IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 10, 2004 Session

VICTOR RIVERA v. JELD-WEN, INC.

Appeal from the Circuit Court for White County
No. CC1039 John A. Turnbull, Judge

No. M2003-01651-WC-R3-CV - Mailed July 22, 2004
Filed - August 25, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this case, the plaintiff whose arm was amputated as a result of a work-related injury had entered into a settlement agreement with his employer. The plaintiff claims this agreement obligated his employer to pay for an expensive, state-of-the-art myoelectric prosthesis. The trial court agreed and expressly found that the provision of the myoelectric arm was within the reasonable contemplation of the parties at the time of the agreement and compelled the employer to pay for it. The Panel has concluded that the judgment of the trial court should be affirmed.

Tenn. Code Ann. § 506-225(e)(3) Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C. J., and JAMES L. WEATHERFORD, SR. J., joined.

Richard C. Mangelsdorf, Jr., Nashville, Tennessee, for the appellant, Jeld-Wen, Inc.

Anthony C. Maxwell, Livingston, Tennessee, for the appellee Victor Rivera.

MEMORANDUM OPINION

The plaintiff/appellee, Victor Rivera, worked for the defendant/appellant, Jeld-Wen, Inc., in Sparta, Tennessee. On June 11, 2002, he sustained a severe injury to his left hand, wrist and arm when it was caught in a wood-cutting machine. The arm had to be amputated at the mid-forearm level. Dr. Woody Kennedy performed the amputation surgery and provided follow-up care. An arm prosthesis was prescribed, and Mr. Rivera began working with the Amputee Clinic.

On September 9, 2002, Mr. Rivera filed a complaint seeking workers' compensation benefits, and Jeld-Wen answered disputing the nature and extent of Mr. Rivera's permanent disability. The case never went to trial because on January 23, 2003, the trial court entered a final order approving the settlement agreement that had been negotiated by the parties. The agreement provided, in pertinent part:

> That the parties have agreed that Victor Rivera will be entitled to receive future medical treatment which is reasonable and necessary for treatment of the work related injury as authorized by T.C.A. 50-6-204, for treatment which is specifically authorized by a representative of the workers' compensation carrier's third party administrator, Crawford & Company, or its successors. Future medical treatment and supplies, including a reasonable and necessary prosthetic device, will be approved if prescribed by the treating physician, Dr. Woody Kennedy.

Shortly thereafter, a disagreement arose regarding the type of prosthetic device Mr. Rivera would be provided. Consequently, Mr. Rivera filed a Motion to Compel, Motion for Contempt, and Motion for Sanctions against Jeld-Wen, based on the company's failure to provide him with a myoelectric prosthesis.[1] After a hearing, the trial court ordered that Mr. Rivera

> be provided with the myoelectric prosthetic device as a reasonable and necessary medical supply/artificial member. The Court expressly finds that it was within the reasonable contemplation of the parties at the time of entry of the Final Order approving settlement that the myoelectric prosthesis was authorized and would be provided to Plaintiff as part of his settlement.

The court declined to find contempt or to order sanctions. After Jeld-Wen filed a motion to alter or amend the judgment and a hearing was held on that motion, the trial court refused to alter its previous decision and again ordered that Mr. Rivera be provided the myoelectric prosthesis. This appeal followed.

In reviewing the facts, it is important to keep in mind that the trial court based its decision on what the parties contemplated at the time the Settlement Agreement was reached. Consequently, the situation that existed when the parties reached agreement and the facts leading up to it are critical. In order to understand the background of the disagreement, however, some facts occurring after the settlement must also be discussed. The record before us does not include a transcript of the hearing on the motion to compel or of the testimony taken at that hearing. The record consists of affidavits, exhibits, and the deposition of Dr. Kennedy, from all of which we can reconstruct the chronology of events.

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[1] A myoelectric arm is lifelike in appearance, with fingers and a hand, and has a rubber membrane textured skin with receptors that fit on the skin and respond to human thoughts. Its appearance and operation differ from the much less expensive mechanical arm, which usually has a hook or clamp and is directed by shoulder movement.

After the amputation, Mr. Rivera was referred to the Amputee Clinic for a prosthetic device, its fitting, and training or therapy related to its use. Crawford & Company through its employee, Cheri Roberts, the case manager for Mr. Rivera, had selected the clinic as the provider. In October of 2002 Ms. Roberts contacted Mr. Randall, a certified prosthetist and owner of Amputee Clinic, about the prospect of preparing prosthetic devices for Mr. Rivera. Mr. Randall prepared and submitted to Crawford & Company a price estimate for both the body-powered and the myoelectric prosthetic devices.

On October 10, 2002, Dr. Kennedy issued a prescription for Mr. Rivera that stated "Left arm prosthesis, status post mid forearm amputation." Dr. Kennedy later testified that, as a surgeon, he generally did not participate with the patient in obtaining a prosthetic device and he had no special training in preparing, fitting, or maintaining prosthetic devices. Consequently, he generally left such issues up to providers like Amputee Clinic.

Apparently as a result of prior communications, on December 4, 2002, Russell Martin, the adjuster at Crawford & Company sent a letter to Amputee Clinic regarding Mr. Rivera's claim. That letter stated:

> Please allow this to serve as authorization to fit Mr. Rivera with a body-powered prosthesis. It is our understanding that this is the first prosthesis in a series of three. We will authorize each prosthesis individually at each stage.
>
> Also, please allow this to serve as authorization for occupational therapy for Mr. Rivera.

Mr. Randall prepared the body-powered prosthesis and provided it to Mr. Rivera in December. He also began work on the myoelectric prosthesis. On December 26, he sent a request for payment for the first device in a letter to Mr. Martin in which he also discussed the myoelectric device. In the letter, Mr. Randall explained that Amputee Clinic was giving Crawford & Company a 25% discount on the body powered prosthesis since no travel expenses had been involved and Mr. Rivera had been "a relatively easy candidate to work with. He is progressing rather rapidly, is eager to learn and move forward." The letter also stated:

> With the cost of the myoelectric components, it cannot be guaranteed what kind of a discount will be offered for that prosthesis. Each prosthesis will have to be evaluated at the time it is done for discount eligibility.
>
> If you have any questions or concerns, please feel free to contact us. . . .

The record contains no response to this letter, and Crawford & Company has not claimed to have responded, objected, or inquired further. Based on his understanding that the myoelectric arm had been approved, Mr. Randall continued with its production, and Mr. Rivera continued to meet

and work with Amputee Clinic staff. The myoelectric prosthesis was completed and available on January 9, 2003.

This is all the record tells us about the situation leading up to the settlement. The settlement agreement at issue was negotiated, submitted to the court and heard on January 21, 2003, with the order approving the settlement entered on January 23.

Mr. Randall understood that the myoelectric prosthesis had previously been approved, and it was ready for delivery on January 9. Nonetheless, on January 27, 2003, Mr. Walker of Amputee Clinic contacted Dr. Kennedy for a more specific prescription for the myoelectric arm. According to Dr. Kennedy, Mr. Walker told him Crawford & Company had approved three prostheses, that one of those was a myoelectric, and that the doctor needed to write a prescription for that one. Based on that information, Dr. Kennedy wrote a prescription for a myoelectric prosthesis. He testified it was not uncommon for a specific prescription to be needed after approval.

On February 4, 2003, Mr. Martin at Crawford & Company called Dr. Kennedy and told him there had been no approval by that company of the myoelectric arm. He apparently also told Dr. Kennedy that Mr. Rivera was likely to be deported to El Salvador.[2] On the same day, Dr. Kennedy sent a letter to Mr. Martin confirming their conversation and changing his "recommendation" for prosthesis. In that letter, Dr. Kennedy stated he would not recommend a myoelectric arm "in an environment of less than acceptable technologies that might be able to maintain the arm," referring to the possibility that Mr. Rivera might be deported. "I feel like this would probably be a total loss of money and waste due to the fact that it would probably not maintain his functionality." Dr. Kennedy did recommend a body powered prosthesis. A copy of this letter was sent to Amputee Clinic.

Mr. Randall of Amputee Clinic responded in a letter to Dr. Kennedy and asked him to stand by his prescription for the myoelectric prosthesis for Mr. Rivera. Mr. Randall reported that Mr. Rivera was doing extremely well using his body-powered prosthesis, but would do even better with a myoelectric one. Reminding Dr. Kennedy of his earlier prescription and that the myoelectric arm had been ready for delivery for more than a month, Mr. Randall also stated:

> Mr. Rivera is an excellent candidate for this myoelectric prosthesis. He has been looking forward to this since the onset of this process. He has been told repeatedly that he will receive this myoelectric prosthesis and I believe he settled his case upon receiving the myoelectric prosthesis.

Mr. Randall further assured the doctor that the clinic would not have made the myoelectric prosthesis if it had not "been encouraged" by Crawford & Company. In addition, Mr. Randall explained that the specific prosthesis required little maintenance in the first few years, comes with

[2]Although Crawford & Company made similar allegations upon information and belief in its response to the contempt motion, there is nothing in the record about Mr. Rivera's status.

battery adaptors for foreign circuits, and that through correspondence with patients who cannot come into the lab, both major and minor prosthetic needs can be met, even if Mr. Rivera leaves the country.

On February 28, 2003, Dr. Kennedy responded to Mr. Randall stating he had earlier been told by Mr. Walker of Amputee Clinic that Crawford & Company had approved three prostheses, including the myoelectric one, and that he wrote the requested prescription assuming that information was correct. However, it now appeared Mr. Martin of Crawford & Company had never approved the myoelectric arm. Dr. Kennedy further stated he did not see how a myoelectric arm would add significant functional benefit to Mr. Rivera's "current status" and that he felt Mr. Rivera would benefit more from a mechanical prosthesis "at this time."

In his later deposition, Dr. Kennedy reaffirmed his re-considered belief that the mechanical prosthesis was appropriate for Mr. Rivera because, in his opinion, it was better suited for the type of manual labor Mr. Rivera worked at. When asked if he routinely defers to the prosthesis provider regarding maintenance of appearance and functionality and the upgrade of such devices, Dr. Kennedy responded affirmatively.

The employer would define the issue in this case as whether the myoelectric arm is reasonable and necessary treatment under the statute, Tenn. Code Ann. § 50-6-204(a), and the settlement agreement, both of which require prescription by the attending physician, Dr. Kennedy. We agree with the trial court, however, that the issue is whether the settlement agreement, which was approved by the court, should be construed to include the myoelectric arm as future reasonable and necessary treatment based upon the intent of the parties at the time the agreement was reached.

A settlement agreement is a contract between the parties to litigation, subject to the rules of contract interpretation, that, when it is incorporated into the judgment of the court, is also enforceable as a judgment. *See Sweenten v. Trade Envelopes*, 938 S.W.2d 383, 385 (Tenn. 1996); *Harbour v. Brown*, 732 S.W.2d 598, 599 (Tenn. 1987); *Environmental Abatement, Inc. v. Astrum R.E. Corp.*, 27 S.W.3d 530, 539 (Tenn. Ct. App. 2000); *Bringhurst v. Tual*, 598 S.W.2d 620, 622 (Tenn. Ct. App. 1980). Interpretation of contracts is a question of law, and a trial court's interpretation of an agreement is not entitled to a presumption of correctness on appeal. *Guiliano v. CLEO, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). This court must review the document ourselves and make our own determination regarding its meaning and legal import. *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993). Regarding factual findings, our review is also *de novo* upon the record of the trial court, but with a presumption of correctness. Tenn. R. App. P. 13(d); *Cross v. City of Memphis*, 20 S.W.3d 642, 643 (Tenn. 2000).

"The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern." *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002). The parties' situation at the time of the making of an agreement is relevant to the interpretation and application of the language used in that agreement. *Hathaway v. Hathaway*, 98 S.W.3d 675, 680-81 (Tenn. Ct. App. 2002). The question of whether

the parties intended that the myoelectric arm was to be provided as a "reasonable and necessary prosthetic device" at the time they reached agreement is a question of fact. Based on the evidence before it, the trial court determined that "it was within the reasonable contemplation of the parties at the time of entry of the Final Order approving settlement that the myoelectric prosthesis was authorized and would be provided to Plaintiff as part of his settlement." Our review of the record leads us to the same conclusion.

The doctor's first prescription was very general, "left arm prosthesis," and a myoelectric prosthesis is clearly covered by that description. We find particularly persuasive the letter of December 4, from Crawford & Company authorizing the body-powered prosthesis as the first in a series of three. In addition, in its December 26 letter, if not earlier, Amputee Clinic put Crawford & Company on notice that it was preparing the myoelectric prosthesis, and Crawford & Company did not object or inquire further. All these circumstances could reasonably have led Mr. Rivera and his representatives to believe that he would receive the myoelectric arm as he progressed.

Mr. Martin of Crawford & Company testified at the hearing on the motion for contempt. His testimony was not preserved by transcript or in a statement of the evidence. In the absence of a record of his testimony, we must presume the trial court's findings would have been supported by it had it been preserved and filed. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). An affidavit by Mr. Martin was attached to the motion to alter or amend. Although Mr. Martin states he did not approve a myoelectric device either before or after settlement, he makes no attempt to explain his letter of December 4 or point out any notice to Amputee Clinic or Mr. Rivera that the prosthesis had not been or would not be approved.

We affirm the decision of the trial court. We remand this case to the Circuit Court of White County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellant, Jeld-Wen, Inc.

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PATRICIA J. COTTRELL, JUDGE

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JUDGMENT

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 appeals 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 will be paid by the appellant, Jeld-Wen, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM