IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
December 10, 2012 Session

JAMES CARRIGAN v. DAVENPORT TOWING AND RECOVERY SERVICES, LLC, ET AL.

Appeal from the Chancery Court for Shelby County
No. CH-10-0302-1 Walter L. Evans, Chancellor

No. W2012-00586-SC-WCM-WC - Mailed February 8, 2013; Filed April 11, 2013

In this workers' compensation action, the employee alleged that he sustained a compensable injury to his lower back while using a sledge hammer. He had injured his back in a similar manner a year earlier, and his employer asserted that the earlier event was the cause of the employee's symptoms and need for additional medical treatment. The trial court found that the employee had sustained a compensable injury and awarded additional temporary and permanent disability benefits. The employer has appealed, challenging both the temporary and permanent disability benefits awarded.[1] The employee raises two additional issues: the adequacy of the vocational disability award and the trial court's decision not to award certain discretionary costs. We reverse the trial court's decision not to award the employee each of the discretionary costs requested; we affirm judgment of the trial court in all other respects.

Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2012) Appeal as of Right;
Judgment of the Chancery Court Affirmed in Part and Reversed in Part

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and DONALD E. PARISH, SP. J., joined.

Thomas D. Yeaglin, Memphis, Tennessee, for the appellants, Davenport Towing and Recovery Services, LLC and Benchmark Insurance Company.

Stephen F. Libby, Memphis, Tennessee, for the appellee, James Carrigan.

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[1] Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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.

MEMORANDUM OPINION

Factual and Procedural Background

James Carrigan ("Employee") was employed by Davenport Towing and Recovery Services, LLC ("Employer") as a class C tow truck driver from 2006 until January 2008. According to Employee, there are three classes of tow truck drivers. Class A tow truck drivers haul the smallest vehicles, namely disabled cars. Class A drivers are required "to lift and pull, pick up at least 80 pounds of debris, tires, wheels, doors," and whatever debris remains at the scene of a wreck. To pull a car out of a ditch requires hooking it with a cable and "a chain, a V chain, hooked on to the end of that cable that's probably twenty pounds."

Class B drivers perform similar work on vehicles "larger than a normal size vehicle, a box truck, armored cars, milk trucks," and other mid-size trucks. This requires picking up to be able " to pick up fifty to eighty pounds continuously, push, pull, climb," and "move the drive shaft or axles" to avoid damaging the transmission. For trucks with knockout caps, the driver must "take a sledgehammer [and] knock the caps out one way; then knock the drive shaft back the other way to make the caps come out of the yoke." All of this must be done under the vehicle where the drive shaft is located. Class B jobs are more demanding that Class A work because "the cables are bigger, the trucks are bigger, the work is harder."

Class C drivers haul larger commercial vehicles, including eighteen-wheel tractor-trailers, cement mixers, off-the-road trucks used by construction companies, and fire trucks. Compared to other classes, Class C drivers perform "way heavier, more strenuous" work because "the drive shafts weigh more; the parts are bigger; the axles are bigger. Everything is larger" as compared to Class A or Class B. Because tow truck operators generally work on commission, Class C drivers typically earn the most money.

Employee testified that he made "around five hundred, four or five hundred dollars" per week working as a Class A tow truck operator, but earned "right at sixty-nine thousand" dollars his last complete year as a Class C driver.

Employee first injured his back on February 19, 2007, while using a sledge hammer to remove a drive shaft from a truck. The injury was accepted as compensable.

Dr. Stephen Waggoner, an orthopaedic surgeon, performed an L4-5 discectomy on May 24, 2007. Employee recovered well from the injury and surgery and was able to return to his former job, without restrictions, in August 2007. Employee testified that he had no symptoms, took no medications, and was able to perform his job without difficulty after his

return. His workers' compensation claim concerning that injury was settled on October 23, 2007.

Employee alleged that he sustained a second injury to his back on January 2, 2008, and it is that injury that is the subject of this appeal. The circumstances of the second injury were similar to the first. Employee as using a twenty-five pound (25lb.) sledgehammer to remove the drive shaft off of a disabled truck when he felt a popping sensation in his lower back as he swung the hammer. Employee removed the shaft with the assistance of the driver of the disabled truck. He immediately informed his dispatcher of the incident, and he was able to complete his assignment. Employee sought treatment from his personal physician, and eventually, he was referred to Dr. Waggoner for evaluation and treatment.

