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

KATHY SHRUM, Plaintiff/Appellee v. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Defendant/Appellant	))))))))))	MACON CHANCERY Hon. C. K. Smith, Chancellor NO. 01S01-9511-CH-00205

FILED
June 20, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

For the Appellant:	**For the Appellees:**
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MEMORANDUM OPINION

Members of Panel:

Justice Frank F. Drowota, III
Senior Judge John K. Byers
Special Judge Roger E. Thayer

MODIFIED **THAYER, Special Judge**
AND REMANDED

_____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) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

This appeal by Defendant, Insurance Company of the State of Pennsylvania, has resulted from the action of the trial court in authorizing the employee to seek treatment from a physician not designated by the employer. The dispute has arisen after the parties reached a settlement of all issues, and it relates to post-judgment treatment of plaintiff, Kathy Shrum.

During February, 1995, an order of compromise and settlement was entered stating the employee was to receive an award of permanent disability benefits based on a 40.17% disability to the body as a whole. The order recited plaintiff was to remain under the care of Dr. Dave A. Alexander, an orthopedic surgeon, who had performed surgery on plaintiff and who was her treating physician for carpal tunnel syndrome injuries. Dr. Alexander had been designated along with two other surgeons by the Defendant as medical care providers pursuant to our statute.

After providing for the furnishing of future medical expenses, the order recited

> The parties specifically recognize that defendant has not accepted as compensable and will not pay medical benefits related to any condition other than plaintiff's alleged bilateral carpal tunnel syndrome in light of the fact that there is medical proof which suggests that plaintiff suffers from a congenital condition known as cervical ribs which might be responsible for some of plaintiff's current symptomatology.

On May 19, 1995, plaintiff filed a motion reciting she had not been receiving satisfactory medical attention and requested the court to choose an independent physician to treat her or to allow plaintiff to choose her own treating physician. Defendant filed a response opposing the request and alleged there was no evidence to support her claim as she had not been treated since April 4, 1994.

On June 19, 1995, an order was entered by the trial court, stating " . . . Plaintiff is not satisfied with the doctors submitted to treat plaintiff by defendant . . ."

and the order provided for the appointment of Dr. Stephen Neeley, an orthopedic surgeon, to treat her for injuries which were the subject of the workers' compensation proceeding.

Defendant filed a motion to alter or amend the order which was supported by two affidavits. One affidavit was executed by an insurance adjuster stating neither plaintiff nor her attorney had expressed any dissatisfaction with the medical treatment of Dr. Alexander. It also stated she had not requested to see either of the other two physicians the company was providing. The other affidavit was executed by the records custodian of Dr. Alexander's office and all of the doctor's notes relating to his treatment of plaintiff was made an exhibit to the affidavit.

The doctor's office records indicate on Tuesday, March 14, 1995, plaintiff was complaining of symptoms on both sides on both hands. The doctor noted he was not sure what to make of her symptoms but they did not sound like carpal tunnel syndrome symptoms. The office note further stated she had been evaluated for thoracic outlet syndrome, and the doctor thought she should see another doctor whom she had seen before regarding her problem.

The doctor's records also contain a copy of a letter dated May 2, 1995, from Dr. Alexander to Plaintiff's attorney stating it was his clinical opinion that plaintiff was not suffering from carpal tunnel syndrome.

The motion to alter or amend the order was overruled, resulting in this appeal. The appellate record does not contain a transcript of evidence at any hearing which the trial court conducted, and our review of the issue is confined to the technical record.

It is often stated that the appellate review of findings of fact by the trial court shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). However, the appellate court cannot review the facts *de novo* without an appellate record containing the facts and,

therefore, in the absence of a transcript of a statement of the evidence, the appellate court must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings. *Sherrod v. Wix*, 849 S.W.2d 780 (Tenn. App. 1992). The *de novo* review does not carry a presumption of correctness to a trial court's conclusions of law but is confined to factual findings. *Union Carbide Corp. V. Huddleston*, 854 S.W.2d 87 (Tenn. 1993). Thus, a question of law is reviewed without the presumption of correctness.

The only factual finding by the trial court, which we must accept as being supported by the evidence since a transcript of evidence is lacking, is that plaintiff was dissatisfied with Dr. Alexander. A review of the record leads us to conclude her dissatisfaction has resulted from Dr. Alexander's opinion that her current problem was not connected to her work-related injuries. We are to decide whether, as a matter of law, the trial court may order a new physician to treat the employee merely because the employee is not satisfied with the physician's opinion as to the causation of her current problems.

TENN. CODE Ann. § 50-6-204 imposes responsibility on the employer to provide free medical care to the employee and the employee is generally required to accept such services. There are many cases supporting the payment of medical expenses of doctors seeing and treating employees who were not designated by the employer, but these exceptions are grounded on peculiar factual situations and contain legitimate reasons to depart from the statutory rules.

Our workers' compensation statutes do not specifically address the issue involved but TENN. CODE ANN. § 50-6-204(a)(5) provides:

> In case of dispute as to the injury, the court may, at the instance of either party, or on its own motion, appoint a neutral physician of good standing and ability to make an examination of the injured person and report such physician's findings to the court, the expense of which examination shall be borne equally by the parties.

It could be argued this section of the statute only applies prior to the

adjudication of a workers' compensation claim but the language of the statute does not limit the application to that narrow of a scope. We recognize there are many times when hotly contested issues develop after final adjudication of a claim in regard to the payment of future medical expenses, and we believe this language is sufficient to authorize the trial court to proceed when unusual and exceptional circumstances arise in post-trial hearings. We note this provision authorizes a physician to make an examination and report his findings not to treat the injured party.

Plaintiff cites TENN. R. CIV. P. 35 as justifying the court's action. This rule, if applicable, only authorizes an examination and not treatment of the injured party.

Considering all of the circumstances in our review of the record, we are of the opinion the trial court was in error in authorizing a new and different physician to treat the plaintiff solely under the finding she was dissatisfied with Dr. Alexander's opinion. We find that since there is a dispute regarding the question of payment of medical expenses, the trial court's order should be modified to provide that plaintiff is authorized to see Dr. Stephen Neeley for the purpose of examination and determination of whether her present problems are related to her compensable injury or to other causes. After this report is filed with the trial court, then a decision could be made whether to continue with Dr. Alexander, or with one of the other two designated surgeons or Dr. Neeley. Costs of the new examination and report should be shared equally by the parties.

Our caution here is also to avoid providing an injured employee with a treating physician who only tells the employee what he or she desires to hear concerning causation of symptoms or current problems.

It results that the action of the Chancellor is modified as indicated and the case is remanded to the trial court for such further orders as may be necessary. Costs of the appeal are taxed to Defendant and sureties.

Roger E. Thayer, Special Judge

CONCUR:

Frank F. Drowota, III, Justice

John K. Byers, Senior Judge