IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 21, 2016 Session

CRAIG BRUECKHEIMER v. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA ET AL.

Appeal from the Circuit Court for Giles County
No. CC10288 Stella L. Hargrove, Judge

No. M2015-01468-SC-R3-WC – Mailed May 25, 2016
Filed June 29, 2016

Pursuant to Tennessee Supreme Court Rule 51, this 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. In this pain management case, the employee received pain management treatment for more than ten years for a work-related injury pursuant to a judgment entered in November 2003. In April 2015, the employee's treating physician advised him that he was retiring and moving to Florida, prompting the employee to contact his employer's insurance carrier, who provided him with a panel of pain specialists two days later. The treating physician then made a referral to a different clinic to continue the employee's treatment, so the employee declined to select a doctor from the panel while the insurance carrier declined to authorize the referred clinic. The employee filed a motion in the Circuit Court for Giles County, seeking to compel the insurance carrier to authorize treatment by the clinic. The trial court granted the motion and awarded attorney's fees and travel expenses for a trip to Florida by the employee to see his previous physician. The insurance carrier has appealed, asserting that the trial court erred by granting the employee's motion. We reverse in part and affirm in part the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(a)(2) (2014) Appeal as of Right; Judgment of the Circuit Court Reversed in Part and Affirmed in Part

BEN H. CANTRELL, SR.J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and PATRICIA J. COTTRELL, SP.J., joined.

Kenneth D. Veit, Nashville, Tennessee, for the appellants, Insurance Company of the State of Pennsylvania (NY), and Glen Springs Holdings, Inc.

Steven C. Fifield and Larry R. McElhaney, II, Nashville, Tennessee, for the appellee, Craig Brueckheimer.

OPINION

Factual and Procedural History

Craig Brueckheimer ("Employee") was injured on July 20, 2000, in the course of his employment with Glen Springs Holdings, Inc. ("Employer"), sustaining burns on 75% of his body as a result of a phosphorous explosion. After a trial in August 2003, Employee was awarded permanent total disability benefits and lifetime medical benefits. Dr. Greg Bowers, a pain management specialist in Columbia, Tennessee, became Employee's authorized treating physician. Dr. Bowers continued to provide pain management treatment to Employee until April 2015, when he decided to retire and move to Florida, where he intended to practice medicine on a smaller scale. On April 6, 2015, Employee called Deborah Raymer, the claims representative assigned to Employee's case by Employer's insurance carrier, Insurance Company of the State of Pennsylvania ("Insurer"). Employee advised Ms. Raymer of the impending closure of Dr. Bowers's office.

In an affidavit submitted in support of his motion to compel Insurer to authorize treatment by Comprehensive Pain Specialists ("CPS"), Employee implied that during this April 6 phone call, he presented Dr. Bowers's referral notice, in which Dr. Bowers referred Employee to CPS. He also implied that after presenting the referral to Ms. Raymer, she told him he would have to select a doctor from a list that Insurer had compiled.

In contrast, Insurer submitted an affidavit in which Ms. Raymer stated that, during the April 6 phone call, Employee requested to be referred to MedCare Clinic, a clinic in Lawrenceburg, for continuing pain management treatment. She submitted that she was unable to locate this clinic after the phone call, and then compiled the list of physicians. Her statement is consistent with the copy of Dr. Bowers's referral notice in evidence, which is dated April 24, 2015, and Employee's testimony, in which he agreed that that he mentioned the Lawrenceburg clinic to Ms. Raymer during their first phone call.[1] Employee also stated

[1] Employee referred to the Lawrenceburg clinic as "MediCare," not "MedCare," stating at the motion hearing that "[Ms. Raymer] was correct about me calling a place in Lawrenceburg–that MediCare Clinic."

that, after the phone call, he worked with Dr. Bowers's secretary to locate a clinic that would provide the same medications he had been receiving. On April 8, Ms. Raymer provided Employee with a panel of three pain management physicians. It is undisputed that Employee did not make a selection from the panel.

Dr. Bowers referred Employee to CPS in a notice dated April 24, 2015. In his affidavit, Dr. Bowers stated that he "wrote a referral for [Employee] to transfer his treatment to the doctors at [CPS]." He stated he was "familiar with the doctors at [CPS]," and opined that "[Employee] would be best treated by continuing his pain management with [CPS]," due to "[Employee's] injuries and treatment history." As Dr. Bowers would no longer serve as Employee's treating physician after moving to Florida, it appears Dr. Bowers envisioned CPS as providing a new treating physician for Employee. However, Dr. Bowers did not identify any specific CPS physician who would be responsible for Employee's treatment, nor did he describe the qualifications of any physician or physicians at CPS.

On May 6, 2015, Employee's attorney sent an email message to Ms. Raymer and attached a copy of Dr. Bowers's April 24 referral to CPS. The message requested that Ms. Raymer immediately allow CPS to become authorized treating physicians. In the subsequent series of email messages, Ms. Raymer declined to authorize CPS and restated that Employee could select a pain management physician from the panel provided on April 8, adding that an appointment would then be made. Employee's attorney continued to insist that Insurer was required to accept Dr. Bowers's referral. Employee filed a request for a benefit review conference ("BRC") on June 8, 2015. The Division of Workers' Compensation issued a waiver of BRC on the same date. Three days later, Employee filed a motion "to enforce the final [2003] judgment and compel compliance with the obligations of the parties and for an award of attorney fees and expenses."

In support of his motion, Employee included a copy of the 2003 judgment, copies of email messages between Employee's attorney and Ms. Raymer, Dr. Bowers's April 24, 2015 referral to CPS, affidavits of Employee and Dr. Bowers, and some of Dr. Bowers's medical records. Employee contended that Insurer was required to authorize CPS as a provider based upon the presumption of reasonableness and necessity attaching to treatment recommendations of the authorized treating physician. See Russell v. Genesco, Inc., 651 S.W.2d 206, 211 (Tenn. 1983).

Insurer filed a response in opposition to Employee's motion, supported by an affidavit from Ms. Raymer, a copy of Dr. Bowers's April 1, 2015 office note, a copy of the original panel of physicians presented to Employee, and a copy of a later panel, accompanied by an explanatory affidavit from Insurer's attorney. Insurer argued that it was required by Tennessee Code Annotated section 50-6-204(j) to provide a panel of pain management physicians.

Prior to the hearing on his motion to compel treatment at CPS, Employee requested that he be authorized to fly to Florida to see Dr. Bowers for a refill of his prescriptions, as Dr. Bowers was still his authorized physician. Insurer declined, advising that if Employee needed prescription refills, he could select a physician from the panel and a timely appointment would be scheduled to facilitate this. Employee stated in his affidavit that he scheduled an appointment with CPS, but submitted at the hearing that the appointment fell through. He testified that he flew down to Florida instead for an appointment with Dr. Bowers to get his pain medications filled because, without them, he experienced intense pain.

The trial court held a hearing on June 24, 2015. At trial, Employee requested reimbursement for travel expenses for the trip to Florida to obtain refills of his prescriptions. Employee testified briefly about his own efforts to find a pain management physician, his need for a medication known as Kadian,[2] and his course of treatment with Dr. Bowers. Insurer argued that the statutory requirement to provide medical care had been satisfied by offering a panel of pain management physicians on April 8, 2015. The trial court issued its findings from the bench, granting Employee's motion and awarding attorney's fees and expenses. An order consistent with those findings was entered on July10, 2015. Insurer has appealed, arguing that the trial court committed reversible error by requiring it to authorize CPS.

Analysis

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(a)(2) (2014), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

[2] Kadian is an extended-release form of morphine sulfate. Medication Guide, Kadian, U.S. Food and Drug Administration (April 2014), http://www.fda.gov/downloads/Drugs/DrugSafety/UCM311373.pdf.

Critical to our decision in this case is a determination of whether Employee's request to authorize treatment by CPS is a request for a new authorized treating physician, or is a referral by an already-authorized physician for specialized pain management. The parties assert opposing characterizations in their briefs.

Insurer contends that Employee is seeking a new primary attending physician. Insurer asserts the right to provide Employee with a panel of qualified physicians, relying on the language of Tennessee Code Annotated sections 50-6-204(a)(4)(A) and (j)(2)(A), which require employers to provide a list of three or more physicians from which an injured employee may select "the operating surgeon and the attending physician." Insurer cites several cases establishing the employer's right to provide an employee with a list from which the authorized physician must be selected, though all these cases involve the employer's right to provide a panel of physicians in the first instance or after an employee becomes dissatisfied with the authorized physician. See Irwin v. Fulton Sylphon Co., 166 S.W.2d 610 (Tenn. 1942); see also Greenlee v. Care Inn of Jefferson City, 644 S.W.2d 679, 680 (Tenn. 1983) (stating that, absent exceptional circumstances, "the better rule is that the employer be given an opportunity to provide for the treatment each time the employee reasonably requires additional treatment").

In contrast, Employee asserts the opposite in his brief. He portrays the set of circumstances as a mere referral by an authorized physician to a pain-management specialist. Relying upon Russell v. Genesco, Inc., he advocates that the authorized physician is entitled to a "presumption that treatment furnished by physicians designated by the employer is necessary and the charges reasonable" and that the employee does "not bear the burden of establishing the necessity of medical treatment or the reasonableness of medical charges when the employer has designated the physician or the employer's designate refers the claimant to other specialists." 651 S.W.2d at 211.

Under this theory, authorized treating physicians enjoy the presumption of reasonableness and necessity because the employer had the opportunity initially to designate the group of physicians from which the employee selected the authorized treating physician. The General Assembly granted the employer "the right to designate a group of physicians . . . to allow the employer to select 'reputable physicians and surgeons.'" Id. If the physician is "reputable, medical assistance supplied to the claimant should be necessary." Id. The presumption attaches, the Court found, "when the employer . . . designated the physician or the employer's designate refers the claimant to other specialists." Id.

We have not been presented with this set of facts prior to this case. However, we conclude that the actual request being made is for a new treating physician. Dr. Bowers is retiring from his Tennessee practice and moving to another state, where he will no longer be able to serve as the primary treating physician. Accordingly, his attempt to transfer Employee's treatment to CPS, prior to terminating his relationship with Employee, is not in

reality a referral merely for specialized treatment. Instead it would have the effect of leaving an unknown doctor at CPS to become the sole treatment professional for Employee, without input from Employer or Insurer. Indeed, a May 6, 2015 email from Employee's attorney clearly requests that CPS become Employee's new authorized treating physician.

Permitting the authorized treating physician to choose his or her successor and transfer an employee's treatment to that successor would give the authorized treating physician the power to transfer the legal presumption of reasonableness and necessity to a physician who has not been selected by the employer. Neither party has cited any authority directly addressing this question. We find that such a result would be inconsistent with the purpose and intent of the presumption.

Accordingly, we find that the facts of this case, specifically the retirement and the move of the treating physician, require the designation of a new treating physician. Insurer, not the retiring authorized treating physician, has the right to designate a panel of reputable physicians from which Employee can select a new authorized physician. Insurer fulfilled its obligation to provide a panel of physicians within two days of receiving notice from Employee of Dr. Bowers's impending retirement. Employee was required by Tennessee Code Annotated section 50-6-204(a)(3)(A) to select a treating physician from that panel. He did not do so.

The order of the trial court requiring Insurer to authorize CPS to provide treatment is reversed. Employee must choose a new authorized physician from among the doctors on the panel provided by Insurer.[3] In the interest of equity, we affirm the trial court's judgment directing Insurer to reimburse Employee for the reasonable expenses of his trip to Florida. See Tenn. Code Ann. § 50-6-116 (2014) (stating the workers' compensation law is "a remedial statute, which shall be given an equitable construction by the courts, to the end that the objects and purposes of this chapter may be realized and attained").[4] During the time this issue was in dispute, Employee needed to see a physician to get his prescriptions refilled. Under those unique circumstances, the trip was reasonable.

This case is remanded to the trial court for entry of an order requiring Employee to select a physician from the list provided by Insurer and to calculate and award Employee the reasonable expenses of his trip to Florida. Because Employee is no longer the prevailing party, it follows that the award of attorney's fees and costs is vacated.

[3] Insurer has provided a list of qualified pain management physicians to serve as Employee's treating physician; their qualifications in pain management do not detract from their ability to serve as his treating physician. See Tenn. Code Ann. § 50-6-204(j)(1).

[4] This section was amended, effective July 1, 2014, to state the workers' compensation law "shall not be remedially or liberally constructed . . . and . . . shall not be construed in a manner favoring either the employee or the employer."

Conclusion

The judgment of the trial court directing Insurer to authorize CPS is reversed. The award of expenses for the trip to Florida is affirmed. The award of attorney's fees and court costs are vacated. The case is remanded to the trial court for further proceedings consistent with this opinion. Costs on appeal are taxed to Craig Brueckheimer, for which execution may issue if necessary.

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BEN H. CANTRELL, SENIOR 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 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 Craig Brueckheimer, and his surety, for which execution may issue if necessary.

PER CURIAM