IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
May 23, 2016 Session

# SELVIN CALDERON v. AUTO OWNERS INSURANCE COMPANY, ET AL.

**Appeal from the Circuit Court for Davidson County**
**No. 13C2419 Hamilton V. Gayden, Jr., Judge**

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**No. M2015-01707-SC-R3-WC – Mailed August 8, 2016**
**Filed October 24, 2016**

Selvin Calderon ("Employee") suffered a compensable injury to his spine when he fell from a two-story roof. The trial court found Mr. Calderon to be permanently and totally disabled and ordered Auto Owners Insurance Company ("Insurer")[1] to pay benefits and provide medical care for the injury. Seven months after entry of the judgment, Employee filed a "Motion to Compel Appropriate Medical Accommodations and Expenses and for an Award of Attorney's Fees," seeking to have Insurer pay the difference in rent between his present apartment and a wheelchair accessible residence and also for a bus pass to be used for daily activities unrelated to his disability. Insurer is willing and able to modify any apartment for wheelchair accessibility, and it provides transportation to Employee for his medical appointments. Insurer argued it is fulfilling its obligations under the workers' compensation law. The trial court denied Employee's motion, and he appealed. The appeal was referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment of the trial court.

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

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[1] A. G. O. Contracting ("AGO"), a subcontractor, employed Mr. Calderon. AGO was not insured at the time of the injury. For that reason, Employee included AE Roofing, an intermediate contractor, Ken Allen Enterprise, the general contractor, and their insurer as defendants in the case, alleging that he was a statutory employee of AE and Ken Allen pursuant to Tennessee Code Annotated § 50-6-113.

WILLIAM B. ACREE, JR., SP.J., delivered the opinion of the Court, in which JEFFREY S. BIVINS, J. and PAUL G. SUMMERS, SP.J., joined.

David S. Hagy, Nashville, Tennessee, for the appellant, Selvin Calderon.

Michael L. Haynie, Nashville, Tennessee, for the appellees, Auto Owners Insurance Company, AE Roofing and Exteriors, LLC, and Ken Allen Enterprise, LLC.

## OPINION

### Factual and Procedural History

Employee fell on May 15, 2012, causing a spinal injury and rendering him a paraplegic. Employee filed claims in both Georgia[2] and Tennessee and, subsequently, dismissed the Georgia claim for lack of jurisdiction. Following an unsuccessful benefit review conference ("BRC"), Employee filed suit in the Circuit Court for Davidson County. The trial court entered judgment on September 9, 2014, ordering Insurer to pay permanent total disability benefits, past medical bills, and provide future medical care for the injury.

On April 8, 2015, Employee filed a "Motion to Compel Appropriate Medical Accommodations and Expenses." In the motion Employee alleged his residence was not wheelchair accessible and could not be modified to become so. Employee acknowledged that Insurer made efforts to find an accessible apartment or an apartment that could be modified. A nurse case manager located an accessible home, but the rent was beyond Employee's financial capability. Employee therefore requested that Insurer pay the difference between his current rent and the rent of the accessible home. The Shepard Center, a rehabilitation center specializing in treatment of catastrophic injuries, performed a housing assessment and submitted it to the court. The report set out specific requirements for a fully accessible apartment or home. In reliance on the report, Employee contended Tennessee Code Annotated § 50-6-204(a)(1) (A) (2014) (applicable to injuries occurring prior to July 1, 2014) obligated Insurer to find an alternate residence that was wheelchair accessible, or capable of being modified to be accessible. He also contended Insurer is liable for any difference between his current rent and the cost of the residence found for him.

Employee further alleged in his motion that Insurer provided transportation for Employee's medical appointments and therapy but declined to pay for "discretionary transportation." Employee requested to be provided with a pass for "CCT Paratransit,"[3]

[2] Employee resides in Georgia.

[3] In his brief, Employee refers to this service as "CTA Paratransit." However, a "Passenger Guide" clearly refers to the service as "CCT Paratransit." We will refer to this entity as CCT Paratransit.

a public service that provides transportation to handicapped individuals. In support of that request, Employee submitted a clinical note from Dr. Angela Beninga of the Shepard Center. The note stated, in pertinent part:

> [T]he patient does require transportation to get to and from doctors [sic] visits, to and from Shepherd Center for exercise as well as other [activities of daily living] such as patient being able to get groceries, go to laundry mat, go to bank and other forms of shopping/errands. It is reasonably necessary to provide Mr. Calderon with access to transportation.

Citing Dennis v. Erin Truckways, 188 S.W.3d 578 (Tenn. 2006), Insurer acknowledges liability for modifications made necessary by Employee's injury to an existing residence, but denied the responsibility to locate other housing, pay increased rent, or purchase a home for him. Insurer acknowledges Employee moved to a different apartment at some time after entry of the judgment. It stood ready to make the necessary modifications to that residence with owner permission. Insurer reported it provides Employee with transportation to and from medical activities, but maintained it was "not responsible for providing [Employee] transportation for everyday activities, such as visiting friends or going to a store."

The trial court issued its memorandum decision on August 20, 2015. Relying on Dennis, the court found Insurer liable for modifications to Employee's existing or future residence, but Insurer was not required to pay the difference between Employee's present rent and the potentially greater rent at an accessible or modifiable location. The trial court further held Insurer obligated to provide transportation for medical treatment, as it had been doing, but was not required "to provide transportation to regular, everyday activities unrelated to his medical condition." The trial court denied Employee's motion in its entirety. Employee appeals that order, asserting the trial court's interpretations of Tennessee Code Annotated § 50-6-204(a)(1)(A) and Dennis were incorrect. He also seeks an award of attorney's fees.

## Analysis

This appeal presents no factual disputes. Both parties' arguments concern the trial court's interpretation of Tennessee Code Annotated § 50-6-204(a)(1)(A) and Dennis. "The interpretation of a statute and its application to undisputed facts involve questions of law." Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009) (Internal citations omitted). Accordingly, we will review the trial court's interpretation and application of Tennessee Code Annotated § 50-6-204(a)(1)(A) de novo without a presumption of correctness. (Id.)

*Housing*

Tennessee Code Annotated § 50-6-204(a)(1)(A) states:

> 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 reasonable and necessary apparatus, including prescription eyeglasses and eye wear, such nursing services or psychological services as ordered by the attending physician and hospitalization, including such dental work made reasonably necessary by accident as defined in this chapter.

Tenn. Code Ann. § 50-6-204 (2014) (applicable to injuries occurring before July 1, 2014).

Employee contends wheelchair accessible housing falls within the category of "other reasonable and necessary apparatus" described in section 50-6-204(a)(1)(A). He cites Dennis and several decisions from other jurisdictions in support of his position. We agree Dennis is applicable here, but conclude it does not support Employee's position.

In Dennis, a motor vehicle accident paralyzed the employee from the waist down. Id at 581. Compensability of the injury was not disputed. The Supreme Court addressed the employee's contention that "the trial court erred in holding that the workers' compensation statute does not require an employer to cover the cost of wheelchair-accessible housing." Id. at 590. The Dennis Court held, "although the Workers' Compensation Law does not contemplate an employer paying for wheelchair-accessible housing in its entirety, the law does require the employer to pay for medically-necessary modifications to make existing housing wheelchair-accessible." Id. at 592. In reaching this conclusion, the Court said,

> Although it is true that the Workers' Compensation Law "is remedial in nature and is to be given a liberal and equitable construction in favor of workers," Long v. Mid-Tennessee Ford Truck Sales, Inc., 160 S.W.3d 504, 510 (Tenn. 2005), the language of the statute simply cannot sustain the analytical leap necessary to construe housing as "medical apparatus." The statute includes as examples of "medical apparatus" such items as "crutches, artificial members" and "prescription eyeglasses and eye wear." The statute contemplates specialized accessories and aid particularly necessary to an injured employee. It does not contemplate basic necessities of life, such as housing.

* * *

> The purpose of workers' compensation is to replace lost wages. See, e.g., VanHooser v. Mueller Co., 741 S.W.2d 329, 330 (Tenn. 1987). From that compensation, it is contemplated that an injured employee will purchase the necessities of life such as food and shelter. Compensation rates are set with the assumption that the payments will be used by injured employees to cover such ordinary and necessary expenses. Requiring an employer to pay the full cost of specialized housing would be an unintended windfall for the injured employee because it would relieve that employee of the entire cost of housing—a cost which the statute contemplates he will be paying with the wage-replacement he receives in the form of compensation benefits.
>
> This does not mean, however, that the employer has no responsibility under the Workers' Compensation Law to supply the modifications necessary to make housing wheelchair-accessible to an injured employee confined to a wheelchair. It is undisputed that wheelchair-accessible housing is medically necessary for Dennis. . . . Unlike the entire cost of housing itself, in our view, modifications such as ramps, grab bars, widened doorways, and accessible cabinets and appliances are within the statute's definition of "apparatus" when such modifications are found to be medically necessary. If it is possible to modify the injured employee's existing home, then the employer shall bear the cost of all modifications deemed medically necessary.

Id. at 591-592.

The Dennis Court remanded for findings of fact as to the availability and cost of the appropriate remedy. Id. at 592.

Employee cites several decisions from other states holding employers liable for the cost of housing. See Pringle v. Mayor & Aldermen of The City of Savannah, 478 S.E.2d 139 (Ga.App. 1996); Espinosa v. Tradesource, Inc., 752 S.E. 2d 153 (N.C. App. 2013); Tinajero v. Balfour Beatty Infrastructure, Inc., 758 S.E.2d 169, 176-79 (N.C. App. 2014); and Ramada Inn South Airport v. Lamoureux, 565 So.2d 376, 377 (Fla. Dist. Ct. App. 1990). We conclude, however, that the holding in Dennis controls in this case. Therefore, we cannot rely upon authority from other states.

We hold that the trial court correctly applied the precedent of Dennis in its decision that Insurer is not required to pay for employee's housing beyond the costs directly attributable to modification of the housing to make it handicap accessible. Employee lived in a home which was not handicap accessible and which could not be modified to make it such. Had the home been modifiable, the Insurer would have been required to pay for the costs of modification. However, the Insurer is not responsible for

paying the difference in rent between a non-handicap accessible home and a handicap accessible home under current law. Accordingly, we affirm the trial court's decision with respect to this issue.

*Transportation*

Employee also contends that the trial court erred by failing to order Insurer to provide him with a pass for CCT Paratransit. In its memorandum order, the court stated that "although the employer is obligated to provide transportation for Plaintiff to attend medical appointments and other appointments related to his injuries; there is no obligation to provide transportation to regular, everyday activities unrelated to his medical condition."

Employee cites language in Wilhelm v. Kern's Inc., 713 S.W.2d 67 (Tenn. 1986), in support of his position: "In order for travel expenses to be compensable under the Act, we conclude that the evidence must show that the travel is 'reasonably required' as being therapeutic in itself or that it is necessary to enable the employee to acquire a 'reasonably required' medical, surgical, dental or nursing service." Id. at 68.

However, Employee concedes that Insurer has provided transportation to all medical appointments, physical therapy, and related care. He contends that Dr. Beninga's note stating that it was "reasonably necessary" for Employee to have access to transportation in order to "get groceries, go to laundry mat, go to bank and other forms of shopping/errands[,]" amounts to a finding of that such access is therapeutic in itself or is required to permit Employee to receive medical services. We disagree. Groceries, laundry, shopping and errands are neither medical apparatus nor medical treatment. These are "necessities of life such as food and shelter[,]" which are to be paid for by Employee's permanent disability benefits. See Dennis, 188 S.W.3d at 592.

Therefore, we affirm the trial court's denial of Employee's request for a CCT Paratransit pass.

Because the trial court's denial of Employee's motion is affirmed, the question of an award of attorney's fees is moot.

**Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to Selvin Calderon and his surety, for which execution may issue if necessary.

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WILLIAM B. ACREE, JR., SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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**Circuit Court for Davidson County**
**No. 13C2419**

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**No. M2015-01707-SC-R3-WC – Filed October 24, 2016**

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## JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Selvin Calderon pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court and is designated "Not For Citation" in accordance with Supreme Court Rule 4, § E.

Costs are assessed to Selvin Calderon, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Jeffrey S. Bivins, J., not participating