IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 26, 2018 Session

C. K. SMITH, JR. v. GOODALL BUILDINGS, INC. ET AL.

Appeal from the Circuit Court for Trousdale County
No. 3615-P-38 Clara W. Byrd, Judge

No. M2017-01935-SC-R3-WC – Mailed June 29, 2018
Filed September 14, 2018

C.K. Smith, Jr. ("Employee") suffered a compensable shoulder injury and was awarded lifetime medical care pursuant to a settlement agreement with Goodall Buildings, Inc. ("Employer"). Employee suffered from long-term chronic pain because of his injury and was referred to Dr. Jeffrey Hazlewood for pain management. Upon entering the care of Dr. Hazlewood, Employee was already prescribed a high dosage of opioids to manage his pain. Dr. Hazlewood continued this treatment, slowly raising Employee's prescription. However, Dr. Hazlewood began to have concerns about Employee forming an addiction, and new medical guidelines on pain management indicated that Employee was taking too high a dosage of opioids. Dr. Hazlewood recommended weaning Employee off opioids, or at least lowering his dosage. In response, Employee left the care of Dr. Hazlewood and filed a motion for a new panel of physicians. That motion was heard for the first time almost two years later. The trial court granted Employee's motion and ordered Employer to provide a new panel of physicians. Employer appealed, arguing Tennessee Code Annotated section 50-6-204(j) precludes Employee from receiving a new panel of physicians. The appeal has been referred to the Special Workers' Compensation Appeals Panel pursuant to Tennessee Supreme Court Rule 51. We reverse the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(a) (2014) Appeal as of Right;
Judgment of the Circuit Court for Trousdale County Reversed

JEFFREY S. BIVINS, C.J., delivered the opinion of the court, in which RUSSELL PARKES, SP. J., and ROBERT E. LEE DAVIES, SR. J., joined.

Jeffery G. Foster and Benjamin J. Conley, Jackson, Tennessee, for the appellants, Goodall Buildings, Inc., and Builders Mutual Insurance Co.

Jamie D. Winkler, Carthage, Tennessee, for the appellee, Charles K. Smith, Jr.

OPINION

Factual and Procedural Background

This case arises out of a Settlement Agreement and Final Order entered August 5, 2009, related to a compensable shoulder injury suffered by C.K. Smith, Jr. ("Employee"). The August 5, 2009 settlement provided for lifetime medical benefits. Pursuant to that settlement, Employee chose Dr. Jeffrey Hazlewood to manage his chronic pain, and Dr. Hazlewood began a pain management regimen. Dr. Hazlewood treated Employee until November 20, 2014, when Employee voluntarily ceased treatment with Dr. Hazlewood. On March 6, 2015, Employee filed a "Motion for Panel of Physicians." In this motion, Employee indicated that he had reached an "impasse with Dr. Hazlewood" and was requesting a new panel of physicians "from which to choose a new pain management specialist." Goodall Buildings, Inc. ("Employer") took the deposition of Dr. Hazlewood on April 28, 2015. This deposition served as the only basis for the trial court's order when it held a hearing in January 2017, and serves as the basis for the following recitation of the facts.

Dr. Hazlewood first examined Employee on August 20, 2009, and continued to treat Employee until November 20, 2014, when Employee voluntarily ceased treatment with Dr. Hazlewood due to a dispute between them regarding the level of prescription opioids Employee was taking. More specifically, Dr. Hazlewood recommended weaning Employee off opioids, or at least lowering the amount he was taking. Employee disagreed and believed that his prior treatment was effective for treating his chronic pain and should continue.

The disagreement regarding pain management took shape over several months as Dr. Hazlewood treated Employee. When Employee first came under the care of Dr. Hazlewood, a previous physician had prescribed Employee roughly 120 milligrams of morphine equivalent per day. During the course of his treatment, Dr. Hazlewood increased Employee's morphine equivalent up to, at one point, 150 milligrams of morphine equivalent per day. Dr. Hazlewood grew concerned about the amount of morphine equivalent Employee was taking: "The research shows that if you're over a hundred milligrams of morphine equivalent a day, the risk for adverse events goes up

nine times, which is a huge increase. Adverse events include unintentional death, overdose." Employee also was taking Xanax prescribed to him by his psychiatrist, which Dr. Hazlewood stated further raises the risk of death.

