

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

September 12, 2016 Session

HOLLY L. GRISSOM v. UNITED PARCEL SERVICE, INC., ET AL.

**Appeal from the Circuit Court for White County
No. CC1951 Amy V. Hollars, Judge**

**No. M2016-00127-SC-R3-WC – Mailed November 29, 2016
Filed January 9, 2017**

In October 2011, Holly Grissom (“Employee”) entered into a settlement agreement with United Parcel Service (“Employer”), resolving her workers’ compensation claim for an April 2007 injury. In April 2013, Employer declined to authorize a procedure ordered by the authorized physician. Employee filed a motion to compel Employer to authorize the procedure. The trial court ordered Employer to pay \$187.00 to Employee and to provide future medical care to her. A second motion was filed, and the parties entered into an agreed order which again required Employer to pay \$187.00 and reimburse Employee for mileage to and from medical treatment. Employee petitioned for an award of attorney’s fees. The court awarded fees and expenses in the amount of \$27,353.63. Employer has appealed from that order. The 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 pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

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

ROBERT E. LEE DAVIES, SR. J., delivered the opinion of the court, in which JEFFREY S. BIVINS, C.J. and PAUL G. SUMMERS, SR. J., joined.

David T. Hooper, Brentwood, Tennessee, for the appellants, United Parcel Service, Inc, and Liberty Mutual Fire Insurance Co.

Richard Lane Moore, Cookeville, Tennessee, for the appellee, Holly Grissom

OPINION

Factual and Procedural Background

The Employee, Holly Grissom sustained a compensable injury to her back in April 2007. On October 27, 2010, a judgment was entered in favor of Ms. Grissom against the Employer, United Parcel Service, Inc. and Liberty Mutual Fire Insurance Company. The Court found Ms. Grissom had sustained an 80% vocational disability to the body as a whole and in addition, awarded her future medical expenses pursuant to Tennessee Code Annotated § 50-6-204. Thereafter, on October 28, 2011, an order of compromise and settlement was entered. Pursuant to that order, Ms. Grissom would continue to receive future care from Dr. Jeffrey Hazlewood, who was designated as the authorized treating physician.

Dr. Hazlewood had been treating Ms. Grissom with trigger point injections for pain. However, in April 2013, Dr. Hazlewood submitted another request to Liberty Mutual for approval of a trigger point injection. At that point, Liberty Mutual requested a peer utilization review. The utilization review provider found the procedure to be unnecessary, and Ms. Grissom appealed to the medical director. The medical director for the State of Tennessee, Dr. James Talmage, agreed with the opinion of the utilization review provider that the trigger point injections were unnecessary.

Employee initially filed a motion to compel Employer to authorize the treatment on August 19, 2013. This pleading was later followed by a petition for contempt filed on April 7, 2014. The petition for contempt alleged Employee was paying for the trigger point injections out of pocket and Dr. Hazlewood had advised Employer that in his opinion these injections were necessary.

On October 1, 2014, Employee filed a motion for a hearing requesting the trial court to initiate temporary benefits pursuant to McCall v. NHC, 100 S.W.3d 2009 (Tenn. 2003). In support of said motion, Employee filed the sworn statement of Dr. Hazlewood indicating that the two trigger point injections which the carrier had refused to pay, in fact had provided Employee with a benefit, and that the trigger point injections were a way of pain management without resorting to taking opioids. After a hearing on the merits, the trial court entered an order on November 19, 2014, which required Employer to pay for future trigger point injections and to reimburse Employee for trigger point injections given by Dr. Hazlewood. On August 10, 2015, an agreed order was entered which again required Employer to reimburse Ms. Grissom for two trigger point injections in the amount of \$187 and to reimburse her unpaid mileage. The order also provided:

The Court further finds that it was necessary for [Employee] to obtain an attorney to represent her in this matter. The parties agree that Employer shall reimburse Employee's counsel his reasonable attorney's fees and expenses associated with the prosecution of this matter. The parties agree that [Employee's] counsel will prepare a petition seeking recovery of attorney's fees and expenses. In the event the parties cannot reach an agreement, the Court will conduct a hearing to determine the reasonableness of [Employee's] attorney's fees and expenses claim.

The parties agree that the Plaintiff is the prevailing party in this action. The parties agree that all claims for bad faith damages and penalties are hereby dismissed with full prejudice.

Plaintiff shall be entitled to future medical expenses pursuant to the original Court order with Dr. Jeffrey Hazlewood.

The parties were unable to reach an agreement and thereafter Employee's attorney filed a motion seeking an award of fees and expenses. This motion was later supplemented with an additional affidavit requesting fees in the total amount of \$27,353.63. Employer filed a response to the motion, arguing that the amount of fees requested was excessive in light of the relatively small amount which Employee received as a result of the Court's order of November 19, 2014. After a hearing, the trial court granted Employee's motion and awarded the full amount requested in fees and expenses. Employer has timely appealed from that order, and the appeal has been referred to this Panel pursuant to Supreme Court Rule 51.

Issue

Employer raises a single issue in this appeal: "Whether the award of attorney's fees and expenses is excessive."

Analysis

Tennessee Code Annotated § 50-6-204(b)(2) (2014) (for injuries occurring before July 1, 2014) allows a trial court to award attorney's fees and expenses arising from an employer's refusal to provide medical care required by a settlement or judgment. The statute does not set out any specific factors to be considered by a trial court when making this determination. A recent decision of our Supreme Court provides us with some guidance, albeit in the context of a minor's settlement. In Wright ex rel. Wright v.

Wright, 337 S.W.3d 166 (Tenn. 2011), the Court stated that “the correct legal standard” for determining the reasonableness of an application for attorney’s fees is to analyze the request using the ten factors set out in Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.5(a) (hereinafter “RPC 1.5(a)). Id. at 169-70. Those factors are:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent;

(9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and

(10) whether the fee agreement is in writing.

This Panel has applied Wright and approved the use of these factors in workers’ compensation proceedings brought pursuant to Tennessee Code Annotated section 50-6-204(b)(2). Welcher v. Cent. Mut. Ins. Co., No. M2012-00248-WC-R3-WC, 2013 WL 1183314, *7 (Tenn. Workers Comp. Panel Mar. 21, 2013). Appellate courts review

attorney's fee awards on an abuse of discretion basis. Wright, 337 S.W.3d at 176.

In this case, Employer's argument focuses on the fourth factor. Employer argues the trial court failed to consider the fourth factor in making its determination to award the full amount of fees and expenses.

At the hearing on the attorney's fees and expenses, the trial court went through the ten factors set forth in Welcher v. Central Mutual Insurance Co. With regard to the first factor, the trial court found the time and labor required on the matter to be significant and that the defendants did not question the time entries except to the extent that there may have been some duplicative effort by Employee in first obtaining the sworn statement of Dr. Hazlewood and then having to take Dr. Hazlewood's deposition.¹

With regard to the second factor, the trial court found it was necessary for Attorney Fitzpatrick to ask his partner, Attorney Moore, to handle this matter because of the significant amount of time that was necessary to pursue this claim. The Court also found Mr. Moore had a busy and heavy practice and therefore concluded that the acceptance of the employment precluded Mr. Moore from engaging in other work.

The third factor was the fee customarily charged in the locality for similar services. The Court found this factor was not contested by Employer and that the Chancellor in this Judicial Circuit had awarded a similar fee in a similar case.

With regard to the fourth factor, the trial court noted the amount recovered was a modest amount of \$187.00 plus unpaid mileage for a total judgment of approximately \$1,000. The trial court went on to find the agreed order provided Ms. Grissom was the prevailing party and that the main objective of the petition was achieved. Although the amount involved verses the amount of attorney's fees awarded gave the trial court pause, the trial court reasoned that this fourth factor was not dispositive of Ms. Grissom's entitlement to attorney's fees and therefore refused to give this factor so much weight that it would trump all of the other factors in the trial court's analysis.

As to the fifth factor regarding time limitations, the trial court noted Employee's counsel pursued the case vigorously. Moreover, Employee was having to pay for these trigger point injections out of pocket. The trial court found there was an ongoing professional relationship between the client and Mr. Fitzpatrick, who had represented Ms. Grissom a number of years ago in her initial workers compensation case and had

¹ Any duplicative effort regarding the proof from Dr. Hazlewood was caused by the Employer's insistence to take Dr. Hazlewood's deposition irrespective of the sworn statement of Dr. Hazlewood which the Employee had submitted with her motion.

continued to represent her and attempted to help her with this particular issue up until the time Liberty Mutual made it abundantly clear it would not agree to the requested trigger point injections.

With regard to the final four factors, the trial court found both Mr. Fitzpatrick and Mr. Moore had exemplary reputations; that there was an hourly fee set forth in the contract with Ms. Grissom; that the contract was in writing; and the rate had not varied from the amount reflected in the contract.

