



IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
Assigned on Briefs May 11, 2020

**MARY DENSON v. VIP HOME NURSING AND REHABILITATION
SERVICE, LLC**

**Appeal from the Circuit Court for Putnam County
No. 02-N-0010 Jonathan Young, Judge**

No. M2019-02145-SC-R3-WC – MAILED JUNE 18, 2020

The only issue in this workers' compensation appeal is whether the trial court erred in awarding attorney's fees. An employee sustained a compensable injury to her back at work. The settlement agreement resolving her workers' compensation claim required her employer to pay her future medical expenses. When her employer refused to pay for prescribed pain medication, she filed a petition for contempt and to compel payment. After her employer reversed its denial of payment, the trial court awarded her \$7,500 in attorney's fees. We affirm the judgment and remand the case to the trial court for determination of reasonable attorney's fees to be awarded to the employee for this appeal.

**Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries
occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Circuit Court Affirmed; Remanded**

CORNELIA A. CLARK J., delivered the opinion of the court, in which ANDY D. BENNETT, J., and WILLIAM B. ACREE, JR., SR.J., joined.

Alex B. Morrison and Tiffany B. Sherrill, Knoxville, Tennessee, for the appellant, VIP Home Nursing and Rehabilitation Service, LLC.

Gregory L. Groth, Cookeville, Tennessee, for the appellee, Mary Denson.

OPINION

Factual and Procedural Background

In 2001, Mary Denson (“Employee”) sustained a compensable injury to her back while working for VIP Home Nursing and Rehabilitation Service, LLC (“Employer”). In 2004, the parties settled the workers’ compensation claim. The order approving the settlement required Employer to pay Employee’s authorized future medical expenses. For several years, Employer paid for pain management treatment by Employee’s authorized treating physician, Dr. Thomas Scott Baker.

On August 11, 2017, Employee filed a Petition for Contempt and to Compel Compliance with Court Order, alleging that Employer had refused to pay for pain medication prescribed by Dr. Baker. Employer filed an answer to the petition, denying that it had refused to pay for any reasonable and necessary medication prescribed by Dr. Baker. On December 12, 2017, Employer filed a motion to compel an independent medical evaluation (“IME”) of Employee. The trial court reserved judgment on the motion pending the deposition of Dr. Baker.

On October 24, 2019, Employee filed an affidavit from her attorney, seeking a total of \$9,116.69 for attorney’s fees and expenses. That same day, Employer filed a response, acknowledging that it had reversed its denial of payment for the pain medication but disputing Employee’s entitlement to attorney’s fees and their reasonableness. The next day, October 25, 2019, the trial court held a hearing on the petition. No witnesses testified, and no exhibits or depositions were entered into evidence. The hearing was not transcribed.

By order filed November 8, 2019, the trial court awarded Employee attorney’s fees in the amount of \$7,500 and denied Employer’s motion for an IME. Employer filed a statement of the evidence, to which Employee filed objections. The trial court filed an order on March 25, 2020, pursuant to Tennessee Rule of Appellate Procedure 24(e) and (f). The trial court described its familiarity with the underlying workers’ compensation case and clarified that it was undisputed at the hearing that the medication Dr. Baker had prescribed for Employee was causally related to her work injury. The trial court also clarified what portions of the record it had considered when ruling on Employee’s petition for contempt and request for attorney’s fees. The trial court noted that it had considered the affidavit of Employee’s attorney and the arguments Employer made in its brief in opposition to awarding Employee attorney’s fees. The trial court pointed out that it had not awarded Employee the full amount of the requested fees. The trial court also corrected the record to include a finding that Employer was in contempt.

Analysis

“Review of the trial court’s findings of fact shall be de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding[s], unless the preponderance of the evidence is otherwise.” Tenn. Code Ann. § 50-6-225(e)(2) (2014) (applicable to injuries occurring prior to July 1, 2014). Questions of law are reviewed de novo with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009) (citations omitted).

In its appeal, Employer challenges Employee’s entitlement to attorney’s fees and their reasonableness. This 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 pursuant to Tennessee Supreme Court Rule 51.

Entitlement to Attorney’s Fees

A trial court has discretion to award attorney’s fees and reasonable costs when an employer fails to furnish appropriate medical treatment pursuant to a settlement or judgment. Tenn. Code Ann. § 50-6-204(b)(2) (2014) (applicable to injuries occurring prior to July 1, 2014). This statute provides:

In addition to any attorney fees provided for pursuant to § 50-6-226, a court may award attorney 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, 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.

Id.

Employer argues in its brief, initially lodged as premature on February 24, 2020, that the trial court erred in awarding attorney’s fees because the trial court made no finding that Employer was in contempt and, by failing to come forward with any evidence showing that the disputed medical treatment (i.e., the pain medication) was causally related to the work injury, Employee failed to prove that Employer was in contempt. Employer declined to file a reply brief to clarify its argument after the trial court entered its March 25, 2020 order, which resolved Employee’s objection to Employer’s statement of the evidence and clarified the record to state that it was undisputed at the hearing that the medication Dr. Baker had prescribed for Employee was causally related to her work injury. The trial court’s March 25, 2020 order also clarified that it had found Employer in contempt.

Tennessee Rule of Appellate Procedure 24(e) states:

If any matter properly includable is omitted from the record, is improperly included, or is misstated therein, the record may be corrected or modified to conform to the truth. *Any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court. Absent extraordinary circumstances, the determination of the trial court is conclusive.* If necessary, the appellate or trial court may direct that a supplemental record be certified and transmitted.

Tenn. R. App. P. 24(e) (emphasis added). Rule 24(e) plays a central role here because this case is an example of how *not* to prepare a record for appeal. No transcript of the hearing before the trial court was prepared or filed. The parties agree that no witnesses were called to testify at the hearing and no documents were formally introduced into evidence. Yet, Employer submitted a statement of evidence, to which Employee objected. In its March 25, 2020 order resolving the parties' dispute about the statement of evidence, the trial court clarified that, before granting Employee's request for attorney's fees, it actually had considered the affidavit and accompanying itemization Employee's attorney submitted, even though these matters were apparently not formally introduced into evidence at the hearing, and that it also had considered the brief and arguments Employer advanced in opposition to Employee's request for attorney's fees.¹ The trial court also stated, contrary to Employer's assertion, that the issue of whether the prescribed medication was causally related to Employee's work injury was *undisputed* by the time of the hearing. The trial court's determinations about these matters are "conclusive." Tenn. R. App. P. 24(e). "The procedure for correction or modification of the record reflects the policy of avoiding technicality and expediting a just resolution on the merits by according deference to the trial court's decision on which matters are properly includable in the record, thereby avoiding additional litigation on that subject alone." *Bradshaw v. Daniel*, 854 S.W.2d 865, 868 (Tenn. 1993). Rule 24(e) also reflects the reality that "the trial judge is in the best position to determine which matters are necessary to 'convey a fair, accurate and complete account of what transpired with

¹ These documents were included in the technical record and relied upon by the trial court in its ruling. The Supreme Court has held that a trial court's reliance upon documents included in the technical record may be sufficient to place the documents into evidence. *See State v. Bobadilla*, 181 S.W.3d 641 (Tenn. 2005). "The better practice, however, is to mark the document as a trial exhibit." *Layman v. Vanguard Contractors, Inc.*, 183 S.W.3d 310, 316 n.5 (Tenn. 2006).

respect to those issues that are the bases of appeal.” *Id.* (quoting Tenn. R. App. P. 24(a)) (citing *Artrip v. Crilley*, 688 S.W.2d 451, 453 (Tenn. Ct. App. 1985)). Employer has failed to establish any “extraordinary circumstances” to overcome the trial court’s conclusive determinations about what issues were disputed at the October 25, 2019 hearing and about what documents the trial court considered as evidence in making its decision.

Employer’s reliance on *Young v. Sugar Hollow Properties, LLC*, No. E2017-00981-SC-R3-WC, 2018 WL 2357772, at *4 (Tenn. Workers’ Comp. Panel May 24, 2018) is misplaced. In that case, the Panel held that the trial court erred in awarding attorney’s fees because, at the hearing on the motion to compel medical benefits, Ms. Young offered no evidence to support her *disputed* claim that the requested medical treatment was causally related to her compensable injury. In contrast, by the time of the hearing on attorney’s fees in this case, it was undisputed that the requested medical treatment was causally related to Employee’s compensable injury. Again, in its March 25, 2020 order, the trial court “took notice that it was undisputed that the pain management, that Dr. Thomas Baker had rendered for all of these years for [Employee], was related to her work injury.”²

In this instance, Employer failed to furnish appropriate medical treatment pursuant to a settlement by refusing to pay for pain medication prescribed by Employee’s authorized treating physician. Employer then reversed its denial of payment after Employee filed a petition for contempt and to compel payment. Under these circumstances, the trial court did not abuse its discretion by awarding Employee attorney’s fees pursuant to Tennessee Code Annotated section 50-6-204(b)(2).

² The March 25, 2020 order also “correct[ed] the record” by indicating that the trial court had found Employer in contempt for “unilaterally terminat[ing] [Employee’s] pain medication without any reason to do so.” We note that, even if the trial court had not found Employer in contempt, this omission would not have precluded an award of attorney’s fees, as Employer suggests, because the law does not require a finding of contempt when a trial court awards attorney’s fees under section 50-6-204(b)(2). *See Harville v. Emerson Elec. Co.*, No. W2010-01011-WC-R3-WC, 2011 WL 11745136, at *1, *5 (Tenn. Workers’ Comp. Panel July 6, 2011) (treating a petition for contempt as a motion for medical treatment pursuant to section 50-6-204(b)(2), noting this section does not state attorney’s fees may be awarded only when there is a bad faith denial of medical care, and declining to read such a requirement into this section).

Reasonableness of Attorney's Fees

We next consider Employer's assertion that the attorney's fee award is unsupported by any proof, as Employee's attorney's affidavit was not introduced into evidence or, in the alternative, excessive. The ten factors set forth in Tennessee Supreme Court Rule 8, Rules of Professional Conduct 1.5(a) ("RPC 1.5(a)"), constitute the "correct legal standard" for determining the reasonableness of attorney's fees. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 169-70 (Tenn. 2011). The ten 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).

The Court in *Wright ex rel. Wright v. Wright* declined to place special emphasis on any of these factors. 337 S.W.3d at 180. Addressing the proper procedure, the Court instructed:

[T]he trial court should develop an evidentiary record, make findings concerning each of the factors, and then determine a reasonable fee that depends upon the particular circumstances of the individual case. To enable appellate review, trial courts should clearly and thoroughly explain the particular circumstances and factors supporting their determination of a reasonable fee in a given case.

Wright, 337 S.W.3d at 185-86 (internal citations, quotation marks, and brackets omitted). The Panel has applied *Wright* and approved the use of these factors in workers' compensation proceedings brought pursuant to section 50-6-204(b)(2). *Welcher v. Cent. Mut. Ins. Co.*, No. M2012-00248-WC-R3-WC, 2013 WL 1183314, at *7 (Tenn. Workers' Comp. Panel Mar. 21, 2013).

In the November 8, 2019 order, the trial court stated that it was aware of the proper procedure under *Welcher v. Central Mutual Insurance Co.* Regarding the first factor, the trial court found that the time and labor required in this case was substantial and that the skill and difficulty of the questions involved required expert legal advice which Employee's attorney, Mr. Groth, displayed. Regarding the second factor, the trial court found that acceptance of the case prevented Mr. Groth from accepting other work that would have maximized time for his fees. Regarding the third factor, the fee customarily charged in the locality for similar legal services, the trial court stated:

The Court reviewed the Affidavit submitted by Mr. Groth and finds that the Affidavit does set forth his time expended, even though during the hearing, Mr. Groth indicated that the Affidavit does not include any time for preparation of the brief which amounted to around four hours. The Court finds that in light of the defense counsel's arguments, the total fee requested by Mr. Groth is not warranted and therefore, the Court accordingly awards \$7,500.00 for his fees.

As to the fourth factor, the amount involved and the results obtained, the trial court acknowledged that the amount in dispute was not substantial but found that the other factors outweighed this factor. Regarding the fifth factor, the trial court stated:

The Court finds that the case was filed as a result of immediate need on behalf of the client and that there [were] time limitations imposed upon the client that were substantial as she needed her medication. The Court is aware that a person on narcotic pain medication needs that medication without any interruption to maintain quality of life. Therefore, the timing of getting the medication ordered was important. [Employee] was required to hire counsel soon after the medication was stopped and therefore it was

of vital importance to the client as far as getting the medication ordered as soon as possible.

As to the sixth factor, the trial court found that Employee had a lengthy relationship with her attorney who had obtained a good result for her in the original case. Regarding the seventh factor, the trial court found that Mr. Groth had been handling workers' compensation cases for thirty years, that he had an excellent reputation, and that he definitely had the ability to handle a case like this one. Regarding the final three factors, the trial court found that Mr. Groth charged an hourly fee, that the rate did not exceed what he routinely charges, and that the fee agreement was in writing.

Employer does not address the trial court's findings as to these factors. Instead, Employer first asserts that the fees as a whole should be denied because no affidavit of fees was entered into evidence during the October 25, 2019 hearing. As previously explained, by its March 25, 2020 order, the trial court clarified that it had considered the affidavit Employee's attorney filed before the October 25, 2019 hearing. The trial court's determination on this affidavit being properly part of the record is "conclusive" in the absence of extraordinary circumstances. Tenn. R. App. P. 24(e). Employer has shown none, and Employer's argument is without merit.

Employer next contends that, if the fees as a whole are not denied, then they should be reduced substantially. Employer challenges the inclusion of approximately fifteen hours designated to the dispute over whether Employee was required to attend an IME and approximately five hours associated with settlement negotiations and Employee's requested continuances. Employer presented these same arguments to the trial court. Employee responds that the time spent on the disputed IME was part of the underlying petition. The trial court found that, "in light of defense counsel's arguments," the total fee was not warranted, and the trial court therefore reduced the amount to \$7,500. Employer fails to demonstrate how the trial court abused its discretion by not further reducing the amount. We therefore affirm the trial court's judgment as to the amount of attorney's fees.

Employee seeks \$3,750 in additional attorney's fees incurred in this appeal. The Panel has interpreted section 50-6-204(b)(2) to include an award of attorney's fees on appeal to an employee who is the prevailing party on appeal. *Harville v. Emerson Elec. Co.*, No. W2010-01011-WC-R3-WC, 2011 WL 11745136, at *5 (Tenn. Workers' Comp. Panel July 6, 2011). We conclude that Employee is entitled to attorney's fees on appeal in this case and that the amount of reasonable attorney's fees to be awarded Employee for the appeal should be determined by the trial court.

Conclusion

The judgment of the trial court is affirmed. The case is remanded to the trial court for determination of the amount of reasonable attorney's fees to be awarded Employee for the appeal. Costs are taxed to VIP Home Nursing and Rehabilitation Service, LLC, for which execution may issue if necessary.

CORNELIA A. CLARK, JUSTICE