Around the same time Dr. Hazlewood's concern was reaching its peak, Employer requested a Utilization Review of Employee's medications and prescriptions.[1] At that point, Employee was taking the equivalent of 150 milligrams of morphine per day. The Utilization Review Board recommended weaning Employee down. Dr. Hazlewood characterized the recommendation of the Utilization Review Board as follows: "[The Board indicated] there was insufficient documentation regarding functional benefits and functional improvement with the continued use of opioids. And basically. . .[the Utilization Board] felt like the risk outweighed the benefits." Dr. Hazlewood "couldn't argue with a word they said."

Dr. Hazlewood also began having concerns that Employee was or would become addicted to his pain medicine. Although Dr. Hazlewood could not diagnose an addiction, he stated, "there's a strong smell of potential addiction here." In fact, Dr. Hazlewood was "about 80 or 90 percent concerned that [Employee] has a true opioid addiction." Dr. Hazlewood further testified that he "treat[s] a lot of pain patients, but [Employee] is, in my mind, one of the top ten [patients] who is literally scared to death to come down on pain pills."[2]

Based on these concerns, around September 2014, Dr. Hazlewood began having ongoing discussions with Employee about the risks associated with high opioid levels and the goal of weaning Employee off such high levels of opioids. Dr. Hazlewood and Employee began the process of weaning Employee to lower levels of opioids. Initially, there was some success weaning Employee off his opioids, as Employee was able to reduce his morphine equivalent intake from 150 milligrams per day to 112.5 milligrams. While there was initial success weaning Employee down to 112.5 milligrams, Dr. Hazlewood stated, "[Employee] was resistant to coming down more." Employee met with Dr. Hazlewood for the last time a few months later on November 20, 2014, when Employee indicated that he had a new pain management doctor who was prescribing

[1] As there is no other information in the record besides Dr. Hazlewood's deposition, our statements and understanding of the utilization review come entirely from Dr. Hazlewood's 2015 deposition.

[2] Dr. Hazlewood also based his concern on reports that Employee had been cutting up his pills. Dr. Hazlewood was concerned that if Employee were to accidently cut-up his slow-release medicine, it could kill Employee. Employee's girlfriend reported to Dr. Hazlewood, and Employee confirmed, that Employee had been crushing his quick release pain medicine before taking it.

roughly the equivalent of 120 milligrams of morphine.[3] Employee canceled his future appointments with Dr. Hazlewood and never returned.

Following the deposition of Dr. Hazlewood, a hearing on the motion for a new panel of physicians was set for May 1, 2015. This hearing, however, was voluntarily removed from the docket by Employee.

The case then sat dormant for over a year and half until December 2016, when Employee rescheduled the hearing for January 13, 2017. This newly scheduled hearing prompted Employer to propound a new set of interrogatories on Employee, request a new deposition of Dr. Hazlewood, file a motion to quash the hearing, file a motion in opposition to the Employee's request for a panel of physicians, and file a motion to continue the upcoming hearing till the new deposition could be taken and the new interrogatories be answered. In its motion to quash the hearing, Employer argued that Employee was attempting to have a "hearing by ambush" because Employee had not seen Dr. Hazlewood in almost two years, Employer had not seen any of Employee's medical records for the past two years, and Employer was not sure who was currently treating Employee and to what extent. The hearing on these motions was held a few weeks later on January 13, 2017.

The hearing began with an attempt to address the motion to continue until Employer could take new depositions; it ended with a ruling on the substantive motion for a new panel of physicians. Just minutes into the hearing, the trial court appeared to rule on the motion to continue by stating, "[O]kay. Y'all have got 30 days to finish your discovery and then we're going to hear this." However, shortly thereafter the trial court performed an about-face and, admittedly without even having read the transcript of Dr. Hazlewood's deposition, the only piece of evidence in the case, concluded that by attempting to wean Employee off high-dose opioids, Dr. Hazlewood was "second-guessing" his prior medical judgment and that he "evidently couldn't make up his mind in his own deposition."[4] These findings led the trial court to a new ruling: "[Employee

[3] Employee also had an upper extremity of CRPS/RSD that was not related to the injury Dr. Hazlewood was treating. It appears as though at one point Dr. Mahlon West, who was treating Employee for his RSD had taken over Employee's pain management and Employee was receiving his pain prescriptions from Dr. Mahlon.

[4] Although Employee's counsel argued to the trial court that Dr. Hazelwood was "second guessing" his prior opinion, after a review of Dr. Hazelwood's deposition, we discern no basis for this argument. Dr. Hazelwood was clear time and time again. He agreed with the Utilization Review Board's recommendation that Employee be weaned off his high level of opioids. There is not a scintilla of

is] entitled to a whole new panel of physicians. Give it to him, let him choose. We're not out here to hurt the people." Accordingly, the court ordered Employer to provide a new panel of physicians for Employee. Employer appealed, arguing Tennessee Code Annotated section 50-6-204(j)(3) prevents Employee from being awarded a new panel of physicians for his pain management.

Analysis

This case turns on the interpretation and application of Tennessee Code Annotated section 50-6-204(j). The interpretation and application of a statute is a question of law which this Court reviews de novo. *Patterson v. Prime Package & Label Co., LLC*, No. M2013-01527-WC-R3-WC, 2014 WL 7263811, at *2 (Tenn. Workers' Comp. Panel Dec. 22, 2014). In addition, because in this case the trial court based its findings on documentary evidence, no deference is afforded the trial court's factual findings. *Russell v. Dana Corp.*, No. M2015-00800-SC-R3-WC, 2016 WL 4136548, at *4 (Tenn. Workers' Comp. Panel Aug. 1, 2016).

This case involves long-term, high dose prescriptions of opioids and it involves an authorized treating physician attempting to wean an employee off those opioids. Tennessee Code Annotated section 50-6-204(j)(1) states, "If a treating physician determines that pain is persisting for an injured or disabled employee beyond an expected period for healing, the treating physician may either prescribe . . . , or refer, such injured or disabled employee for pain management encompassing pharmacological, nonpharmacological and other approaches to manage chronic pain." Tennessee Code Annotated section 50-6-204(j) "more closely regulate[s] treatment provided by pain-management physicians." *Patterson*, 2014 WL 7263811, at *3. Subsection (j) applies when an employee is undergoing long-term treatment for chronic pain. *See* Tenn. Code Ann. § 50-6-204(j)(1). Specifically, "[Section 50-6-204(j)] is triggered only when there is a referral to a pain-management specialist." *Patterson*, 2014 WL 7263811, at *5.

Here, there is no dispute that under section 50-6-204(j)(1) Employee was referred to a pain management specialist and was receiving ongoing pain management from a qualified physician. *See* Tenn. Code Ann. § 50-6-204(j). Thus, as section 50-6-204(j) is triggered and Employee is requesting a new pain management physician, this case turns on the interpretation of section 50-6-204(j)(3). Section 50-6-204(j)(3) states,

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evidence to support the trial court's finding. Indeed, the trial court's finding on this issue is particularly perplexing given the fact that the trial court did not even read the deposition.

> The injured or disabled employee is not entitled to a second opinion on the issue of impairment, diagnosis or prescribed treatment relating to pain management. However, on no more than one (1) occasion, if the injured or disabled employee submits a request in writing to the employer stating that the prescribed pain management fails to meet medically accepted standards, then the employer shall initiate and participate in utilization review as provided in this chapter for the limited purpose of determining whether the prescribed pain management meets medically accepted standards.

Thus, with regard to "impairment, diagnosis, or prescribed treatment," the "injured or disabled employee is not entitled to a second opinion." *Id.* The purpose of section 50-6-204(j)(3) was outlined by Senator Jack Johnson: "'What we're trying to attack here . . . is the abuse and overutilization of [Schedule II, III, and IV] drugs.' The bill, [Senator Johnson stated], was meant to prevent workers' compensation beneficiaries from 'unfortunately becoming addicted and perhaps doing some doctor shopping.'" *Patterson*, 2014 WL 7263811, at *3 (quoting *Hearing on S.B. 3315 before the Senate Finance, Ways,and Means Committee*, 107th Gen. Assemb., (Tenn. 2012) (statement of Sen. Jack J ohnson)), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=539.

Employee relies on *McClendon v. Food Lion, LLC*, No. E2013-00380-WC-R3-WC, 2014 WL 3407430, at *3 (Tenn. Workers' Comp. Panel July 11, 2014), to argue that the trial court was within its authority to order the new panel. *McClendon* involved an Employee who was seeking a panel of orthopedic specialists. *Id.* Upon retirement of her authorized treating physician, Employee selected a new physician from a panel provided by Employer. *Id.* However, because the new physician was a neurosurgeon rather than an orthopedic surgeon, Employee asserted that the new physician was "not an appropriate treating physician" and requested a new panel of orthopedic physicians. *Id.* at *2. The trial court ordered Employer to provide a list of orthopedic specialists for a second opinion. *Id.* at *1. On appeal, Employer argued the "trial court lacked the authority under Tennessee Code Annotated section 50-6-204 to order the new panel." *Id.* at *5. The Court disagreed, holding that, although section 50-6-204 did not explicitly *authorize* the trial court to order a new panel of physicians, "nothing in the statute precludes a trial court from doing so." *Id.*

Employee's reliance on *McClendon* is misplaced. The employee in *McClendon* was not referred to, nor treated by, a qualified pain management physician pursuant to section 50-6-204(j). Thus, section 50-6-204(j) was not triggered. *See Patterson*, 2014 WL 7263811, at *3. Accordingly, *McClendon* dealt with a court's authority to do something not explicitly covered by the statute. 2014 WL 3407430, at *5. Here,

Employee was being treated pursuant to section 50-6-204(j)(3), which by its plain text makes a second opinion unavailable to employees undergoing chronic, long-term pain management who have been referred to a pain management specialist.

In fact, we can hardly imagine a more fitting case to give effect to the text of section 50-6-204(j) than this one. Two purposes of section 50-6-204(j), as stated by the sponsor himself, are to prevent the overutilization of Schedule II, III, and IV drugs and to curb or prevent addictions. Employee was taking between 135 and 150 milligrams of morphine equivalent per day, and Dr. Hazlewood was eighty to ninety percent sure Employee had an addiction to opioids. The Legislature also was attempting to prevent "doctor shopping," and after Employee refused to reduce his opioid intake, Employee left the care of Dr. Hazlewood to receive treatment from another doctor who prescribed a higher amount of opioids. Now, Employee is requesting a new physician entirely.[5]

Employee also attempts to draw a distinction between a request for a new panel of physicians, and obtaining a "second opinion" concerning his pain management. He argues section 50-6-204(j)(3) only prevents a "second opinion" and not a request for a new panel of physicians. Accordingly, he argues section 50-6-204(j)(3) is inapplicable. This argument quickly falls apart under scrutiny. For several years, Dr. Hazlewood prescribed a particular course of treatment, prescribing high dose opioids. Now, Dr. Hazlewood is proposing new a course of treatment, weaning Employee off opioids. This new course of treatment is entitled to deference. *Russell v. Dana Corp.*, No. M2015-00800-SC-R3-WC, 2016 WL 4136548, at *7 (Tenn. Workers' Comp. Panel Aug. 1, 2016). Employee's own doctor has now changed course on his *treatment*. Immediately following this change in treatment, Employee left the care of Dr. Hazlewood, and then filed a motion for a new panel of physicians. He did so because he has a disagreement about this new treatment. Granting Employee's request would subvert the clear language and the legislative intent of section 50-6-204(j)(3). Therefore, under these facts, section 50-6-204(j)(3) is plainly applicable.

Section 50-6-204(j)(3) prevents a second opinion on the issue of "impairment,

[5] We are sympathetic to patients in Employee's situation who have been receiving long-term, high dose prescriptions of opioids and now are being weaned off of them. *See* Anita Wadhwani and Joel Ebert, *Combating Tennessee's Opioid Crisis: More Than a Dozen Legislative Proposals Introduced*, The Tennessean; (Feb. 20, 2018), https://www.tennessean.com/story/news/2018/02/20/tennessee-opioid-crisis-bill-haslam-laws-legislature-prescriptions/329492002/ ("'You are going to have people who think they need to receive more in the way of prescriptions and the questions are going to become, What alternatives are there?'" (quoting Senate Majority Leader Mark Norris)). However, we are required to interpret the applicable law as written.

diagnosis or prescribed treatment relating to pain management." Employee is requesting a new panel of physicians because he has a disagreement about his treatment regarding his pain management. The plain text of section 50-6-204(j)(3) precludes this request. Accordingly, we hold that the trial court erred in granting a new panel, and we reverse the trial court's judgment.

Conclusion

The trial court's order of a new panel of physicians for Employee is in direct contravention of Tennessee Code Annotated section 50-6-204(j)(3). Therefore, the trial court's judgment is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

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JEFFREY S. BIVINS, CHIEF JUSTICE