Dr. Waggoner ordered a magnetic resonance imaging scan ("MRI"), which showed no changes from a recent pre-injury MRI. Dr. Waggoner prescribed physical therapy and medication. When Employee's symptoms did not improve, Dr. Waggoner ordered a functional capacity evaluation ("FCE"). The evaluator found that Employee was "self-limiting" during the test, and the results were therefore inconclusive. Dr. Waggoner did not think surgery was necessary, and on April 17, 2008, he declared Employee to be at maximum medical improvement ("MMI"). Dr. Waggoner advised Employee that he could attempt to return to his previous job. Dr. Waggoner testified that, based on the results of the FCE, he thought Employee may have been malingering. Dr. Waggoner, however, later changed his mind concerning that subject and the date of MMI.

Employee sought additional treatment and was referred to Dr. Green, a pain management specialist. Dr. Green ordered a discogram, a test in which dye is injected into the vertebral discs. The results of this test showed that the L4-5 and L5-S1 discs were the likely source of Employee's symptoms. Based on those findings, Dr. Waggoner determined that it was appropriate to proceed with a two-level lumbar fusion, and that procedure was performed on March 16, 2009.

Dr. Waggoner testified that Employee "had been doing fairly well working at his regular job, up until the recurrent injury that he incurred, that occurred I guess in January of 2008 . . . So most of these changes that he had are degenerative in nature, but somehow they may have been exacerbated by the injury." Dr. Waggoner determined that Employee reached MMI on August 20, 2009. Although he placed no formal restrictions on Employee's activities, he did state, "somebody that had [a spinal] fusion should be in some sort of a medium work category. You know, not extremely heavy lifting. Can do some occasional lifting." Dr. Waggoner assigned no additional impairment due to the second injury and surgery. He reasoned that, according to the Sixth Edition of the American Medical Association Guides ("AMA Guides"), Employee had a 10% permanent impairment after the

second injury, the same impairment that had been assigned under the Fifth Edition of the AMA Guides for the previous injury.

At the request of Employee's attorney, Dr. Apurva Dalal, an orthopaedic surgeon, conducted an independent medical examination. Dr. Dalal opined that Employee retained a 20% permanent anatomical impairment from the January 2008 injury and surgery according to the Sixth Edition of the AMA Guides. He recommended that Employee avoid lifting more than ten pounds at a time and limit bending, pushing, and pulling. Dr. Dalal testified that the January 2008 incident aggravated "the preexisting degenerative changes in the spine, necessitating the need for surgical intervention." Dr. Dalal also testified that the impairment rating for Employee's first injury and surgery could have been as low as 0%, using the Sixth Edition of the AMA Guides criteria. He further testified that, according to the Fifth Edition of the AMA Guides, the first injury and surgery would have caused an impairment of 10% to 13%, while the second would have caused an impairment of 20% to 23%.

Employee was thirty-eight years old when the trial occurred. He had attended school into the ninth grade. He had no additional education. He had worked as an over-the-road truck driver before becoming a tow truck operator. He began as a class "A" operator, towing passenger and similar vehicles, and gradually worked his way up to class C. He had earned more than $60,000 during 2006, his last full year as a class C operator. He testified that, after his February 2007 injury, he had returned to work without any difficulty or limitations until the January 2008 injury. He did not return to work for Employer after that injury because he was no longer able to perform the heavy aspects of the job. Following the January 2008 incident, Employee had gone to work as a class A driver for another company. This job consisted of moving small equipment, such as forklift trucks, that could be driven from a dock onto the tow truck. Employee had earned $15,600 in 2010. Employee testified that he still had leg pain and stiffness in his back. He was unable to perform yard work as he had done before. He no longer swam, water skied, or hunted. Previously, he had preformed routine maintenance on all of his own vehicles. He was no longer able to do so, however, because of his limited ability to lift and bend. Adrianna Corrigan, Employee's wife, testified at trial and confirmed Employee's description of his current symptoms and limitations.

The trial court issued written findings and conclusions. It found that Employee had sustained a compensable injury as a result of the January 2008 event, for which he retained a 20% permanent anatomical impairment and a 40% permanent partial disability to the body as a whole. The trial court also awarded temporary total disability benefits from March 11, 2008, through March 16, 2009, and from April 27, 2009, through August 20, 2009.

