IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 21, 2009 Session

VICKIE J. MYERS v. VANDERBILT UNIVERSITY

Direct Appeal from the Chancery Court for Davidson County
No. 06-2489-I Claudia C. Bonnyman, Chancellor

No. M2008-02009-WC-R3-WC - Mailed - April 8, 2010
Filed - May 11, 2010

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) (2008) for a hearing and a report of findings of fact and conclusions of law. After developing an allergy to latex, a hospital employee filed a claim for workers' compensation benefits in the Chancery Court for Davidson County. While the case was pending, the trial court declined to require the employee to submit to an independent medical examination in accordance with Tenn. Code Ann. § 50-6-204(d)(1) (Supp. 2009). The trial court conducted a bench trial and determined that the employee's latex allergy was an occupational disease. The trial court also determined that the employee had a fifteen percent impairment to the body as a whole and awarded her permanent partial disability at fifty percent. The employer has appealed. We have determined that the trial court erred by failing to require the employee to submit to an independent medical examination. Accordingly, we vacate the judgment and remand the case for further proceedings.

Tenn. Code Ann. § 50-6-225(e)(3) (2008) Appeal as of Right;
Judgment of the Trial Court Vacated and Remanded

WILLIAM C. KOCH, JR., J., delivered the opinion of the Court, in which JON KERRY BLACKWOOD and DONALD P. HARRIS, SR. JJ., joined.

Raymond S. Leathers, Nashville, Tennessee, for the appellant, Vanderbilt University.

Kirk L. Clements, Goodlettsville, Tennessee, for the appellee, Vickie J. Myers.

MEMORANDUM OPINION

I.

Vickie Myers graduated from high school in 1975 and later attended the Metropolitan Davidson County School of Licensed Practical Nursing. She graduated in 1977 and became a licensed practical nurse. Ms. Myers worked in various hospitals prior to beginning her employment with Vanderbilt Orthopaedic Surgery Center in 1988.

Around 1990, Ms. Myers became certified in surgical technology. During her tenure at Vanderbilt, Ms. Myers "scrubbed cases." Scrubbing cases consists of preparing equipment for surgical procedures and providing surgical equipment to physicians during an operation. Ms. Myers was employed by Vanderbilt in this capacity until 2006.

In 2002, Ms. Myers began to develop hives and experience respiratory problems. She was examined by an allergist who informed her that she was allergic to bananas, cashews, eggs, hay, wheat, and pecans. Ms. Myers began avoiding exposure to these foods and substances. Nevertheless, she continued to suffer from chronic hives and respiratory difficulties. In 2003, Ms. Myers consulted with Dr. Samuel Marney, Jr. who determined that Ms. Myers was allergic to a number of additional foods, dyes, and beverages. Despite avoiding exposure to these substances, Ms. Myers continued to experience problems at work with hives and respiratory problems.

Though the allergic reactions had become increasingly minor at home, Ms. Myers's allergic reactions at work continued to intensify. Within thirty to forty-five minutes of arriving at work, Ms. Myers would "start itching and breaking out." She experienced numbness in her mouth, burning eyes, ankle swelling, and hives that were so severe they interfered with her ability to walk or bend.

Ms. Myers visited the Vanderbilt Occupational Health Clinic in 2005. She sought to address her allergic reactions by consulting Dr. Pat King and Dr. Melanie Swift. Drs. King and Swift sent Ms. Myers back to work without providing her with any medication.

Ms. Myers continued to experience severe allergic reactions at Vanderbilt. These reactions led her to miss work often and violate the attendance policy. Her excessive absenteeism resulted in receipt of a performance improvement counseling evaluation. In response, Ms. Myers visited Dr. Marney again in February 2005. During this visit Dr. Marney determined that Ms. Myers was allergic to latex. Dr. Marney informed Vanderbilt that Ms. Myers would need to be placed "in a latex-fee environment for it to be safe for her to work."

Vanderbilt conducted an assessment of the possibility of removing latex from the surgery suite where Ms. Myers worked. Ultimately, Vanderbilt decided against making this accommodation but instead offered Ms. Myers a job in a "latex-free" operating room at Vanderbilt's Children's Hospital. However, the Children's Hospital itself was not a latex free environment. Instead, only those objects that came into direct contact with the patients themselves were actually latex free. Furthermore, two orthopaedic surgeons practicing at Children's Hospital had received special permission to wear latex gloves.

Although Vanderbilt asserted at trial that Ms. Myers did not accept the offer of a transfer to a position at the Children's Hospital, Ms. Myers did not recall rejecting the offer. However, Ms. Myers testified that she had an intense allergic reaction to the latex in the Children's Hospital during her meeting at Children's Hospital regarding transferring to a position there and that she was forced to leave the hospital quickly. In considering transferring to a position there, Ms. Myers was worried that the hospital itself was not latex free. Ms. Myers also was concerned about working with the two physicians who continued to wear latex gloves. Although Vanderbilt assured Ms. Myers that she could informally trade assignments with other nurses, it would not create any formal structure to prevent Ms. Myers from working with the surgeons that used latex. However, it is also clear from the record that Ms. Myers objected to the transfer because she would be "on-call" on weekends once every six to eight weeks and was displeased with the idea that her patients would be children.

Ms. Myers continued to experience allergic reactions, though not as severe, despite not having worked since April 2005. She suspected the presence of latex to be the cause. In June 2005 she saw Dr. Bruce Wolf. Employing a different test than Dr. Marney, Dr. Wolf concluded that Ms. Myers was not allergic to latex. During a subsequent visit, Dr. Wolf determined that it was not the latex but the powder from latex gloves that caused Ms. Myers's allergic reactions. Accordingly, Dr. Wolf advised Vanderbilt that Ms. Myers should work solely in a powder-free environment.

Ms. Myers was given latex-free gloves after she returned to work, but she was assigned to a small operating room where the aerosolized powder-exposure was actually worse. Ms. Myers objected. The Vanderbilt nurse manager informed her that the operating room could not be powderless. Ms. Myers still experienced burning eyes, itching, numbness, swelling, and hives upon her return to work. She continued to struggle with excessive absenteeism. Ultimately, Ms. Myers was terminated in 2006 for excessive absenteeism.

In October 2006, Ms. Myers sought treatment from Dr. Travis Cain for her allergies. Dr. Cain concluded that Mr. Myers's latex allergy was so intense that it required avoiding even casual exposure to latex. Acting on Dr. Cain's advice, Ms. Myers made her home latex

free. While these measures minimized her allergic reactions at home, Ms. Myers continued to experience allergic reactions any time she left the confines of her home.

Ultimately, Drs. Cain and Marney concluded that Ms. Myers suffered from a latex allergy. Both doctors also concluded that more likely than not, Ms. Myers's employment with Vanderbilt was the cause of her latex allergy. Although Dr. Wolf believed that Ms. Myers was allergic to the powder on the latex gloves, not the latex itself, all three doctors concluded that an individual can develop an allergy to a chemical or a substance as the result of frequent exposure to that chemical or that substance.

Ms. Myers has not been able to maintain employment after the termination of her employment at Vanderbilt. Although she has sought positions with various hospitals, these hospitals have informed her that they are unable to provide a latex-free work environment. She has also briefly held a number of other jobs including driving a flat-bed truck hauling concrete and delivering newspapers. However, the allergic reactions she experienced in performing these jobs have caused her to quit and have inhibited her from securing other employment. Ms. Myers has investigated the possibility of furthering her education by taking online courses via her home computer. However, she is limited in the further educational opportunities available to her because high-speed internet is not available in the area in which she lives and enrollment in such courses, she indicated, requires high-speed internet access.

II.

Ms. Myers filed a workers' compensation complaint on October 16, 2006 in the Davidson County Chancery Court. Vanderbilt answered the complaint on December 11, 2006. In a motion filed on March 14, 2008, Vanderbilt sought to compel Ms. Myers to submit to an examination by a dermatologist of its choosing that would be accompanied by a referral for testing to a second dermatologist. The trial court denied the motion. The case was tried before the Davidson County Chancery Court on May 29, 2008, with a Judgment entered on June 16, 2008.

The trial court found that Ms. Myers suffers from a latex allergy, and concluded that her latex allergy is an occupational disease that was caused by Ms. Myers's employment with Vanderbilt. The court also determined that Ms. Myers did not make a meaningful return to work and found that her impairment rating was fifteen percent (15%) to the body as a whole. It assessed Ms. Myers's permanent partial disability at fifty percent (50%), employing a three and one-third (3 ⅓) times multiplier. The trial court further concluded that Dr. Cain's treatment of Ms. Myers was reasonable and medically necessary but unauthorized by Vanderbilt. It determined that because this treatment was unauthorized by Vanderbilt,

Vanderbilt was not required to pay for the treatment. The court concluded that Ms. Myers is entitled to lifetime medical benefits and held that Vanderbilt must designate a panel of doctors who accept the latex diagnosis.

Vanderbilt filed a motion for new trial and/or to alter or amend the judgment. The trial court denied this motion on August 12, 2008. Vanderbilt appealed on September 5, 2008. Vanderbilt raises four issues on appeal. First, it contends the trial court erred by determining that Ms. Myers suffered an occupational disease arising out of and in the course of employment pursuant to Tenn. Code Ann. § 50-6-301 (2008). Second, it asserts the trial court erred by determining that Ms. Myers did not have a meaningful return to work, and by failing to apply the 1.5 times multiplier cap set forth in Tenn. Code Ann. § 50-6-241(d)(1)(A) (Supp. 2009). Third, Vanderbilt argues the trial court erred (a) by denying Vanderbilt's motion to compel a medical examination; (b) by denying its motion to continue; and (c) by denying its motion for a new trial pursuant to Tenn. R. Civ. P. 59.02 and/or to alter or amend the judgment pursuant to Tenn. R. Civ. P. 59.04. Fourth, Vanderbilt contends that the trial court's award of permanent partial disability is excessive and contrary to the preponderance of the evidence presented.

Ms. Myers raises three issues on appeal. First, she argues that the trial court erred by awarding an insufficient permanent partial disability award. Second, Ms. Myers contends that the trial court erred by failing to order Vanderbilt to pay the medical expenses Ms. Myers incurred from being treated by Dr. Cain. Third, Ms. Myers asserts that the trial court erred in not allowing Dr. Cain to be the authorized treating physician for future medical treatment. We have determined that the outcome of this appeal hinges on a single issue - whether the trial court erred by failing to grant Vanderbilt's request for an order pursuant to Tenn. Code Ann. § 50-6-204(d)(1) directing Ms. Myers to submit to an examination by its physician.

III.

Vanderbilt argues that the trial court erred by denying its motion to compel an examination of Ms. Myers by a physician of its choosing. Ms. Myers insists that the trial court properly denied Vanderbilt's motion. We conclude the trial court erred by failing to grant Vanderbilt's motion.

On March 14, 2008, Vanderbilt requested the trial court to order Ms. Myers to submit to an examination by Dr. John Zic with an accompanying referral for testing to another dermatologist, Dr. Joe David Fine. In its motion, Vanderbilt indicated that based upon previous discussions with Ms. Myers's counsel the parties were operating under an understanding that Ms. Myers would voluntarily submit to such examination but that Ms. Myers had now changed her mind. Ms. Myers filed a response opposing Vanderbilt's

motion. While she agreed with Vanderbilt's rendition of the facts, she noted that she already had been seen by multiple physicians. Ms. Myers added that "two of [Vanderbilt's] own physicians"[1] had examined her and that Vanderbilt had already had "ample opportunity to have Ms. Myers examined by their own physicians." She indicated that Vanderbilt was not entitled to compel her to submit to an examination for a "fourth opinion."

The trial court denied Vanderbilt's motion. It reasoned as follows:

> My best judgment is not to have Ms. Myers go to yet another physician for examination. . . . [It] looks to me like she's become very distrustful of the whole process and I don't really know that another physician's opinion is going to help the Court make a decision. It looks like you got enough doctors involved.

In rejecting Vanderbilt's motion to compel, the trial court specifically noted that "it looks to me like Vanderbilt . . . was very cooperative with Ms. Myers, I'm talking about at the beginning of the case where she went to the two doctors, who she chose and that's really good." The third doctor, Dr. Cain, was also chosen by Ms. Myers. Accordingly, Vanderbilt did not have Ms. Myers examined by a doctor of its choosing.

Under Tenn. Code Ann. § 50-6-204(d)(1), "[t]he injured employee must submit to examination by the employer's physician at all reasonable times if requested to do so by the employer . . .." In a 2008 decision interpreting Tenn. Code Ann. § 50-6-204, the Tennessee Supreme Court held that

> an employer has a statutory right to compel an injured employee to undergo a medical evaluation by a physician of the employer's choosing. The employee may challenge the request as unreasonable in light of the circumstances. If the trial court determines the request is reasonable, the employee must submit to a medical evaluation conducted by the physician of the employer's choice.

Overstreet v. TRW Commercial Steering Div., 256 S.W.3d 626, 639 (Tenn. 2008).

Tenn. Code Ann. § 50-6-204, however, imposes some limits on the employer's ability to require an employee to submit to an examination. Tenn. Code Ann. § 50-6-204(d)(1)

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[1]Ms. Myers is referring to Drs. Marney and Wolf. Dr. Marney is a physician working at Vanderbilt. Dr. Wolf is an assistant clinical professor at Vanderbilt, but he has no other connection with Vanderbilt University.

requires that the request be made at a "reasonable time[]," and Tenn. Code Ann. § 50-6-204(d)(8) provides that the employer must be making a "reasonable request." *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d at 637 n.4. Accordingly, "the timing of the request must be reasonable and the requested examination must be reasonable, as a whole, in light of the surrounding circumstances." *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d at 637 n.4.

Tennessee's "trial courts have been afforded the discretionary authority to determine whether the employer's request for examination is reasonable." *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d at 637. "The many and varied situations possible to arise require such be the case" in assessing the reasonableness of the employer's request. *Tibbals Flooring Co. v. Marcum*, 218 Tenn. 509, 512, 404 S.W.2d 498, 500 (1966). Accordingly, appellate courts review these decisions using the "abuse of discretion" standard. *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d at 639. "[R]eviewing courts will set aside a discretionary decision only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008).

A previous case referenced in *Overstreet v. TRW Commercial Steering Div.* gives some form to the concept of a reasonable request for an examination, addressing limitations in terms of avoiding "appreciable pain or suffering or danger to life or health." *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d at 637 (citing *Trent v. Am. Serv. Co.*, 206 S.W.2d 301, 304-05 (Tenn. 1947)). Additionally, in *Tibbals Flooring Company v. Marcum*, 404 S.W.2d at 500, the Tennessee Supreme Court affirmed a trial court determination that an employee would not be required to submit to an additional examination where the parties had previously agreed upon an independent medical examiner whose qualifications were not doubted.

An employer's cooperation with an employee's request to consult with a number of physicians should not, in fairness, prevent the employer from exercising its rights under Tenn. Code Ann. § 50-6-204(d)(1). A contrary ruling would have serious implications, and could cause employers to be less cooperative with their employees. Additionally, Ms. Myers's frustrations with the course of her medical treatment, and the distrust that it has engendered, do not provide an adequate basis for finding the employer's request to be unreasonable. 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.

This case presents an additional complexity with regard to the trial court's denial of Vanderbilt's Tenn. Code Ann. § 50-6-204(d)(1) motion. In a post-trial motion, Vanderbilt again moved the court to require Ms. Myers to submit to an additional medical examination and to reopen the proof to hear this additional testimony. The trial court denied Vanderbilt's post-trial motion.

The trial court's reasoning, however, varied from its earlier stated reasons for denying Vanderbilt's motion. The Chancellor stated at the outset of the hearing upon Vanderbilt's post-trial motions:

> [Y]our request for an Independent Medical Examination or examination . . . could have been reasonable at sometime. The Court was considering at one time when probably would have required a continuance, and given that the case was filed in 2006, the Court decided that the case needed to be tried on the trial date.

In denying the motion at the close of the hearing, the trial court stated:

> [For the] [l]awyers, most certainly at that hearing, delay was not an issue for either of the lawyers. I totally understand that. And I can see how the discussions would put Ms. Myers' lawyer in a position where he couldn't complain. I understand that, too.
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> But, expediting these Workers' Compensation cases are also an issue and I thought that it was going to be problem regardless of what the lawyers tell me, it's not going to cause any kind of problem.
>
> . . . I think my best judgment is that I don't have a reason to reevaluate or to retry . . ..

In its post-trial order, the trial court noted the timing consideration, stating that the court was obligated "to hear these matters in an expedited fashion." The court also repeated

the earlier basis for its ruling that Ms. Myers had already been seen by three physicians by noting that it did not believe that a fourth opinion would be helpful.

In *Overstreet v. TRW Commercial Steering Division*, the Tennessee Supreme Court interpreted Tenn. Code Ann. § 50-6-204(d)(1)'s requirement that "[t]he injured employee must submit to examination by the employer's physician at all reasonable times if requested to do so by the employer . . ." as referring to the timing of the request itself:

> In Tennessee Code Annotated section 50-6-204, subsection (1) requires that the request be made at a "reasonable time[ ]" and subsection (8) states that it must be a "reasonable request." This indicates that the timing of the request must be reasonable and the requested examination must be reasonable, as a whole, in light of the surrounding circumstances.

Overstreet v. TRW Commercial Steering Div., 256 S.W.3d at 637 n.4. The timing of employer's request, thus, is certainly a legitimate consideration for a trial court in declining to compel a medical examination under Tenn. Code Ann. §50-6-204(d)(1).

Vanderbilt filed its motion on March 14, 2008. The trial court conducted a hearing on March 28, 2008 - two months before the May 29, 2008 trial date. At that time, many significant depositions had not yet been taken, including those of Dr. Wolf on April 28, 2008, Dr. Marney on May 19, 2008, and Dr. Landsberg on May 21, 2008. Vanderbilt asserts that the trial court should have apprised Vanderbilt of its concerns when it denied Vanderbilt's motion and should have allowed the examination but required that it be conducted before trial and advised that no continuances would be allowed.

An employer's request can be made at such a late point in time that it is unreasonable in light of the court's docket and the potential unfairness to the employee resulting from inadequate time to address the results of the examination. Both are legitimate reasons for finding an employer's request to have been made at an unreasonable time. The trial court's decision in this case dealt only with the docket-related concerns but did not address any circumstances that might be particularly problematic for conducting such an examination within the remaining time prior to trial.

The appropriateness of the trial court's analysis turns upon its determination that two months was inherently too close to the trial date to constitute a "reasonable request" under Tenn. Code Ann. § 50-6-204. We are wary of creating a precedent that requires a physical examination to be conducted more than two months before a scheduled trial date to avoid being deemed unreasonable per se. There are no facts referenced in the trial court's decision,

nor are any readily apparent, that suggest any particular circumstances that would render two months particularly unreasonable in this case. To the contrary, Ms. Myers was no longer working and appeared to have ample time available to submit to such an examination, and Vanderbilt through its hospital facilities had an array of doctors that could perform the examination without unreasonably inconveniencing Ms. Myers. Furthermore, the fact that Ms. Myers had agreed to an examination and then changed her mind mitigates against finding that Vanderbilt's request was made at an unreasonable time. A contrary approach would invite gaming of the process and only encourage further entanglement of the trial courts in resolving disputes that may be amicably settled without need to resort to motions to compel.

The trial court's ruling is also problematic for an additional reason. The Tennessee Supreme Court has stated that "[i]f the employer's request is unreasonable, the trial court should deny the request, but must specifically state its reasons in the record." *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d at 639. Deferring an explanation of the court's decision until its ruling on the post-trial motion is inconsistent with *Overstreet*. We conclude that the trial court abused its discretion by denying Vanderbilt's motion to compel Ms. Myers to submit to an examination by a doctor of its choosing. Accordingly, the remaining issues are pretermitted.

IV.

We hold that the trial court abused its discretion by denying Vanderbilt's motion to require Ms. Myers to submit to a physical examination. Accordingly, the trial court's judgment is vacated, and the case is remanded to the trial court in order to allow Vanderbilt the opportunity to have Ms. Myers examined by a physician of its choosing, and for further proceedings consistent with this opinion. Costs are assessed to Ms. Vickie Myers, for which execution may issue if necessary.[2]

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WILLIAM C. KOCH, JR., JUSTICE

[2] On remand, we invite the trial court to revisit its decision regarding Vanderbilt's responsibility for paying for the treatment Dr. Cain provided to Ms. Myers in light of its conclusion that this treatment was reasonable and medically necessary. The Tennessee Supreme Court has held that an employer may be liable for an injured employee's unauthorized medical expenses when the employee demonstrates that the treatment was reasonable and medically necessary. *Moore v. Town of Collierville*, 124 S.W.3d 93, 98 (Tenn. 2004).

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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 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 will be paid by Vickie Myers, for which execution may issue if necessary.

PER