordance with provisions of [Tennessee Code Annotated section] 50-6-204." By order entered January 9, 2004, the settlement was "spread upon the minutes" of the trial court, and Employee's civil action was "retired from the docket."

On April 30, 2008, Employee visited Dr. Blake Chandler, her authorized treating physician, and complained of numbness, tingling, coldness, and discoloration of her right ring finger, long finger, and thumb. Dr. Chandler recommended an electromyogram ("EMG") and nerve conduction study of the right arm. Employer's insurer submitted the recommendation to its utilization review provider, Genex Services. Genex declined to authorize the procedure based on a "failure to perform a trial of conservative care prior to requesting an electrical study." On May 8, 2008, Employee and Dr. Chandler received notification of the denial and of the procedures for appealing the denial through the insurer's administrative process. Neither Employee nor Dr. Chandler appealed.

On May 14, 2008, the claims examiner handling Employee's worker's compensation claim mailed Dr. Chandler a letter stating that the utilization review provider's rationale for denying the study was "the failure to perform a trial of conservative care such as splinting, restrictions, medications, exercise and physical therapy prior to requesting the electrical study." The claims examiner requested that Dr. Chandler provide the reasons for his failure to perform a trial of conservative care prior to requesting the electrical study. In a December 11, 2008 letter to the claims examiner, Dr. Chandler explained that "splinting, restrictions, medications, exercise, and physical therapy are not appropriate or required prior to an EMG/NCS according to The American Academy of Orthopedic Surgeons guidelines for treatment of carpal tunnel syndrome."

Employee filed a petition for contempt on June 2, 2009, which the trial court heard on February 5, 2010. Employee introduced the deposition of Dr. Chandler into evidence. Employee and Dianah Burton, a claims representative for Employer's insurer, testified at the hearing. The trial court chose to treat the petition for contempt as a motion to compel medical care pursuant to Tennessee Code Annotated section 50-6-204(b) (2008). It found

that the proposed testing was reasonably necessary for the treatment of Employee's injury and that Employee's failure use the Utilization Review Procedure provided for in Tennessee Code Annotated section 50-6-124(a) (2008) to appeal the denial did not bar her claim. The trial court therefore ordered Employer to authorize the testing and awarded attorney's fees, expert witness fees, and court reporter fees to Employee.

Employer has appealed contending that the trial court erred by failing to find that the petition was barred by the statute of limitations, by finding that Employee was not required to request a benefit review conference or participate in the utilization review appeals process, by finding that the proposed test was related to her work injury, and by awarding attorney's fees, expert witness fees, and court reporter fees. Pursuant to Tennessee Code Annotated section 50-6-225(e)(3) (2008) and 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.

Standard of Review

The standard of review of findings of fact is "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (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. *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004); *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). "The construction of a statute and its application to the facts of a case are questions of law." *Larsen-Ball v. Ball*, 301 S.W.3d 228, 232. A trial court's conclusions of law are reviewed de novo on the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. Statute of Limitations

Employer's first contention is that Employee's petition was barred by the one-year statute of limitations set out in Tennessee Code Annotated section 50-6-203(i) (2008), which states that "[p]roceedings to obtain a judgment in the case of the failure of the employer for

thirty (30) days to pay any compensation due under any settlement or determination shall be filed within one (1) year after the default." It is undisputed that Dr. Chandler recommended an EMG study on April 30, 2008 and that Employer notified Employee and Dr. Chandler in writing on May 8, 2008 of the decision to decline payment for that test. Employer argues that the last day on which the limitation period could have commenced is thirty days after May 8, 2008, or June 7, 2008, and that Employee's petition had to be filed on or before June 7, 2009, to be timely. In response, Employee contends that "there is no authority for the proposition that there is a statute of limitations to enforce an Order of the Court."

The trial court treated Employee's petition for contempt as a motion made pursuant to Tennessee Code Annotated section 50-6-204(b)(2), and Employee's assertion that her petition was not subject to any limitations period is simply incorrect. Although Tennessee Code Annotated section 50-6-204(b)(2) does not set out any specific time period for the filing of a motion to compel medical care, the relief sought by Employee for payment of medical treatment related to her work injury falls within the broad language of Tennessee Code Annotated section 50-6-203(i).

For the purposes of this case, we agree with Employer that the one-year limitation period commenced no later than June 7, 2008, which is the thirtieth day after Employer mailed Employee and Dr. Chandler the denial letter. We also agree with Employer that Employee's petition had to be filed within one year of June 7, 2008, to have been filed within the limitation period provided in Tennessee Code Annotated section 50-6-203(i). The appellate record indicates that Employee's petition was filed on June 2, 2009 at 11:25 a.m. Therefore, since Employee's petition was filed within one year of June 7, 2008, we conclude that the trial court did not err in finding that Employee's petition was timely filed.

2. Exhaustion of Administrative Remedy

Employer next contends that Employee's petition is barred by her failure to exhaust her administrative remedies by (1) failing to request a benefit review conference and (2) failing to participate in the Utilization Review Procedure provided for in Tennessee Code Annotated section 50-6-124(a) (2008). The first assertion is based upon Tennessee Code Annotated section 50-6-203(a)(1), which currently provides:

> No claim for compensation under this chapter shall be filed with a court having jurisdiction to hear workers' compensation matters, as provided in § 50-6-225, until the parties have exhausted the benefit review conference process provided by the division of workers' compensation.

The benefit review conference requirement of Tennessee Code Annotated section 50-6-203(a) applies to injuries that occurred on or after January 1, 2005. *See., e.g., Lynch v. City of Jellico*, 205 S.W.3d 384, 390-91 (Tenn. 2006). The injury in this case occurred on February 14, 2001. Since the injury in this case occurred prior to January 1, 2005, the benefit review conference requirement of Tennessee Code Annotated section 50-6-203(a) does not apply to this injury. We conclude that the trial court did not err in finding that Employee's petition was not barred by her failure to request a benefit review conference.

Tennessee Code Annotated section 50-6-124, which establishes the utilization review system, was in effect at the time this injury occurred, and the Supreme Court examined that statute in *Kilgore v. NHC Healthcare*, 134 S.W.3d 153 (Tenn. 2004). In *Kilgore*, as in this case, the employer argued that Tennessee Code Annotated section 50-6-124(d) implicitly required an injured employee to appeal a denial of medical care by a utilization review provider to the Commissioner of Labor and Workforce Development before filing an action in court. *Id.* at 157. The Supreme Court rejected that contention and held "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)." *Id.* at 158.

Employer argues that *Kilgore* is distinguishable because the settlement in that case provided medical benefits to the employee for only two years, while the settlement at issue in this case provides for lifetime medical benefits. The Court in *Kilgore* only briefly referenced a statement by the trial court concerning the two-year provision, and we find nothing in the language or reasoning of *Kilgore* that limited its holding and application to cases that provided medical benefits for only a limited duration of time.

Employer also contends that this panel should reconsider and overrule *Kilgore* in light of certain amendments to the workers' compensation laws. Specifically, Employer asserts that the amendments that added the benefit review conference process demonstrates the general assembly's intent to require employees seeking medical treatment to exhaust all administrative appeals, including the utilization review program, before seeking judicial relief. First, this panel does not have the authority to overrule *Kilgore*. Also, the injury in this case occurred in 2001, and the amendments that added the benefit review conference process do not apply to injuries that occurred prior to January 1, 2005. *See Lynch*, 205 S.W.3d at 390-91. Additionally, we are not persuaded that the amendments creating the benefit review conference process affected the application of the holding of *Kilgore* to pre-January 1, 2005 injuries.[1] Accordingly, we conclude that the trial court did not err in finding

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[1]As did the panel in *Mayes v. Peebles*, E2009-02030-WC-R3-WC, 2010 WL 3323742, at * 3 n.1 (continued...)

that Employee's petition was not barred by her failure to participate in the Utilization Review Procedure provided for in Tennessee Code Annotated section 50-6-124(a).

3. *Causation*

Employer further contends that the trial court erred by finding that Employee sustained her burden of proof that the proposed testing was causally related to her 2001 injury. In support of its contention, Employer points to the opinion of Dr. Andrew Cole, who reviewed the proposed treatment for Genex, the utilization review provider. Employer also points out that Employee had not seen Dr. Chandler for almost three years, from June 2005 until April 2008, at the time she returned to him, and that Dr. Chandler apparently did not obtain a history for that period.

Dr. Chandler is Employee's authorized treating physician, and there is a rebuttable presumption that treatment or testing ordered by him is reasonable and necessary for the treatment of the work injury. *Russell v. Genesco, Inc.*, 651 S.W.2d 206, 211 (Tenn. 1983). Dr. Chandler's opinion was presented by means of a deposition, in which he explained his reasoning and was subjected to cross-examination by Employer. In contrast, Dr. Cole's opinion was expressed in a letter placed into evidence as an exhibit, and Dr. Cole did not actually examine Employee. It is unclear what records or other information Dr. Cole reviewed in forming his opinion, and Dr. Cole was not subjected to cross-examination. Taking all of these factors into consideration, we conclude that the evidence does not preponderate against the trial court's finding that the proposed test is reasonably necessary for the treatment of Employee's injury.

4. *Attorney's Fees*

Employer's final contention is that the trial court erred by awarding attorney's fees, expert witness fees, and court reporter fees to Employee. Specifically, Employer argues that it was simply making a good faith effort to follow the utilization review process provided for in Tennessee Code Annotated sections 50-6-124 and that it is therefore unfair that it be required it to pay Employee's attorney's fees, expert witness fees, and court reporter fees. The trial court did state that it believed Employer was attempting to follow the utilization review guidelines, that the guidelines were not entirely clear, and that Employer's decision to deny treatment was not made in bad faith.

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[1](...continued)
(Tenn. Workers' Comp. Panel Aug. 23, 2010), we express no opinion concerning the effect the amendments to Tennessee Code Annotated sections 50-6-203(a) and -239(a) (2008) may have on the application of *Kilgore* to cases involving injuries that occurred on or after January 1, 2005.

Tennessee Code Annotated section 50-6-204(b)(2) provides that "a court may award attorney's fees and reasonable costs to include reasonable and necessary court reporter expenses and expert witness fees for depositions and trials incurred when the employer fails to furnish appropriate medical . . . treatment or care . . . to an employee provided for pursuant to a settlement or judgment." This section does not state that attorney's fees may be awarded only when there is a bad faith denial of medical care, and we are not inclined to read such a requirement into this section. We conclude that the trial court did not err in awarding attorney's fees, expert witness fees, and court reporter fees in this case.

Employee requests that the Court award her the attorney's fees she has incurred on appeal. Employee does not contend that the appeal was frivolous. Instead, she cites to Tennessee Code Annotated section 50-6-204(b)(2) and *Forbes v. Wilson County Emergency District 911 Board*, 966 S.W.2d 417 (Tenn. 1998), as authority for granting her attorney's fees on appeal. *Forbes* is distinguishable in that the attorney's fees awarded in that case were awarded pursuant to the Tennessee Human Rights Act and not the worker's compensation law. *Id.* at 422. An award of attorney's fees, however, is one of the remedies provided by Tennessee Code Annotated section 50-6-204(b)(2), and we have interpreted this section to include "award of attorney's fees incurred in pursuing an appeal on the issues of medical care." Tharpe v. Emerson Elec. Co., No. W2007-01037-SC-WCM-WC, 2008 WL3892029, at *3 (Tenn. Workers' Comp. Panel Aug. 22, 2008) (observing that this interpretation of section 50-6-204(b)(2) "is consistent with the purpose of that section"). We see no reason why that remedy should not extend to employees who are the successful party on the appeal of these cases. Employee was the prevailing party on this appeal. We conclude that she is entitled to the attorney's fees on appeal that were reasonably necessary to compel the Employer provide her medical treatment. The issue is remanded to the trial court for determination of the amount of the reasonable attorney's fee to be awarded to Employee.

Conclusion

The judgment of the trial court is affirmed, and the issue of the amount of reasonable attorney's fees to be awarded to Employee for this appeal is remanded to the trial court. Costs are taxed to Emerson Electric, and its surety, for which execution may issue if necessary.

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Tony A. Childress

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 21, 2011

BARBARA ANN HARVILLE v. EMERSON ELECTRIC COMPANY

Circuit Court for Henry County
No. 2009

No. W2010-01011-WC-R3-WC - Filed July 6, 2011

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 on appeal are taxed to the Appellant, Emerson Electric Company, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM