IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 22, 2019 Session

NATCHEZ TRACE YOUTH ACADEMY ET AL. v. CHRISTOPHER TIDWELL

Appeal from the Chancery Court for Humphreys County
No. 2016-CV-2 Larry J. Wallace, Judge

No. M2018-01311-SC-R3-WC – Mailed July 12, 2019

Christopher Tidwell ("Employee") suffered facial injuries during the course of his employment at Natchez Trace Youth Academy ("Employer") while restraining a resident during an altercation. Employee filed this workers' compensation claim alleging both physical and psychological injuries resulting from the incident. After a trial, the court concluded Employee did not make a meaningful return to work and awarded benefits for physical and psychological injuries, using a 4.85 multiplier. Employer has appealed, claiming the trial court erred in concluding Employee failed to make a meaningful return to work; in awarding additional temporary benefits; in determining Employee suffered a compensable psychological injury; and in awarding certain discretionary costs. 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the trial court's award of benefits beyond the statutory 1.5 cap, additional temporary benefits, and its finding of psychological injury. We reverse the award of certain discretionary costs.

Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right;
Judgment of the Chancery Court Affirmed in part and reversed in part.
(Applicable to injuries occurring before July 2014)

ROBERT E. LEE DAVIES, SR. J., delivered the opinion of the court, in which ROGER A. PAGE, J. and WILLIAM B. ACREE, SR. J., joined.

Gregory H. Fuller and Christopher R. Brooks, Brentwood, Tennessee, for the appellants, Natchez Trace Youth Academy, and Keystone Continuum, LLC

Charles L. Hicks, Camden, Tennessee, for the appellee, Christopher Tidwell

OPINION

Factual and Procedural Background

Christopher Tidwell was employed as a youth service officer at Natchez Trace Academy ("Employer") where he supervised troubled youth. On June 28, 2013, Employee was struck in the face while restraining a resident during an altercation. He suffered injury and eventually had plastic surgery on his face. Over the course of his treatment, Employee was seen by various health professionals. He claimed both physical and psychological injuries resulting from the incident. After exhausting the benefit review process, Employee filed a complaint on January 5, 2016, to recover workers' compensation benefits.

The case came on for trial on July 31, 2017, with the court hearing testimony from Employee, Anna Graham (Employee's fiancé), and Tamra Gadberry (Employer's human resources director). The parties submitted the depositions of Dr. John Griffin, Dr. Stephen Montgomery, and Dr. Kent Higdon. The trial court also considered a number of exhibits, including Dr. Richard Fishbein's C-32 and report.

Testimony of Employee

Mr. Tidwell, age 43, has a high school diploma and lives in Centerville, Tennessee with his fiancé and her minor children. Upon graduation from high school, Mr. Tidwell worked as a forklift operator and a material handler. He subsequently worked with developmentally disabled individuals and eventually was employed by Natchez Trace Youth Academy ("Academy") as a youth services officer. In his position, Mr. Tidwell oversaw the residents' daily activities and intervened when the residents became unruly. One such incident occurred on June 28, 2013, after Mr. Tidwell had been on the job for approximately seven months. As the residents were preparing for lunch, one juvenile "jumped on" another student. As Mr. Tidwell moved in to break up the fight, a third youth blindsided him, striking Mr. Tidwell in the face with a sharp object. Although he was bleeding profusely, Mr. Tidwell restrained the youth until he was relieved by another staff member.

Mr. Tidwell first went to the nursing station but was later transported to the emergency room at Three Rivers Hospital in Waverly. The emergency room staff

"glue[d]" the cuts and released him; however, the bleeding did not stop until the next day. He explained that his face was "swelled real bad," his lip had "drawn down," and he had no feeling on the right side of his face. A few days later, he chose Dr. Noel Dominguez from a panel of doctors provided by Tamra Gadberry, Academy's human resources director.

According to Mr. Tidwell, Dr. Dominguez kept him off of work for about a week and then allowed him to return to work on light duty. He returned to work during the overnight shift with the understanding he would not interact with the residents. On a couple of mornings, however, Mr. Tidwell was required to wake up the children because no staff had arrived to replace him. His return to work lasted only a "week or two" because Mr. Tidwell became so nervous, he hyperventilated. Mr. Tidwell said he was "terrified" by the thought that one of the residents could blindside him again.

On a return visit, Dr. Dominguez prescribed medication for anxiety and depression. According to Mr. Tidwell, Dr. Dominguez told him he should be off work until he saw a psychiatrist and provided him with an excuse form, which he gave to Ms. Gadberry. Mr. Tidwell denied having anxiety or depression before the work incident.

For his physical injury, Dr. Dominguez referred Mr. Tidwell to Dr. Garrison Strickland, a neurologist, who then made a referral to Dr. Kent Higdon at Vanderbilt. After obtaining approval from Utilization Review, Dr. Higdon performed surgery on Mr. Tidwell's face. During a follow-up visit, Mr. Tidwell reported feeling suicidal. Dr. Higdon's staff immediately escorted him to the emergency department where he was admitted for two days of psychiatric care.

After the Department of Labor ordered Employer to provide psychiatric treatment, Mr. Tidwell saw Dr. Greg Kyser for one session and Dr. Kathryn Steele for a few sessions of therapy. Mr. Tidwell recalled being tested by Dr. Kyser and Dr. Pamela Auble and being diagnosed with Post Traumatic Stress Discover (PTSD) and depression. He believed the counseling sessions with Dr. Steele produced mixed results.

Since his injury, Mr. Tidwell exhibits little patience and a very high anger level; he suffers from depression and has trouble concentrating. According to Mr. Tidwell, the Academy has no jobs he is able to perform. He does not believe he can return to a position that would require him to work with mentally disabled individuals or troubled youth. He likewise does not believe he can return to factory work because he would have to "deal with people." In fact, he does not believe there is any job he can do because he "can't get along with people."

On cross-examination, Mr. Tidwell said Dr. Dominguez advised him he could not return to work until he had been released by a psychiatrist, which Mr. Tidwell said had not occurred. Mr. Tidwell was asked to examine the two work excuses from Dr. Dominguez that bore the same date. He agreed that, although the first excuse indicated he should not return to work until after a psychiatric evaluation, the second excuse indicated he was not to return to work until 8/26/13. Mr. Tidwell agreed that Dr. Higdon had released him from a "physical [injury] standpoint," and he was not aware of any restrictions placed on him by Dr. Auble or Dr. Montgomery.

Mr. Tidwell said his employment at the Academy ended due to some confusion. He acknowledged Dr. Higdon had returned him to full duty without restrictions at the time he received a letter from Ms. Gadberry about returning to work. Although he agreed that the letter contained a response deadline of April 25, 2014, Mr. Tidwell could not state with certainty whether he called her before the deadline. He said he called Ms. Gadberry "around the deadline" and told her he needed to speak with his attorney before making a decision but could not recall the specifics of his conversation with Ms. Gadberry about returning to work.

During re-direct and re-cross examination, counsel battled over when Dr. Kyser imposed restrictions on Mr. Tidwell. In an addendum from Dr. Kyser dated May 28, 2014, Dr. Kyser indicated Mr. Tidwell could return to work on light-duty with no interaction with young offenders. Dr. Kyser also noted that "the prognosis for [Mr. Tidwell] returning to his former employment duties would be poor." Mr. Tidwell agreed this was the first time Dr. Kyser had provided any kind of work restrictions. He further acknowledged that Employer's offer to return to work (April 25, 2014) preceded these restrictions, but he still claimed that Dr. Kyser had not yet released him and that Dr. Dominiguez's order was still in place.

Mr. Tidwell was recalled to the stand following the testimony of Ms. Gadberry. When asked if he ever told Ms. Gadberry he could return to work with no restrictions, he responded, "Not to my knowledge."

Testimony of Anna Graham

Anna Graham resides with Mr. Tidwell and her two children. She met Mr. Tidwell in 2012, when he was still married, but separated, from his second wife. She knew Mr. Tidwell before the incident at the Academy on June 28, 2013, and she has noticed changes in him since the injury. Ms. Graham testified that before the injury Mr.

Tidwell was "a very confident, happy, very upbeat person" but after the incident Mr. Tidwell became isolated. She described Mr. Tidwell as "very short-tempered" and "very emotional." Ms. Graham described an incident during which Mr. Tidwell struck another child and was arrested. In contrast, she said Mr. Tidwell was very loving with her children; but agreed he had a short fuse, and occasionally required his own space. Ms. Graham observed Mr. Tidwell did not like to be in groups; was not happy and "his smile was gone," adding that one side of his face stays "dropped down."

While Ms. Graham acknowledged that Mr. Tidwell occasionally attended her boys' sporting events and went to the grocery or on vacation, she testified Mr. Tidwell had not worked since the injury at the Academy and she did not believe Mr. Tidwell was capable of working anywhere due to his fear of being assaulted.

Testimony of Tamra Gadberry

Tamra Gadberry is the human resources director at Natchez Trace Youth Academy. Although she described herself as the "go-to person" in charge of returning an employee to work after an injury, hiring and firing decisions are made by a team. Ms. Gadberry spoke with Mr. Tidwell on several occasions about his workers' compensation case and was the "main point of contact." She recalled that Mr. Tidwell was hired as a youth care worker, was well-qualified, and was a good employee overall.

Ms. Gadberry explained an investigation determined that a pushpin or thumbtack was used by the student who punched Mr. Tidwell in the face. She recalled that Mr. Tidwell returned to work on light duty for a week or two after the incident. However, Mr. Tidwell stopped working light duty due to a medical note regarding surgery. Ms. Gadberry explained that when an employee is out of work for an injury, Employer works with the employee within the physician's restrictions and tries to return the employee back to work whenever possible. She recalled that Mark Green (loss control manager at UHS – Employer's parent company) told her Mr. Tidwell was returned to full duty in April 2014. At that time, Employer had a youth care worker position to offer him at the same rate of pay and the same number of hours.

Ms. Gadberry's attempts to reach Mr. Tidwell by telephone and by email were unsuccessful, so she sent a letter dated April 14, 2014, asking Mr. Tidwell to contact her by April 25, 2014, to discuss his return to work. Her letter explained that failure to respond by the deadline would be considered abandonment of the job according to the employee handbook. Although Mr. Tidwell made no attempt to set up a meeting prior to the deadline, he left a voicemail with Ms. Gadberry around Friday, May 2, indicating he

had not contacted Employer based on the advice of his attorney. When Ms. Gadberry spoke with Mr. Tidwell the following Monday, he told her he was ready to return to work with no restrictions. However, when Ms. Gadberry spoke to the team about his late request to return to work, the team denied it. She pointed to policies in the employee handbook, regarding attendance and job abandonment.

On cross-examination, Ms. Gadberry recalled receiving a note from Dr. Dominguez indicating Mr. Tidwell should not be put back to work until he was cleared by a psychiatrist. She also agreed Employer had no job that would not involve interaction with the residents in some fashion. Although Ms. Gadberry was aware Mr. Tidwell needed a psychiatric evaluation, she relied on the information provided to her in April 2014 from Mark Green, that Mr. Tidwell was released to full duty. Moreover, she was unaware of an addendum from Dr. Kyser that Mr. Tidwell would not be a good candidate to return to the Academy when he was made an offer to return to work on April 14.

Deposition of Kent Higdon, M.D.

Dr. Kent Higdon is a board-certified plastic surgeon at Vanderbilt Hospital. He first saw Mr. Tidwell on August 13, 2013, upon a referral from Dr. Garrison Strickland. An MRI revealed the nature and extent of Mr. Tidwell's facial injuries. Surgery was approved via Utilization Review and was performed on October 21, 2013. The surgery revealed scarring and lacerated muscles of the elevators of the upper lip. When Mr. Tidwell returned for the first follow-up visit on November 5, 2013, Dr. Higdon noted Mr. Tidwell's main issue was depression. When Mr. Tidwell told Dr. Higdon he was currently suicidal, Dr. Higdon's staff escorted him to the Emergency Department which resulted in a two-day evaluation. The evaluation indicated symptoms suggestive of PTSD. Dr. Higdon, noting he was not a psychiatrist, concurred. Although Dr. Higdon observed improvement with Mr. Tidwell's facial injuries, during a March 2014 visit, Mr. Tidwell continued to describe ongoing depression. During this time, Employer's workers' compensation carrier asked Dr. Higdon whether Mr. Tidwell had reached maximum medical improvement (MMI). Dr. Higdon concluded Mr. Tidwell had not reached MMI, noting PTSD and depression. Although Dr. Higdon believed Mr. Tidwell could return to work based solely on his face and scar, Dr. Higdon noted that Mr. Tidwell continued to indicate he was "very afraid."

On December 2, 2014, Dr. Higdon opined that Mr. Tidwell's face had shown improvement and that he was feeling better from a psychiatric standpoint. Therefore, he had reached MMI. Dr. Higdon assigned an impairment rating of eleven (11%) percent to

the body as a whole. He opined "a large component" of Mr. Tidwell's PTSD was the result of his work injury, noting "[i]t's hard to figure out whether the injury caused the problems with his wife, or they were simultaneously bothersome to him to make him be over the edge towards that diagnosis."

Dr. Higdon agreed that Mr. Tidwell should have been able to go back to work after the healing of his face injury "if he felt safe." He described the facial scar as "highly visible" and explained that Mr. Tidwell would have lasting effects such as an inability to suck through a straw and affected speech. Dr. Higdon did not believe the affected speech would impact his employability, depending on the job, and Dr. Higdon did not assign Mr. Tidwell any permanent restrictions.

Deposition of Stephen A. Montgomery, M.D.

Dr. Montgomery is a board-certified psychiatrist with staff privileges at Vanderbilt University Medical Center, retained by Mr. Tidwell's counsel to perform a psychiatric independent medical evaluation (PIME) on February 5, 2016. Dr. Montgomery reviewed the medical records of Dr. Garrison Strickland, surgical records of Dr. Kent Higdon, medical records from Waverly Medical Center, Three Rivers Hospital, and Horizon Medical Center, an independent psychiatric evaluation by Dr. Greg Kyser, a neuropsychological evaluation by Dr. Pamela Auble, an independent medical evaluation by Dr. Richard Fishbein, and therapy records from Kathryn Steele, Psy. D.

Dr. Montgomery interviewed Mr. Tidwell for two and one-half hours regarding his injury and current functioning. He also obtained psychiatric, educational, occupational, and family histories. Dr. Montgomery testified that immediately after the incident at the Academy, Mr. Tidwell reported increased anxiety, increased stress, anxious mood, crying spells, decreased concentration, low energy, feelings of worthlessness, and flashbacks to the assault. He noted Mr. Tidwell continued to describe depression to his doctors, reporting his suicidal thoughts, nightmares and flashbacks, panic attacks, being hypervigilant, inability to sleep well, poor energy, isolation from others, paranoia, and auditory hallucinations.

Dr. Montgomery said that Mr. Tidwell had not reported any previous psychiatric problems; had never received counseling; or been prescribed psychiatric medications prior to the incident. Dr. Montgomery conducted certain psychological testing, including a specific test for malingering. The results were not consistent with malingering. Dr. Montgomery agreed with previous evaluators that Mr. Tidwell displayed symptoms of PTSD after the injury and had symptoms of "major depressive disorder." However,

because he was concerned about symptom exaggeration, Dr. Montgomery apportioned the impairment rating down to five (5%) percent permanent partial impairment to the body as a whole. He believed Mr. Tidwell could benefit from ongoing psychiatric treatment or counseling.

Dr. Montgomery agreed that auditory hallucinations are not typically seen with a diagnosis of PTSD and that Mr. Tidwell's marital issues could have contributed to his anxiety and depression, but Dr. Montgomery still opined that Mr. Tidwell's symptoms were more than 50 percent related to the June 2013 incident. Although Dr. Montgomery stated Mr. Tidwell could not return to the Academy, he agreed Mr. Tidwell could perform clerical work.

Deposition of John J. Griffin, M.D.

Dr. Griffin is a board-certified psychiatrist engaged in private practice in Nashville, Tennessee. He performed an independent psychiatric evaluation on August 17, 2015, at the request of Employer. Dr. Griffin found it problematic that the physicians who saw Mr. Tidwell during this initial period did not note that anxiety was a problem. Mr. Tidwell told Dr. Griffin about "flashbacks" that began several weeks after the incident. He also described nightmares, two to four times per week, and explained how he avoided crowds and fireworks. He told Dr. Griffin about his recurring hallucinatory-like phenomena two or three times per week during which he would hear voices of multiple people, including the person who struck him. He denied problems with anxiety prior to June 28, 2013. Dr. Griffin discussed Mr. Tidwell's prior marriages, including allegations of affairs, and his current relationship. Dr. Griffin observed that depression and anxiety are common when people have relationship issues.

Dr. Griffin did not agree with the other experts' diagnoses of PTSD. In his view, Mr. Tidwell has a personality disorder, which Dr. Griffin described as a chronic pattern of behavior that has symptoms including depression and anxiety. Dr. Griffin indicated personality disorder is partly genetic and partly based on one's developmental background and environmental experiences. He opined that Mr. Tidwell's condition predated the encounter with the youth at the Academy. However, Dr. Griffin agreed that mental health experts can have honest differences of opinion about PTSD diagnoses. Dr. Griffin recalled that Dr. Kyser, Dr. Auble, and others expressed concern about symptom exaggeration, particularly with regard to hallucinations. Dr. Griffin believed Mr. Tidwell could return to some type of work and disagreed that Mr. Tidwell suffered from any kind of psychiatric disorder caused by the June 28, 2013 injury. Dr. Griffin said he did not believe Mr. Tidwell's personality disorder was exacerbated by the events of June 28,

2013. In fact, he suggested Mr. Tidwell was using the incident at work to get more money, and there were reasons to question Mr. Tidwell's truthfulness.

C-32 & Report of Dr. Richard Fishbein

Dr. Richard Fishbein was retained by Mr. Tidwell's counsel to perform an IME on December 1, 2015. Dr. Fishbein opined that "[t]here is a direct causal relationship between the injury to Mr. Tidwell's face and his depression and PTSD. Dr. Fishbein opined Mr. Tidwell was unable to return to work due to his anxiety and depression. Dr. Fishbein noted that Mr. Tidwell could possibly return to some type of employment after continued psychological treatment. Noting Mr. Tidwell had reached MMI, Dr. Fishbein assigned a two (2%) permanent impairment to the body as a whole based on the facial injury and a five (5%) permanent impairment to the body as a whole based on depression and PTSD.

Trial Court Ruling

On June 20, 2018, the trial court issued its findings of fact and conclusions of law. The court concluded Mr. Tidwell suffered an injury when he was struck in the face by a resident of Natchez Trace Youth Academy. The court further concluded that as a result of the physical injury, Mr. Tidwell also developed depression and PTSD. The court accredited the proof from Dr. Higdon, Dr. Kyser, Dr. Montgomery and Dr. Fishbein. The court also noted the contributions of Drs. Auble and Steele regarding the psychiatric impairment. The court placed emphasis on Dr. Dominguez's work excuse indicating Mr. Tidwell needed a psychiatric evaluation before returning to work and the opinions of Dr. Kyser, Dr. Montgomery and Dr. Fishbein that Mr. Tidwell would not be a good candidate to return to work at the Academy as a youth service worker. The court gave less weight to Dr. Griffin's testimony because Dr. Griffin was missing some of the medical records. The trial court found that although Mr. Tidwell had been released from a physical standpoint, he had not been released from a psychiatric standpoint. As a result, the court concluded Mr. Tidwell did not abandon his job and did not make a meaningful return to work.

The trial court adopted the eleven (11%) permanent impairment rating assigned by Dr. Higdon for the physical injuries and the additional five (5%) permanent impairment rating assigned by Drs. Montgomery and Fishbein for the psychiatric injuries. The court applied a 4.85 multiplier for a 72.75% vocational disability rating for an award of $94,167.60. The court also ordered additional unpaid temporary total disability benefits for the period from March 17, 2014 to February 5, 2016 (MMI according to Dr. Montgomery) for an additional award of $32,360. Finally, the court ordered Employer to

pay certain itemized discretionary costs.

Standard of Review

The standard of review of issues of fact in a workers' compensation case is *de novo* 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) (2014) (applicable to injuries occurring prior to July 1, 2014). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Group 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). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

A. Meaningful Return to Work

Employer's first two issues challenge the trial court's determination that Employee failed to make a meaningful return to work. Employer argues there were no authorized physician-imposed work restrictions as of the expiration of Employer's offer to return to work; therefore, Employee abandoned his job when he failed to timely accept Employer's offer. Accordingly, benefits are limited to the 1.5 cap pursuant to Tenn. Code Ann. § 50-6-241.

When determining whether an employee has a meaningful return to work, the courts assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to work or to remain at work. Williamson v. Baptist Hosp. of Cocke County, Inc., 361 S.W.3d 483, 488 (Tenn. 2012) (citing Tryon v. Saturn Corp., 254 S.W.3d 321 (Tenn. 2008)). Although, the determination of the reasonableness of the actions of the employer and employee depend on the facts of each case, our courts have articulated three factors to consider in the analysis:

> (1) whether the injury rendered the employee unable to perform the job; (2) whether the employer refused to accommodate work restrictions 'arising from' the injury; and (3) whether the injury caused too much pain to permit the continuation of the work.

Id.

In the instant case, Employee made a brief return to work within a week or two of his injury with the caveat of limiting his interaction with the residents. As Employee explained, however, the return was short-lived because he was forced to have contact with the residents in the morning when no staff showed up to relieve him. Employee became nervous in that environment to the point of hyperventilating. This brief return occurred while Employee was in the care of Dr. Dominguez.

As the record demonstrates, Dr. Dominguez had apparently signed two work excuse forms bearing the same date. Most relevant here is the form which indicated Employee should not return to work until after a psychiatric evaluation and release from a psychiatrist. Employer challenges this restriction on several fronts. Initially, Employer argues that since Employee failed to establish that Dr. Dominguez was selected from a legitimate panel of physicians after his injury, his referral and restrictions should be given no weight. This argument was rejected by the Department of Labor workers' compensation specialist. The specialist noted that Employer failed to provide a panel as required by statute, yet paid for the initial treatment provided by Dr. Dominguez, including the August 16, 2013 visit during which Dr. Dominguez noted that a psychiatric referral was a "good idea." The specialist was not convinced Dr. Dominguez was an unauthorized treating physician on the date the referral was made, and the Department of Labor ultimately directed Employer to provide a panel of psychiatrists from which Employee chose Dr. Kyser. Based on our review of the record, we concur with the finding of the compensation specialist.

Next, Employer argues even if Dr. Dominguez's referral and restrictions were once valid, his restrictions had expired since he was not the authorized treating physician when Employee failed to timely accept Employer's offer to return to work. The issue of restrictions on Employee's ability to return to work is indeed confusing because of multiple referrals for both the physical and psychological injury tracks. As to Employee's physical injury, Dr. Dominguez referred Employee to Dr. Strickland, who in turn referred Employee to Dr. Higdon, who eventually became the authorized treating physician. With regard to Employee's psychological injuries, Dr. Dominguez's referral eventually led to the selection of Dr. Kyser as the authorized treating psychiatrist.

Employer relies upon the testimony of Ms. Gadberry, who received a notice from Mark Green that Employee had been fully released to return to work; however, she had not received a medical release from an authorized treating physician. Acting on Mr. Green's instructions, Ms. Gadberry attempted to communicate with Employee by telephone and email. When that proved unsuccessful, she sent him the letter of April 14, 2014 informing Employee there was an open position and providing a deadline to respond. Although Employee responded that he wanted to return to work, the deadline had expired, and his request was denied based on job abandonment.

While it is true that Dr. Higdon had released Employee to return to work on March 17, 2014, Dr. Higdon indicated that his opinion was solely as to Employee's physical injuries. Dr. Kyser, who was treating Employee for his psychological injuries, had not released Employee to return to full duty as of Ms. Gadberry's April 14, 2014 letter. Dr. Kyser's May 28, 2014 addendum, which occurred after the deadline expired, clearly indicates Employee was not ready to return to full duty.[1]

> In its order, the trial court specifically found:
> That as of May 25, 2014, the Plaintiff had not been released by a psychiatrist to return to any work and more importantly had not been released to return to work to Natchez Trace Youth Academy as a youth service worker. Additionally, the court finds that Plaintiff's evaluation was still pending and that based on the records in the personnel file, Ms. Gadberry should have known this fact. Therefore, the court based on all the evidence in this case is of the opinion that the Plaintiff did not willfully quit or abandon his job at Natchez Trace Youth Academy and that the Defendant improperly terminated Plaintiff's employment.

After a thorough review of the physicians' records, we agree with the trial court that Mr. Tidwell had not been released to return to work from a psychiatric standpoint, and therefore, did not make a meaningful return to work since he was unable to perform his job as a youth service worker, and the Academy was unable to provide another job which would accommodate his fear of coming into contact with the residents. Thus, the trial court did not err in exceeding the statutory cap.

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[1] Dr. Kyser stated Employee could return to light duty in the form of clerical responsibilities and that Employee's "prognosis for returning to his former employment duties would be poor."

B. Additional Temporary Benefits

Employer contends the trial court erred by determining Employee was entitled to additional temporary benefits as he was not totally disabled from working. In order to establish a prima facie case for temporary total disability, the employee must prove (1) he was totally disabled to work by a compensable injury; (2) that there was a causal connection between the injury and the inability to work; and (3) the duration of the period of disability. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 776 (Tenn. 2000). Temporary total disability benefits are terminated either by the ability to return to work or attainment of maximum recovery. *Id.*

The trial court awarded additional temporary total disability benefits from March 17, 2014 (the last date Employer paid Employee TTD) through February 5, 2016 (the date Dr. Montgomery concluded Employee reached MMI from a psychiatric standpoint). Employer continues to argue that Dr. Higdon gave Employee a full release in March 2014 and that Employee was offered the opportunity to return to work; thus, the payments came to an end. Having reviewed the record, we agree with Employee that he had not been released from a psychiatric standpoint and had not reached MMI until February 5, 2016, as concluded by Dr. Montgomery. Accordingly, the additional TTD payments were appropriate.

C. Award for Psychiatric Injury

Employer contends the trial court erred in determining Employee suffered a compensable psychiatric injury and requests the Panel to independently evaluate the expert testimony on this issue. In reviewing all of the psychological evidence, it is clear that each of the health professionals, except Dr. Griffin, concluded Employee sustained a psychological injury resulting from the assault at the Academy. Dr. Montgomery found Employee suffered from PTSD and depression. Dr. Higdon observed Employee's bouts of depression and noted symptoms which he believed to be consistent with PTSD. While Drs. Auble, Kyser and Montgomery opined that Employee was exaggerating certain psychiatric symptoms, particularly the hallucinations, they did not conclude that Employee was malingering, and none of them determined that he was not suffering from a psychological injury. Employer's proof is almost entirely based upon the testimony of Dr. Griffin, who was hired for an IME by Employer. Dr. Griffin dismissed all of the other experts' diagnosis of PTSD and instead, concluded that Employee had a personality disorder which predated Employee's injury and caused depression and anxiety at the Academy. Dr. Griffin went on to state that Employee was using his injury at work to obtain more money and that Employee was not a truthful person.

The trial court specifically found that Mr. Tidwell was credible and forthcoming in his testimony. Mr. Tidwell testified that he had no prior depression or anxiety prior to the assault at the Academy, and the trial court specifically found that Mr. Tidwell informed Dr. Griffin of this fact. "Benefits may be properly awarded to an employee who presents medical evidence showing that the employment could or might have been the cause of his or her injury when lay testimony reasonably suggests causation." Glisson v. Mohan International, Inc./Campbell Ray, 185 S.W.3d 348, 354 (Tenn. 2006).

Many times, the trial court's determination regarding credibility of opposing expert witnesses turns on whether the expert is willing to concede a point even though it may somewhat undercut the position the expert has been called upon to support, when compared to another expert who is unwilling to concede any point of contention. For example, Dr. Montgomery reduced his impairment rating to account for possible exaggeration of symptoms. Dr. Griffin went beyond merely disagreeing with the diagnosis of the other experts and suggested that Employee was greedy and untruthful. "When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept." Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996) (citing Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675 (Tenn. 1983)). We conclude the medical proof in this case fully supports the trial court's finding that Employee suffered a compensable psychiatric injury caused by the assault at work.

D. Discretionary Costs

Employer objects to the trial court's award of certain discretionary costs. We begin our analysis with Tenn. Code Ann. § 50-6-239 (C)(8) which provides: "The workers' 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, Rule 54.04 of the Tenn. R. Civ. P. governs awards of discretionary costs and 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 Tenn. S. Ct. R. 42, and guardian ad litem fees; travel expenses are not allowable discretionary costs.

Tenn. R. Civ. P. 54.04(2)

Employer challenges the award of $1,127 for the court reporter expenses associated with the trial. Of that amount, $1,044 was for the preparation of the trial transcript. Employer cites Carrigan v. Davenport Towing and Recovery Services, LLC, 2013 W.L. 1461844 (Tenn. Special W.C. Panel 2013), wherein the Panel in dictum stated that the cost of preparing the trial transcript should be distinguished from the appearance fee. Here, the trial court directed the parties to file proposed findings of fact and conclusions of law; however, it did not direct the parties to order the transcript to be prepared from any witness' trial testimony. Under these circumstances, we believe the trial court was in error to allow the recovery of the court reporter's fees for preparation of a trial transcript.

Employer also objects to the $150 fee for Dr. Fishbein C32 and report. At the time Employee introduced Dr. Fishbein's report, Employer objected to its admission. The trial court overruled the objection and admitted the report. Rule 54.04 (2) however, only provides for discretionary costs for stipulated reports. As the report was not stipulated, it was error for the trial court to award the $150 fee.

Finally, Employer argues the trial court erred in awarding a fee of $6,000 for the deposition of Dr. Higdon. Employer points out that the fee charged by Dr. Higdon is in excess of the Tennessee workers' compensation medical fee schedule recognized in Tenn. Code Ann. § 50-6-235. The medical fee schedule provides that deposition fees cannot exceed $750 for the first hour with any additional hours not to exceed $450 per hour. M.F.S. Rule 0800-2-16-01. Dr. Higdon's invoice indicates 1 hour and 55 minutes for his deposition which equates to $1,200 pursuant to the medical fee schedule. Employee's only response is that Dr. Higdon's charges for the "extensive preparation for his deposition" should be allowed because of Dr. Higdon's extensive treatment.

Our courts have held that parties cannot recover discretionary costs for expert witness fees for preparing for depositions for 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). Tenn. R. Civ. P. 54.02(2) limits the types of expenses related to expert witness fees that can be recovered as discretionary costs only to those fees for depositions and trial. Massachusetts Mut. Life Ins. Co. v. Jefferson, 104 S.W. 3d 13, 38 (Tenn. Ct. App. 2002). The Legislature has clearly limited the amount a physician may charge for his deposition; therefore, the trial court cannot award an hourly rate in a worker's compensation case that is more than the rate approved by the Legislature. Accordingly, the discretionary cost for Dr. Higdon's deposition is reduced to $1,200.

Conclusion

The trial court's award of permanent partial disability, temporary total disability, including the finding of a psychiatric injury, is affirmed. The trial court's award of discretionary costs is reversed as to the $150 fee for the C32 and report; modified to $150 for the court reporter's fees for trial and modified to $1,200 for Dr. Higdon's deposition fee. Costs are taxed to appellants for which execution may issue if necessary.

Robert E. Lee Davies, Sr. Judge

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

NATCHEZ TRACE YOUTH ACADEMY ET AL. v. CHRISTOPHER TIDWELL

Chancery Court for Humphreys County
No. 2016-CV-2

No. M2018-01311-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 the appellants, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM