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

FILED

May 28, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

CATHERINE MAYO,	)	
	)	
Plaintiff/Appellant,	)	Madison Chancery
	)	
v.	)	No. 02S01-9807-CH-00076
	)	
LUMBERMENS MUTUAL CASUALTY COMPANY,	)	Honorable Joe C. Morris, Chancellor
	)	
	)	
Defendant/Appellee.	)	

For the Appellant:

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For the Appellee:

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M E M O R A N D U M O P I N I O N

Members of Panel:

Justice Janice M. Holder
Senior Judge L. T. Lafferty
Special Judge J. Steven Stafford

REVERSED AND REMANDED **LAFFERTY, Senior Judge**

OPINION

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.

On or about August 24, 1993, the plaintiff, Catherine Mayo, was engaged in her regular employment duties as manager for Pizza Hut, when she suffered total permanent disabling injuries. An armed robber inflicted a massive shotgun blast to the plaintiff's entire abdomen. On August 11, 1997, the plaintiff filed a Petition for Approval of Final and Lump Sum Settlement under the Workers' Compensation Law. The trial court entered an order approving the final and cash lump sum settlement, awarding total permanent disability benefits at the maximum rate of recovery through age 65 pursuant to Tenn. Code Ann. § 50-6-207, and lifetime future medical expenses. However, judgment was reserved for a later determination by the trial court on the issue of the medical provision of a heated hydrotherapy pool to be installed at the plaintiff's residence.

Prior to May 11, 1998, the plaintiff submitted to the trial court medical reports of two physicians in support of her request for an in-home hydrotherapy pool. On May 11, 1998, the trial court considered the merits of plaintiff's motion. On June 29, 1998, the trial court entered an order denying the request for the medical apparatus, more specifically described as the in-ground heated hydrotherapy pool.

Since the plaintiff is making a most unusual request that the defendant install an in-ground hydrotherapy pool at her residence as a medical apparatus that is medically necessary, it is beneficial to set forth the underlying facts of this request. At the time of this unfortunate event, the plaintiff, age 47, was a resident of Jackson, Tennessee, but now resides in Buffalo, New York, where she has family support. The shotgun blast injured the plaintiff's chest, solar plexus, abdomen, abdominal wall, and side. Dr. Joseph Spychalski, the treating physician, found that the plaintiff sustained a complete obliteration of the anterior abdominal musculature, and that, as a consequence, she lacks the ability to efficiently sit, transfer, ambulate, bend, or lift. The plaintiff will require lifelong physical therapy to maintain her back muscles and range of motion. Due to the shotgun blast, the

plaintiff has sustained chronic pain syndrome, fibrotic changes in the chest and abdomen, and restrictions in respiratory function, a finding supported by pulmonary studies. As a result of her injuries, the plaintiff has required psychological intervention and pharmacotherapy for depression and anxiety.

Dr. Spychalski opined that plaintiff will be unable to work for the rest of her life, and, in order to maintain the ability to transfer and ambulate, she will require lifelong myofascial release therapies, as well as regular aquatic therapy. Dr. Spychalski stated another critical modality to help her maintain some level of function and for chronic pain control is the medical necessity of home pool therapy.

Dr. Gerald Peer, Medical Director of the Pain Rehab Center of Western New York, re-evaluated the plaintiff in April, 1996. An prescription for EMLA cream for pain relief was not successful. Dr. Peer found that the plaintiff's hydrotherapy sessions seem to help the most. While in the pool, the plaintiff can produce a vital capacity maneuver of over 1500 cc's, whereas such a maneuver performed outside of the pool yields only 500 cc's of total volume. Dr. Peer opined that there are few options of pain control for the plaintiff, and "it is to Catherine's best interest and the best interest of the Compensation Board if her application for a home therapy pool is approved." Thus, the plaintiff could apply this therapy on a daily basis at home.

In an evaluation on March 26, 1998, Dr. Elizabeth D. DiTonto corroborated Dr. Spychalski's findings as to the ongoing areas of pain and limitation in the plaintiff's upper abdomen and anterior lower rib cage. The plaintiff's pain is decreased with aqua therapy and to some extent with the pain medications. Dr. DiTonto concurred in the continuation of aqua therapy and agreed with the request for an in-home therapy pool.

In a report, Kathy McCadden, R.N., plaintiff's psychological counselor and Senior Clinician with Spectrum Human Services, described the harsh winters and difficulties the plaintiff undergoes in attending her therapy sessions away from home.[1] Mrs. McCadden supported the opinion of Dr. Spychalski that in-home hydrotherapy is necessary.

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[1]The plaintiff must travel thirty-six miles round-trip, via automobile, from her residence to the therapy sessions three times a week. It has been stipulated that the defendant pays the costs of these treatment sessions.

The plaintiff's physical therapist, John A. Lord, approved by the defendant to render physical therapy to the plaintiff, stated that a home pool would not only give the plaintiff an opportunity to maintain a level of flexibility and improve her bodily functions, including bowel movements, but would also help her breathing capacity, which has been severely reduced by this injury.

The plaintiff submitted three estimates for the cost of installation of an in-home hydrotherapy pool ranging from $26,875.00 to $32,600.00.

On June 29, 1998, the trial court, after consideration of the stipulated medical reports, statements of counsel, and the record as a whole, denied the request for the medical apparatus.

In workers' compensation cases, the scope of review in this Court on issues of fact is **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) (Supp.1998). The facts as to the plaintiff's injuries are not in dispute. However, where the issues involve expert medical testimony, and all the medical proof is contained in the record by stipulated reports, as in this case, this Court may draw its own conclusions regarding the weight and credibility of that testimony, since we are in the same position as the trial judge. *Orman v. Williams Sonoma, Inc.,* 803 S.W.2d 672, 676-77 (Tenn. 1991).

The plaintiff contends that a medically prescribed therapeutic pool is a necessary medical apparatus pursuant to Tenn. Code Ann. § 50-6-204(a). The defendant does not disagree that hydrotherapy is of great benefit to the plaintiff, but contends that the construction of a home pool and related structure is not reasonably required.

Tennessee Code Annotated § 50-6-204 provides:

> (a)(1) The employer or the employer's agent shall furnish free of charge to the employee such medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members, and **other apparatus, . . . as may be reasonably required**[.] (emphasis added).
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> * * * *
>
> (d)(6) Whenever the nature of the injury is such that specialized medical attention is required or indicated and such specialized medical attention is not available in the community in which the injured employee resides, the injured employee

> can be required to go, at the request of and at the expense of the employer, to the nearest location at which such specialized medical attention is available.

We have been unable to find a Tennessee case directly on point, to wit: the cost of installation of an in-home hydrotherapy pool to be borne by an employer. Both parties cite an unreported case of the Supreme Court addressing the reasonableness of the installation of a hot tub in a workers' compensation case. *Willie S. Myatt v. Textron Aerostructures,* No. 01S01-9409-CV-00108, 1995 WL 572058 (Tenn., Nashville, August 22, 1995). In that case, Myatt fell at work and suffered a ruptured disc. The trial court determined that Myatt was 95% disabled vocationally. Myatt subsequently sought reimbursement for the purchase of a hot tub and special contour chair. The trial court allowed these costs, finding them necessary for Myatt's treatment. The Supreme Court adopted the opinion of the Special Workers' Compensation Appeals Panel that held such obligations are governed by the provisions of Tenn. Code Ann. § 50-6-204, which provides that the employer furnish such medical and surgical treatment as may be reasonably required, citing *Wilhelm v. Kern's, Inc.,* 713 S.W.2d 67, 68 (Tenn. 1986). The Court disallowed the cost of the hot tub, because the plaintiff's doctor had not prescribed it, and the medical proof showed that the tub was not central to his treatment. Therefore, there was no proof that the hot tub was reasonably necessary. 1995 WL 572058, at *2. The present case can be distinguished from *Myatt,* in that Ms. Mayo's doctors have prescribed the hydrotherapy pool, and regular hydrotherapy is a critical factor in her treatment.

In *Wilhelm,* 713 S.W.2d at 68, the Supreme Court was required to determine if travel expenses were compensable under the Workers' Compensation Act. The Court held:

> The determination whether or not a disputed item of medical expense is compensable under the Worker's Compensation Act depends primarily on the evidence of medical experts that the service for which the expense was incurred was one of those enumerated in the above-quoted statute, and was "reasonably required." However, the fact that a certain course of treatment is recommended by a physician does not, ipso facto, render the employer liable to provide such treatment; the court may conclude from all of the evidence that the recommended course of treatment was not "reasonably required." *Martirez v. Meharry Medical College,* 673 S.W.2d 141 (Tenn. 1984).

Since Tennessee law is silent on this precise issue, the defendant cites two Florida

cases which have considered the installation of home pools in workers' compensation cases. In *Firestone Tire and Rubber Co. v. Vaughn,* 381 So. 2d 740 (Fla. Dist. Ct. App. 1980), the First District Court of Appeal of Florida upheld an order of the judge of industrial claims requiring the employer to provide the injured employee with a swimming pool, though title vested in the employee. As a result of an accident in 1966 rendering him permanently and totally disabled, Vaughn had undergone twelve operations, involving the removal of several intervertebral discs, the removal of the coccyx, and a fusion operation on the back. Vaughn required daily therapy. In 1970, Vaughn's doctors recommended that he exercise in a swimming pool. The pool was installed by Vaughn, which he used three to five times daily. All three treating physicians recommended the use of the pool for exercise and relief of pain. The employer presented no evidence rebutting the necessity of the pool. The appellate court upheld the determination made by the district court under Fla. Stat. ch. 440.13(1) (1977) as reasonable and necessary.

In *Haga v. Clay Hyder Trucking Lines,* 397 So. 2d 428 (Fla. Dist. Ct. App. 1981), the plaintiff was not so fortunate before a Deputy Commissioner of Workers' Compensation Claims. In November, 1997, the plaintiff's tractor trailer overturned and caught on fire. The plaintiff was trapped under the wreckage for three hours, resulting in third- and fourth-degree burns to most of the lower half of his body. The severe burns caused the amputation of both of the plaintiff's legs, a colostomy, and extensive skin and muscle grafts. Two doctors recommended the installation of a home swimming pool, but the defendant refused to pay the cost of the installation. The defendant opted to provide the plaintiff with a lifetime membership at a health spa. The health spa was twenty-five miles from the plaintiff's home and was only available three times a week. The pool also lacked facilities for the safe ingress and egress by an amputee. In a contested hearing, two physicians recommended the installation of the pool as reasonably necessary, and two physicians disagreed, contending that other alternatives existed. The District Court of Appeal reversed the Deputy's ruling that the swimming pool was not necessary, because the Deputy failed to properly consider the inconsistencies in the deposition testimony of the non-treating evaluating physicians and did not give enough emphasis to the treating physicians' familiarity with the plaintiff's extensive and unusual injuries. On remand, the

appellate court ordered the employer to either install the pool or to provide the plaintiff with daily access to such a pool within a reasonable distance of the plaintiff's home with reimbursement costs.

Since this workers' compensation appeal presents a set of extremely unique circumstances, combined with a request for highly extraordinary relief, we have carefully scrutinized the record. We find the chancellor was in error in denying the plaintiff's relief. Based upon the overwhelming medical evidence in this record, the requested installation of a hydrotherapy pool is an "other apparatus . . . as may be reasonably required" as set forth in Tenn. Code Ann. § 50-6-204(a). As a note of caution, we find the language in *Haga v. Clay Hyder Trucking Lines,* 397 So. 2d 428, 429 (Fla. Dist. Ct. App. 1981), to be applicable:

> We do not reach this result without considerable concern that an opinion in this case may be misconstrued as an acceptance of the medical necessity of swimming pool installation in cases involving circumstances less extreme than those specifically presented here. Nonetheless, our duty is to judge the case on the particular facts before us and the fear that our decision may not be applied as we intended should not prevent a correct decision in the case at hand. Our intent, however, is that the decision in this case apply solely to the unusual facts presented.

We agree that the plaintiff's case medically and reasonably requires moving the treatment for chronic pain, physical therapy, and respiratory and bodily function improvement therapy to her home. The plaintiff must undergo a thirty-six mile round-trip, three times a week, for her therapy in Buffalo, New York. The medical proof establishes the plaintiff's physical and psychiatric condition will not always allow her to leave home for these appointments. We can only envision the difficulty the plaintiff must endure to meet these appointments in the New York winter weather. We find the medical facts establish a reasonable necessity for the in-home heated hydrotherapy pool.

Alternatively, the defendant contends that, if ordered to construct a pool in the plaintiff's home, the defendant should be granted a lien upon the property in question in the amount of the improvements, citing *Escambia County v. Phipps,* 553 So. 2d 269 (Fla. Dist. Ct. App. 1989). The plaintiff is silent on this issue.

There are two considerations in resolving this issue: first, whether the defendant

is entitled to reimbursement of the medical apparatus under workers' compensation law; and, second, whether this Court has jurisdiction to order a lien on the plaintiff's property in New York.

There is no statutory authority that permits this Court to order such a lien on a medical apparatus. There is no requirement under workers' compensation law that the plaintiff reimburse the defendant for any medical apparatus, regardless of the cost, or permit the employer to be reimbursed from the sale of a reasonably required apparatus. This is a matter for the legislature, not the judiciary. This Court's function is to decide if the apparatus is reasonably required under Tenn. Code Ann. § 50-6-204(a). This statute does not permit any agreement, contract, regulation, or device to relieve the employer of any obligation created by the statute. Tenn. Code Ann. § 50-6-114. The Florida Court of Appeal, in *Firestone Tire and Rubber Co. v. Vaughn,* 381 So. 2d 740 (Fla. Dist. Ct. App. 1980), discussed a similar request. The language from *Firestone* is particularly instructive and was quoted in *Skinner v. Florida Power Corp.,* 580 So. 2d 615, 616 (Fla. Dist. Ct. App. 1991):

> We feel it appropriate to remark that the partial reimbursement in this case seems to be a fair and reasonable result under the circumstances involving this type of award. However, we fail to find the statutory authority to apportion the expense absent a finding that the expense is unreasonable or not necessary. We note that judicially permitting a setoff based upon appreciation of property would open the door to litigation regarding an endless array of other setoffs urged because of "collateral benefits" to employees. Addressing such an issue is the prerogative of the legislature.

Second, this Court does not have jurisdiction to order a lien to be imposed on the plaintiff's real property in New York. Tennessee courts have consistently held that the courts of one state do not have jurisdiction over property located in another state, since this is an action **in rem** rather than **in personam.** In *Cory v. Olmstead,* 154 Tenn. 513, 290 S.W. 31, 32 (Tenn. 1926), our Supreme Court stated: "[I]t is well established that a court of one state is without jurisdiction to pass title to lands lying wholly in another state. The local court cannot by its decree bind the land. . . ." Since any order of this Court would affect the title of property in New York, the Court does not have jurisdiction to impose a lien on the plaintiff's property and declines to do so. *See also Roberts v. Roberts*, 767 S.W.2d 646 (Tenn. Ct. App. 1988); *Booth v. Booth*, 640 A.2d 1063, 1065 (Me. 1994) (Maine court

does not have jurisdiction to impose lien on Texas real estate); *Balke v. First Nat'l Bank of Ariz.,* 276 P.2d 527, 533 (Ariz. 1954) (Arizona court does not have jurisdiction to create a lien on home in California).

In summary, this Court has only to decide if the hydrotherapy pool is reasonably necessary as a benefit under the statute. We do not have the authority to impose a lien on the property, and determining who bears the cost of medical apparatus is best left to the discretion of the legislature.

The trial court's judgment is reversed and remanded.

_____
L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

_____
JANICE M. HOLDER, JUSTICE

_____
J. STEVEN STAFFORD, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

CATHERINE MAYO,	)	MADISON CHANCERY
	)	NO. 48518
Plaintiff/Appellant,	)	
	)	Hon. Joe C. Morris,
vs.	)	Chancellor
	)	
LUMBERMENS MUTUAL CASUALTY COMPANY,	)	NO. 02S01-9807-CH-00076
	)	
	)	
Defendant/Appellee.	)	REVERSED & REMANDED.

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 will be paid by Defendant/Appellee, for which execution may issue if necessary.

IT IS SO ORDERED this 28th day of May, 1999.

PER CURIAM