Employer has appealed, contending that the trial court erred by awarding permanent partial disability benefits and temporary disability benefits beyond those paid voluntarily.

Employee asserts that the award of permanent disability benefits is inadequate and that the trial court erred in failing to award him all his discretionary costs.

Standard of Review

Appellate review of workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008 & Supp. 2012), which provides that appellate courts must review 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[s], 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).

Analysis

I. *Temporary Disability Benefits*

The parties stipulated that Employee received temporary total disability benefits from January 2, 2008, through March 10, 2008, when Dr. Waggoner first returned Employee to light duty work. The trial court found that Employee was also entitled to recover temporary disability benefits from March 11, 2008, through March 16, 2009 (370 days), and from April 27, 2009, through August 20, 2009 (115 days). The trial court further found that Employee worked for approximately three weeks during this period, earning approximately $300 per week. Accordingly, the trial court awarded Employee temporary total disability benefits for 464 days and temporary partial disability benefits for 21 days. Employer strenuously denies that payment of those benefits is appropriate for any period of time after March 10, 2008, contending that at no time after that date was Employee completely unable to perform any work.

The Tennessee Workers' Compensation Law establishes four distinct categories of compensable disabilities: (1) temporary total disability; (2) temporary partial disability; (3) permanent partial disability; and (4) permanent total disability. Tenn. Code Ann. § 50-6-207 (2008 & Supp. 2012); Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 572 (Tenn. 2008). The temporary total disability period terminates when the permanent total or permanent

partial disability period begins; the two periods cannot cover the same period of time. Bond v. Am. Air Filter, 692 S.W.2d 638, 641 (Tenn. 1985). Thus, temporary total disability benefits terminate either by the ability to return to work or attainment of maximum recovery. Foreman, 272 S.W.3d at 575; Robertson v. Loretto Casket Co., 722 S.W.2d 380, 383 (Tenn. 1986); Simpson v. Satterfield, 564 S.W.2d 953, 955 (Tenn. 1978). Temporary total disability benefits are intended to compensate the employee during the period he is recuperating from his injury and is unable to work. Smith v. Gerdau Ameristeel, Inc., No. W2011-01399-WC-R3-WC, 2012 WL 3822156, at *5 (Tenn. Workers' Comp. Panel Sept. 5, 2012); see Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 778 (Tenn. 2000). To establish a prima facie case for temporary total disability benefits, an employee must show that (1) he or she was totally disabled and unable to work as a result of a compensable injury; (2) that a causal connection exists between the injury and the employee's inability to work; and (3) the duration of the period of the employee's disability. Gray v. Cullum Mach. Tool & Die, Inc., 152 S.W.3d 439, 443 (Tenn. 2004).

In this case, Employer asserts that Dr. Waggoner, Employee's only treating physician, placed him on light duty at several point**s** during the time period in question. Because the treating physician deemed him able to work, Employer argues that he was not totally disabled from work during that time and that temporary total disability payments are not appropriate. Employee relies upon Dr. Waggoner's deposition response that Employee "probably" could not have returned to work at his job with Employer at any time between January 2008 and August 2009. He also relies on Dr. Dalal's specific deposition testimony that Employee was unable to work from March 11, 2008, through March 16, 2009, and from April 27, 2009, through August 20, 2009, although he was equally unequivocal that, at no time since the injury of January 2, 2008, had he been capable of returning to his former full-duty job. Dr. Waggoner **also** determined that Employee reached maximum medical improvement on August 20, 2009.

Although certain parts of Dr. Waggoner's testimony suggested that Employee could have been able to return to work at times during the contested period, other parts of his testimony, and all of Dr. Dalal's testimony, provides adequate evidence that he could not. On the record before us, we are unable to conclude that the evidence preponderates against the trial court's conclusion on this issue.

II. *Permanent Partial Disability*

Employer also argues that the evidence preponderates against the trial court's finding that Employee sustained a new, compensable injury in January 2008 that caused permanent disability in addition to that caused by his February 2007 injury. In support of this argument, Employer points to Dr. Waggoner's testimony that Employee's anatomical impairment did

not increase as a result of the second event. We note, as the trial court did, that Dr. Waggoner's impairment rating for the 2007 injury was made according to the Fifth Edition of the AMA Guides, while his rating for the second injury was made according to the Sixth Edition.[2] From the record, it does not appear that Dr. Waggoner was ever asked to compare impairments using the same edition for both injuries.

More importantly, however, we are unable to disregard the fact that the first surgical procedure involved removal of a disc fragment from a single level of the spine, while the second procedure involved the removal of two entire discs. On its face, the second procedure was simply more extensive than the first. In addition, the trial court accepted Employee's testimony concerning the significant effects of the second injury, both as to the increase in his symptoms and as to the diminution of his physical capabilities. After reviewing the record, we are unable to conclude that the evidence preponderates against the trial court's decision to accept Dr. Dalal's impairment rating.

Although it is not entirely clear, it appears that Employer makes a related argument that the second event caused merely an increase in the pain associated with the 2007 injury and was therefore not compensable as a new injury. Whether or not a particular event constitutes a compensable aggravation of a pre-existing condition was recently addressed in Trosper v. Armstrong Wood Prods., Inc., 273 S.W.3d 598 (Tenn. 2008). In that case, the Supreme Court set the applicable standard:

> We reiterate that the employee does not suffer a compensable injury where the work activity aggravates the pre-existing condition merely by increasing the pain. However, if the work injury advances the severity of the pre-existing condition, or if, as a result of the pre-existing condition, the employee suffers a new, distinct injury other than increased pain, then the work injury is compensable.

273 S.W.3d at 607 (citing Smith v. Smith's Transfer Corp., 735 S.W.2d 221 (Tenn. 1987); accord Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 645 (Tenn. 2008); Foreman, 272 S.W.3d at 573.

Dr. Waggoner testified that the January 2008 incident aggravated and "exacerbated" Employee's pre-existing condition, and Dr. Dalal testified that the January 2008 incident

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[2] The Sixth Edition of the AMA Guides is effective for injuries that occur on or after January 1, 2008. Tenn. Dep't of Labor and Workforce Dev., Notice from the Administrator, http://www.tn.gov/labor-wfd/wc_AMAguides2008.shtml (citing Tenn. Code Ann. §§ 50-6-102, -204 (2008 & Supp. 2012)).

advanced Employee's pre-existing condition. Also, as we noted above, the 2008 incident resulted in the performing of an extensive surgical procedure. Our review of the record leads us to conclude that the evidence does not preponderate against the trial court's finding that Employee sustained a new, compensable injury in January 2008 that caused permanent disability in addition to that caused by his February 2007 injury.

III. *Adequacy of Vocational Disability Award*

The Workers' Compensation Law provides that for injuries arising after July 1, 2004, permanent partial disability benefits for injuries to the body as a whole may not exceed six times the medical impairment rating, provided the employee does not return to work for the pre-injury employer. Tenn. Code Ann. § 50-6-241(d)(2)(A) (2008 & Supp. 2012). In this case, there is no dispute that Employee did not return to work; thus, the six-times cap applies. Faced with competing assessments of permanent impairment, the trial court accepted the 20% anatomic impairment rating assigned by Dr. Dalal and found that Employee suffered a vocational impairment rating of 40% to the body as a whole—twice the anatomic rating.

In addition to the issues raised by Employer, Employee contends that the trial court's award of 40% permanent partial disability benefits do not sufficiently compensate him for his work injury. In support of his position, he points to his own description of his current physical limitations; his inability to return to work as a class C tow truck operator; and the significant reduction in his actual earnings since returning to work as a class A tow truck operator.

In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition. Tenn. Code Ann. § 50-6-241 (2008); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990). The claimant's own assessment of his or her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975). "[T]he extent of vocational disability is a question of fact for the trial court to determine from all of the evidence . . . ." Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 458 (Tenn. 1988). As with all issues of fact, the trial court's finding is entitled to a presumption of correctness. Tenn. Code Ann. § 50-6-225(e)(2). In this case, the trial court had the opportunity to observe Employee directly and make its own evaluation of his testimony concerning his abilities and limitations.

A trial court's award of workers' compensation benefits may be reversed or modified under the appropriate circumstances. Howell v. Nissan N. Am., Inc., 346 S.W.3d 467, 474 (Tenn. 2011) (citing Tryon, 254 S.W.3d at 335). It is not the role of this court, however, "to

simply substitute its judgment for that of the trial court in accessing the employee's vocational disability." Howell, 346 S.W.3d at 474 (citing Tryon, 254 S.W.3d at 335). While there is evidence in the record that may have justified a higher judgment, the trial court's decision on this issue is also justified by the evidence. Thus, we are unable to conclude that the evidence preponderates against the trial court's judgment on this issue.

IV. *Discretionary Costs*

The prevailing party may seek to recover certain discretionary costs under Tennessee Rule of Civil Procedure 54.04(2), which provides in relevant part:

> (2) Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions and trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs.

Tenn. R. Civ. P. 54.04(2) (emphasis added).

A party seeking to recover discretionary costs bears the burden of showing that Rule 54 authorizes an award of the costs sought. Stalsworth v. Grummons, 36 S.W.3d 832, 835 (Tenn. Ct. App. 2000). Interpreting a prior version of Rule 54.04, the Supreme Court has affirmed an award of costs for "(1) the court reporter's appearance fee at trial, (2) the court reporter's appearance and transcription costs for the depositions of [expert witnesses]; (3) the fees of [those expert witnesses] for giving testimony by deposition; (4) the transcription cost of the deposition of Plaintiff, and (5) the court reporter fee for the depositions of two witnesses who testified at trial . . . ." Lock v. Nat'l Union Fire Ins. Co., 809 S.W.2d 483, 489 n.3, 490 (Tenn. 1991). In 1993, the Supreme Court amended Rule 54.04(2) to specify which costs may be recovered by the prevailing party. Mass. Mut. Life Ins. Co. v. Jefferson, 104 S.W.3d 13, 34 (Tenn. Ct. App. 2002) (citing Tenn. R. Civ. P. 54.04 advisory committee's note). The resulting language, quoted above, remains in effect.

Prior to 1993, Rule 54.04 required that the moving party file an affidavit certifying that the requested costs were "reasonable and necessary" in preparing for trial. Stalsworth, 36 S.W.3d at 835. This affidavit requirement no longer appears in the text of Rule 54, and the Court of Appeals has acknowledged that an affidavit, though preferable, is not required. Roberts v. Bridges, No. M2010-01356-COA-R3-CV, 2011 WL 1884614, at *11 (Tenn. Ct. App. May 17, 2011); Kendall v. Cook, E2005-02763-COA-R3-CV, 2006 WL 3501325, at *2 (Tenn. Ct. App. Dec. 6, 2006).

Therefore, even without an affidavit, Lock and the text of Rule 54.04(2) indicate that the prevailing party *may* recover the court reporter's appearance fee at trial *and* depositions, as well as transcription costs *for depositions*, if those fees are "reasonable and necessary." Sanders v. Breadth of Life Christian Church, Inc., No. W2010-01801-COA-R3-CV, 2012 WL 114279, at *27 (Tenn. Ct. App. Jan. 13, 2012) (quoting Freeman v. CSX Transp., Inc., 359 S.W.3d 171 (Tenn. Ct. App. 2010)); Hunter v. Jackson, No. W2002-02857-COA-R3-CV, 2003 WL 22071461, at *3-4 (reversing denial of full "court reporter costs" that included costs for appearing at trial and depositions, as well as transcripts of the depositions). These costs must be distinguished from the cost of preparing the trial transcript, however.

The trial court retains the discretion to award costs allowable under Rule 54.04(2). Perdue v. Green Branch Mining Co., 837 S.W.2d 56, 60 (Tenn. 1992). Therefore, appellate courts apply a deferential standard when reviewing a trial court's decision to award certain costs. Woodlawn Mem'l Park, Inc. v. Keith, 70 S.W.3d 691, 697 (Tenn. 2002). Appellate courts will not second-guess the trial court's decision absent an abuse of discretion. Mass. Mut. Life Ins. Co., 104 S.W.3d at 35. This standard, although deferential, requires the trial court to "view the factual circumstances in light of the relevant legal principles and exercise considered discretion before reaching a conclusion." Ballard v. Herke, 924 S.W.2d 652, 661 (Tenn. 1996). Thus, the trial court abuses its discretion "when it fails to properly consider the factors customarily used to guide the particular discretionary decision." Lee Medical, Inc. v. Beecher, 312 S.W.3d 515, 524 (Tenn. 2010). Declining to award discretionary costs for an improper reason also constitutes an abuse of discretion. Hunter, 2003 WL 22071461, at *3-4 (reversing denial of full "court reporter costs" where only rationale provided in the trial court's order was that "the judgment was less than the offer" to settle—but no offer of judgment had been made pursuant to Tenn. R. Civ. P. 68).

In this case, Employee, as the prevailing party, moved to assess seven discretionary costs:

1. Deposition fee for Dr. Dalal (3 hour deposition)	$2,250.00
2. Deposition fee for Dr. Waggoner	$750.00
3. Court reporter / transcript– Dr. Waggoner	$359.00
4. Court reporter / transcript– James Carrigan	$248.75
5. Court reporter / transcript– Rena McDonald	$359.00
6. Court reporter / transcript– Dr. Dalal	$560.00
7. Court reporter – trial appearance	$160.00

In support of this motion, Employee's counsel filed an affidavit in which he averred that the enumerated costs were incurred by Employee in the "preparation and trial" of his claim. The affidavit does not recite that these costs were "necessary and reasonable."

In its order awarding only those costs associated with Dr. Dalal and Dr. Waggoner, the trial court indicated that Employer had only objected to the cost labeled "Court reporter – trial appearance." Nevertheless, the trial court declined to award the costs for the "Court reporter / transcript" for both James Carrigan and Rena McDonald, who the record indicates was the president and owner of Employer, as well as the "Court reporter – trial appearance" cost. The order states that the trial court reached this decision upon considering the motion for discretionary costs, "statements of counsel and the record as a whole," but provides no explanation for why certain discretionary costs that were not objected to by Employer were not awarded. Employee contends on appeal that the trial court abused its discretion in declining to award these costs.

Although it is not entirely clear whether "Court reporter / transcript" costs include the appearance fee of the court reporter in addition to the fee for preparing the transcript of the depositions, both are recoverable by the prevailing party if "necessary and reasonable." We note that "Court reporter / transcript" costs not awarded by the trial court were associated with the depositions of Employee and a representative of Employer—the parties in this case. Moreover, Employee's counsel read portions of Ms. McDonald's testimony into the record, while Employer's counsel challenged Employee's live testimony by repeatedly referring to his deposition testimony on cross-examination. Although Employee's counsel neglected to recite in his affidavit that these depositions were "reasonable and necessary," no affidavit is required, Roberts, 2011 WL 1884614, let alone any specific boilerplate. The depositions were used in some fashion during the trial and Employer did not object to the costs associated with these depositions. Given these facts and in the absence of some explanation from the trial court why the costs that were not objected to were denied, we concluded that the depositions *of the parties*, as well as the costs associated with the presence of the court reporter at trial, to be "reasonable and necessary." Cf. Hunter, 2003 WL 22071461, at *3-4 (reversing denial of similar costs to prevailing party where the trial provided no proper justification for its decision).

Although the trial court has discretion to award costs, Perdue, 837 S.W.2d at 60, the trial court abuses that discretion "when it fails to properly consider the factors customarily used to guide the particular discretionary decision." Lee Medical, Inc., 312 S.W.3d at 524. We can find nothing in the record to indicate why any of the requested costs were not awarded by the trial court nor can we find why they should not be awarded. Indeed, Employer did not even object to any of the costs associated with either of the depositions, and the trial court provided no explanation for its decision to deny the costs in its order. On these facts, we hold that the trial court abused its discretion in declining to award each of the costs sought by Employee.

Conclusion

For the reasons stated above, the judgment of the trial court with respect to temporary total and permanent partial disability benefit awards is affirmed; the trial court's decision not to award certain discretionary costs to James Carrigan is reversed. Therefore, the judgment is modified to award James Carrigan an additional $767.25 in discretionary costs, for a total of $4,686.75. Costs of this appeal are taxed to Davenport Towing and Recovery Services, LLC and Benchmark Insurance Company and their surety, for which execution may issue if necessary.

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TONY A. CHILDRESS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JAMES CARRIGAN v. DAVENPORT TOWING AND RECOVERY SERVICES, LLC ET AL.

Chancery Court for Shelby County
No. CH1003021

No. W2012-00586-SC-WCM-WC - Filed April 11, 2013

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Davenport Towing and Recovery Services, LLC and Benchmark Insurance Company as well as the cross motion filed by James Carrigan pursuant to Tenn. Code Ann. § 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 Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review and cross motion are not well-taken and are 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.

Costs are assessed to Davenport Towing and Recovery Services, LLC and Benchmark Insurance Company and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

CORNELIA A. CLARK, J., NOT PARTICIPATING