IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 24, 2011 Session

JEFFERY[1] IRONS v. K & K TRUCKING, INC. ET AL.

Appeal from the Chancery Court for Macon County
No. 3932 C.K. Smith, Chancellor

No. M2010-01280-WC-R3-WC - Mailed - April 25, 2011
Filed - July 14, 2011

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. The employee sustained an injury which resulted in a court-approved workers' compensation settlement. His authorized physician later recommended medical treatment. The employer's utilization review provider denied approval of the proposed treatment. The employer filed a motion for a medical examination pursuant to Tennessee Code Annotated section 50-6-204(d)(1) which is required if reasonable. The trial court found the employer's request to be unreasonable and denied the motion. The employer has appealed. We reverse the trial court's order and remand for entry of an order granting the motion.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

E. RILEY ANDERSON, SP.J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., J. and DONALD P. HARRIS, SR.J., joined.

Timothy A. Drown, Nashville, Tennessee, for the appellant, K & K Trucking, Inc.

B. Keith Williams and James R. Stocks, Lebanon, Tennessee, for the appellee, Jeffery Irons.

---

[1]Mr. Irons' first name is spelled both "Jeffery" and "Jeffrey" throughout the record. For the purpose of consistency, the former spelling will be used in this opinion.

MEMORANDUM OPINION

Factual and Procedural Background

Jeffery Irons ("Employee") filed a worker's compensation action against his ("Employer") K and K Trucking, Inc. alleging that he injured his foot and his lower back on June 10, 2004 when he fell from a ladder. The employer initially accepted the compensability of the foot injury, but denied that the back injury was work-related. The parties agreed to settle Employee's claim for both injuries based upon 83.8% permanent partial disability and future medical treatment in accordance with the workers' compensation act. The settlement was approved by the trial court on August 11, 2006. Dr. Michael Moore, a physical medicine specialist, became Employee's authorized treating physician.

On June 6, 2005, the Employer filed a motion pursuant to Tennessee Code Annotated section 50-6-204(d)(1) (2008 & Supp. 2010), requesting that Employee be ordered to submit to an examination by Dr. Jeffrey Hazlewood. The trial court denied the motion without reciting a reason. Again in December 2008, Employer filed a motion pursuant to Tennessee Code Annotated section 50-6-204(d)(1), requesting that Employee be ordered to submit to an examination by Dr. Jeffrey Hazlewood. The Employer recited that the employee had been receiving treatment for his lumbar spine condition by the treating physician Dr. Michael Moore. On March 12, 2008 Dr. Moore ordered an MRI which showed mild lumbar levoscoliosis with mild degenerative findings and foraminal narrowing. Dr. Moore was asked whether the employee's lumbar condition was directly related to the workplace injury of June 10, 2004 and he responded that the MRI findings cannot be directly attributed to his injury, but he has developed a chronic pain syndrome that is related to the trauma of his workplace injury.

The employer asked Dr. Jeffrey Hazelwood to review the medical records to determine whether Irons' treatment by Dr. Moore was directly related to the June 10, 2004 injury and whether the employer was required by its obligation under the August 2006 settlement order to approve the treatment. Dr. Hazelwood opined that the complaints of low back pain are much more likely than not to be due to the degenerative spine disease shown on the MRI and not related to the injury of June 10, 2004. Dr. Hazelwood also noted that it is important that employee's back pain began on December 19, 2004 and not at the time of the fall on June 4, 2004 and that he cannot give an opinion about the significant narcotics that are being prescribed for the employee without a history and physical examination. As a result of the foregoing the employer argues that the causal relationship between employee's work injury and Dr. Moore's treatment is in dispute. The record does not contain an order disposing of this motion, although the next trial court order in June 2009 ordered the employer to pay for Dr. Moore's treatment of trigger point injections.

Specifically, in May 2009, Employee filed a motion for contempt, based upon Employer's refusal to pay for trigger point injections proposed by Dr. Moore. The documents submitted in support of and opposition to that motion show that Employer had submitted the proposed treatment to its utilization review provider, as permitted by Tennessee Code Annotated sections 50-6-122 and -124 (2008). The utilization review provider declined to approve the proposed treatment, and the Employer based its refusal to pay on the provider's opinion. The trial court granted Employee's motion in July 2009, ordered the Employer to pay for the treatment, and awarded attorney's fees to the Employee. Employer filed a notice of appeal, but later voluntarily dismissed the appeal and paid for the treatment.

On March 4, 2010, the Employee filed another motion for contempt. The Employer had denied payment for additional trigger point injections ordered by Dr. Moore based upon the finding of its utilization review provider that the medical records did not document the trigger points, that Employee had declined to participate in physical therapy, and that there was no evidence that the previous injections had improved Employee's condition.

Specifically, Dr. Rebecca Ovsiowitz, an MD in Physical Medicine/ Rehabilitation reviewed Dr. Moore's proposed medical treatment and advised that the clinical findings did not support the medical necessity of treatment. She advised that it should be remembered that trigger point injections are considered an adjunct treatment and not a primary one. She said her recommendation was based on the following reasons:

> (1) There is no documentation of circumscribed trigger points with evidence upon palpation of a twitch response as well as referred pain. The medical records do not document clinical findings consistent with myofascial pain syndrome.
>
> (2) The patient declined physical therapy, and the medical records do not establish that the patient is performing an active home exercise program. The medical records do not establish failure of ongoing stretching exercises, physical therapy, NSAIDs and muscle relaxants to control pain. There should be evidence of continued ongoing conservative treatment including home exercise and stretching, however that has not been demonstrated in this case.
>
> (3) In addition, the medical records do not document any improvement in pain or function resulting from the prior

> lumbar trigger injections provided in December 2009. In fact, when re-evaluated on January 6, 2010 the patient's complaints were unchanged. Review of the progress reports reveal no change in the patient's pain medication use or ADLs. As per the guidelines, repeat injections are not recommended unless there is evidence of that greater than 50% improvement.

After the filing of this motion, Employer agreed to pay for the treatment, but filed another motion for an independent medical examination pursuant to Tennessee Code Annotated section 50-6-204(d)(1).

The trial court denied the motion, stating:

> I'm going to deny your request and let you take it up. I think that it's -- it's y'all's doctor. I don't see any reasonable reason for it, except hoping that you get another doctor to say he doesn't need it so you don't have to pay him, is the only reason I can see.

The Employer has appealed from the trial court's order, contending that the trial court erred by implicitly finding that it did not have a right to have Employee examined by a physician of its choosing under section 50-6-204(d)(1), and by finding that its request for such an examination was not reasonable.

Standard of Review

The standard of review of issues of fact is denovo upon the record of the trial court accompanied by a presumption of correctness of the findings, 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, 900 (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. Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). In this case the Employer challenges the trial court's interpretation and application of Tennessee Code Annotated section 50-6-204 (d)(1). "The interpretation of a statute and its application to undisputed facts involve questions of law." Seiber v. Reeves

Logging, 284 S.W.3d 294, 298 (Tenn. 2009). A trial court's conclusions of law are reviewed denovo upon the record with no presumption of correctness. Id.

Analysis

We are asked to decide whether the trial court was correct in denying employer's motion under Tennessee Code Annotated section 50-6-204(d)(1) to require the employee to submit to an independent physical examination because it was unreasonable.

The statute Tennessee Code Annotated section 50-6-204(d)(1) provides:

> The injured employee must submit to examination by the employer's physician at all reasonable times if requested to do so by the employer, but the employee shall have the right to have the employee's own physician present at the examination, in which case the employee shall be liable to the employee's physician for that physician's services.

The Tennessee Supreme Court recently discussed this statute in Overstreet v. TRW Commercial Steering Division, 256 S.W.3d 626 (Tenn. 2008), stating, "[i]n our view, a plain reading of . . . section 50-6-204 gives the employer a right to compel the employee to undergo an independent medical evaluation, so long as the request is 'reasonable.'" Id. at 636. The Court further noted that the language of subsection (8) of section 50-6-204 "indicates the requested examination must be reasonable, as a whole, in light of the surrounding circumstances." Id. at 637 n.4. Consistent with this reasoning, if an employer's request for such an examination is reasonable, then the trial court is obligated to grant it.

Employee contends, and the trial court found, that the request was unreasonable because Employer "has not demonstrated that causation is at issue with respect to the Defendant's [sic] treatment or that it reasonably appears that the treatment is for injuries other than those caused by the workplace incident."

In Trent v. American Service Co., 185 Tenn. 298, 206 S.W.2d 301 (Tenn. 1947), the Supreme Court observed that one of the purposes of section 50-6-204(d)(1), as then codified, was to permit an employer to "ascertain[] whether the ailments from which the employee suffers at some period subsequent to the injury is due to that injury or to some other cause not connected with his or her employment." 206 S.W.2d at 303. This principle was reaffirmed by the Court in Overstreet. 256 S.W.3d at 637. In Myers v. Vanderbilt University, No. M2008-02009-WC-R3-WC, 2010 WL 1854141 (Tenn. Workers' Comp. Panel May 11, 2010), the Special Workers' Compensation Appeals Panel evaluated the

reasonableness of a trial court's denial of an employer's request for an examination under section 50-6-204(d)(1). It stated:

> We do not discount the validity of the trial court's observation that an additional medical evaluation may not be particularly helpful to the court in this case. However, in light of the continuing disagreement among the physicians regarding the precise cause of Ms. Myers's allergies, and therefore, the means to treat them, we have concluded that the trial court erred by finding that Vanderbilt's request for a medical examination was unreasonable. Simply stated, the Tennessee Supreme Court has set the bar for unreasonableness of an employer's request significantly higher than the trial court did in the present case.

Id. at *6.

In this case, the Employer filed three motions for a physical examination of the employee after the injury of June 10, 2004, a period of over 5 years. All the motions were denied. The record contains evidence, in the form of an opinion of Dr. Hazlewood expressed in a letter dated July 14, 2008, that there was a question concerning whether or not Employee's current symptoms were related to his work injury and that his complaints of pain in his back did not begin until December 19, 2004, more than 6 months after his foot injury in his workplace fall on June 4, 2004. In addition, there is a February 18, 2010 "Utilization Review Determination" by Dr. Rebecca Ovsiowitz, stating that the additional trigger point injections proposed by Dr. Moore were not medically necessary to treat the Employee's condition. Based upon these medical opinions, the Employer had a good faith reasonable basis for questioning both the causation and the necessity of the proposed treatment and for filing a motion for a physical examination of the employee. Applying the standards set out in Overstreet, Trent, and Myers, we conclude that the trial court abused its discretion in its finding that Employer's request for a medical examination of Employee was unreasonable.

Conclusion

The judgment of the trial court is reversed. The case is remanded to the trial court for entry of an order granting Employer's motion. Costs are taxed to Jeffery Irons and his surety, for which execution may issue if necessary.

_____

E. RILEY ANDERSON, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JEFFERY IRONS v. K & K TRUCKING, INC. ET AL.

Chancery Court for Macon County
No. 3932

No. M2010-01280-SC-WCM-WC - Filed - July 14, 2011

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Jeffery Irons pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Jeffery Irons and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

William C. Koch, Jr., J., not participating