At the hearing on November 18, 2015, Employee attempted to introduce three letters sent by Employee's counsel to counsel for Employer. These letters were being offered for the purpose of demonstrating Employee's efforts to limit the potential cost of litigation. Employer objected citing Rule 408 T.R.E. Rule 408 provides that evidence of compromise and offers to compromise are not admissible to prove liability for or invalidity of a civil claim. The trial court sustained the objection and did not consider these letters. Employee contends the trial court erred in excluding these letters. We agree with Employee.

Rule 408 T.R.E. does not require exclusion when the evidence is offered for another purpose other than compromise and settlement. In this case, the letters from Employee's counsel were being offered after the trial court had already determined the underlying liability of Employer to pay for the trigger point injections. When the settlement offeror is the same party attempting to gain the admission of the settlement letter into evidence, the threat of admissibility should not be a deterrent to the articulation of a settlement proposal. Vafaie v. Owens, 1996 W.L. 502133 (Tenn. Ct. App. 1996). In the first letter, dated April 25, 2013, Mr. Fitzpatrick wrote:

Ms. Grissom does very well with these lumbar injections and it keeps her off of medications which I think would be to your client's benefit. Actually, I think the trigger point injections once every three months are less expensive than the medications she is on if she is able to not have the injections... Hopefully, you can persuade your clients to change their minds and go ahead and authorize the procedures.

On August 15, 2013, Mr. Fitzpatrick again wrote counsel for Liberty Mutual in which he stated:

If Liberty Mutual is willing to go ahead and provide the trigger point injections, I am willing to waive my attorney's fees relative to this matter. Believe it or not I have a considerable amount of time spent in securing the additional medical records, preparing an itemization of

medical expenses and drafting the motion to compel and meeting with my client, as well as, the cost of securing additional medical records, etc. It seems to me that it would be economically beneficial to simply provide the treatment – as opposed to incurring the cost of defending same.

Finally, on October 17, 2014, prior to the first hearing before the trial judge, Mr. Moore wrote counsel for Liberty Mutual and stated:

If your client would agree to voluntarily reimburse her for the trigger point injections that she paid out of pocket and reimburse her for her mileage, we can prepare an agreed order that states so. However, the order would need to reflect that your client is responsible for our reasonable attorney's fees and expenses associated with prosecuting the claim... Quite frankly, I do not think that it is possible to convenience [sic] the trial judge that trigger point injections that were actually given by the treating physician were not reasonable and necessary.

This proof helps to explain why the fees were so large. Instead of paying for injections back in 2013, Liberty Mutual chose to “double down” on its belief that the opinion of a utilization review provider would trump the opinion of the treating physician; a treating physician, who was chosen by Liberty Mutual; who opined the trigger point injections were beneficial to his patient; who actually gave the trigger point injections; and who provided both a sworn statement and a deposition that these injections were beneficial to Employee.

While we acknowledge that a fee in excess of 28 times the recovery merits careful review, the Supreme Court has not given greater weight to proportionality than to any of the other nine factors set out in RPC 1.35(a). Wright, 337 S.W.3d 181-82. One of the purposes of section 50-6-204(b)(2) is to make it possible for “injured worker[s] to obtain the services of an attorney in cases involving a small amount of medical expenses.” See Dunn-Lindsey v Wal-Mart Stores, Inc. No. W2002-02742-WC-R3-CV, 2003 WL 22351027, *3 (Tenn. Workers Comp. Panel Oct. 9, 2003). Giving greater weight to proportionality than the other nine applicable factors is at odds with that purpose. In this case, the amount at issue was small, but the legal time and effort necessary to obtain that relief was substantial. We therefore conclude that the trial court did not abuse its discretion by awarding an attorney's fee reflecting that expenditure of time and effort.

Conclusion

The judgment of the trial court is affirmed. The case is remanded to the trial court for consideration of a reasonable attorney's fee for defending this appeal. Costs are taxed

to United Parcel Service, Inc., Liberty Mutual Fire Insurance Company and their surety, for which execution may issue if necessary.

ROBERT E. LEE DAVIES, SENIOR JUDGE

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

HOLLY L. GRISSOM v. UNITED PARCEL SERVICE, INC., ET AL.

**Circuit Court for White County
No. CC1951**

No. M2016-00127-SC-R3-WC – Filed January 9, 2017

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 are assessed to United Parcel Service, Inc., Liberty Mutual Fire Insurance Company and their surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM