IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 21, 2011 Session

JERRY LINDSEY v. TIM REEVES D/B/A TIM'S TREE SERVICE

Appeal from the Chancery Court for Madison County
No. 64982 James F. Butler, Chancellor

No. W2010-01736-WC-R3-WC - Mailed May 16, 2011; Filed June 15, 2011

The employee suffered a compensable spinal cord injury. He settled his workers' compensation claim with his employer in 2007. The settlement provided for future medical treatment in accordance with Tennessee Code Annotated section 50-6-204(a) (2008). In 2009, the employee sought authorization and payment for a hydrotherapy tub. His employer declined to authorize installation of the tub. The employee filed a motion for authorization of medical care in February 2010 and supported the motion by attaching a note from his authorized treating physician that he would "benefit" from use of the tub. The trial court granted the motion. On appeal, we reverse.

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

WALTER C. KURTZ, SR. J. delivered the opinion of the Court, in which JANICE M. HOLDER, J. and TONY CHILDRESS, SP. J., joined.

Mildred L. Sabbatini and Christopher M. Myatt, Memphis, Tennessee, for the appellant, Tim Reeves d/b/a Tim's Tree Service.

George L. Morrison, III and Spencer Barnes, Jackson, Tennessee, for the appellee, Jerry Lindsey.

MEMORANDUM OPINION

Factual and Procedural Background

Jerry Lindsey ("Employee") suffered a spinal cord injury as a result of a motor vehicle accident on February 10, 2006. He alleged that his injury arose from and occurred in the course of his employment for Tim's Tree Service ("Employer"). His claim for workers' compensation benefits was settled on the basis of four hundred weeks of permanent partial disability benefits and continuing medical care for his injury in accordance with Tennessee Code Annotated section 50-6-204 (2008). The settlement was approved by the trial court on October 9, 2007.

On February 1, 2010, Employee filed a motion in chancery court in Madison County for authorization of medical care, which is the subject of this appeal. The motion requested that Employer pay for installation of a hydrotherapy tub that Employee's authorized treating physician, Dr. John Neblett, had "recommended."[1] The motion was supported by a copy of a May 20, 2009 note in which Dr. Neblett stated, "I believe [Employee] would benefit from a hydrotherapy tub at home for therapeutic treatment of his painful joints resulting from the injury." Employee later submitted a December 1, 2009 note from Dr. Davidson Curwen, which stated that a "bathtub facility with whirlpool capability" would "be of benefit" to Employee. Also attached to Employee's motion was a letter from Debra Cartwright, a representative of Employer's insurer, denying a request to pay for modifications to Employee's bathroom because "based on your injuries from the accident of 2/10/06 home modifications were not necessary."

Employer filed a response to the motion, arguing that the proposed bathroom modifications were not "reasonably required" for treatment of his work injury. It noted that the contractor's estimate submitted by Employee included various items in addition to a hydrotherapy tub, including a wheelchair accessible vanity, an ADA compliant toilet, and vinyl or carpet flooring.

The trial court held a hearing on the motion on July 7, 2010. Employee was the only witness to testify at the hearing. According to statements of evidence filed by Employer and Employee,[2] Employee testified that: (1) he has trouble getting in and out of the tub and has

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[1] The motion only requested for the court to order "the defendant to authorize the installation of the hydrotherapy tub and to pay for the medical treatment performed by Dr. John Neblett."

[2] No stenographic transcript was made of evidence presented in support of the motion. Employer (continued...)

almost fallen or tripped while getting out of the tub on prior occasions; (2) he has difficulty lowering himself to the toilet and getting up from the toilet; (3) it was occasionally necessary for Employee to use a cane or a walker; (4) he has extreme difficulty performing the most basic physical movements, including walking, bending and reaching; and (5) the renovations are necessary in order for him to access the bathroom and use the bathroom facilities, including the hydrotherapy tub. Employee further stated that Dr. Neblett advised him that a hydrotherapy tub would be beneficial to stimulate muscles and joint motion but that Dr. Neblett did not address other bathroom renovations Employee seeks. The previously-mentioned notes of Dr. Neblett and Dr. Curwen and the contractor's estimate also were introduced into evidence.

The trial court found that "the installation of a hydrotherapy tub and the modifications of [Employee's] bathroom are medically reasonable and necessary" and granted Employee's motion. Employer has appealed from that order. Pursuant to Tennessee Code Annotated section 50-6-225(e)(3) (2008) and 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.

Standard of Review

The standard of review of findings of fact is "de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Madden v. Holland Grp. of Tenn., Inc.*, 277 S.W.3d 896, 898 (Tenn. 2009). A trial court's conclusions of law are reviewed de novo on the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009) (citations omitted).

Analysis

Tennessee Code Annotated section 50-6-204 governs the medical treatment an employer must provide to an injured employee. At the time Employee was injured, section 50-6-204 stated in pertinent part:

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[2] (...continued)
filed a "Statement of Evidence Submitted by Defendant,"and Employee filed "Plaintiff's Objections to Defendant's Statement of Evidence."

> (a)(1) The employer or the employer's agent shall furnish free of charge to the employee the medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members, and other apparatus, including prescription eyeglasses and eye wear, and the nursing services or psychological services as ordered by the attending physician and hospitalization, including dental work made reasonably necessary by accident as defined in this chapter, that is reasonably required; . . . .[3]

Employer contends that Employee bears the burden of proof that a proposed medical treatment is necessary and reasonable, citing *Baggett v. Jay Garment Co.*, 826 S.W.2d 437, 439 (Tenn.1992). Dr. Neblett is Employee's authorized treating physician in this case. The question raised by the proof, however, is whether or not his note of May 20, 2009, amounts to a statement that the installation of a hydrotherapy tub in his home is reasonably necessary for the treatment of Employee's injury. The statement that Employee "would benefit from" is less than clear when measured against the legal requirement. Employer cites *Wilhelm v. Kern's, Inc.*, which states that "the fact that a certain course of treatment is recommended by a physician does not, ipso facto, render the employer liable to provide such treatment; the court may conclude from all of the evidence that the recommended course of treatment was not 'reasonably required.'" 713 S.W.2d 67, 68 (Tenn. 1986) (quoting *Martirez v. Meharry Med. Coll.*, 673 S.W.2d 141, 143 (Tenn. 1984)).

The trial court and this panel are left with Dr. Neblett's statement that Employee "would benefit" from the installation of a hydrotherapy tub in his home and Dr. Curwen's statement that the device would "be of benefit" to Employee. We conclude that this limited evidence is insufficient to sustain the trial court's finding that the hydrotherapy tub was medically reasonable and necessary for the treatment of Employee's work injury. In addition, the record contains no medical evidence at all to support a finding that the other proposed modifications of Employee's home are reasonably necessary and required for the treatment of his injury.

Employee contends that his lay testimony at the motion hearing, as set out in the two statements of evidence, is sufficient to support the trial court's finding concerning the tub and the other modifications. In support of this assertion, he cites the familiar rules that absolute certainty is not required of medical evidence in workers' compensation cases and that all reasonable doubts concerning the medical evidence must be construed in favor of the Employee. *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005). Nevertheless, there must be some expert medical evidence to support a finding that a

[3] Tennessee Code Annotated section 50-6-204 was amended in 2009, but neither party has asserted that the amendment would have any impact on the Employee's right to medical treatment for the 2006 injury.

proposed medical treatment or apparatus is reasonably necessary. *Wilhelm*, 713 S.W.2d at 68.

Whether or not medical treatment or an apparatus is "reasonably necessary" and may be "reasonably required" for the treatment of a compensable injury "depends primarily on the evidence of experts." *Mayo v. Lumbermens Mut. Cas. Co.,* No. 02S01-9807-CH-00076, 1999 WL 339221, at * 3 (Tenn. Workers' Comp. Panel May 28, 1999) (citing *Wilhelm*, 713 S.W.2d at 68).

Here, the doctor, who was designated by Employer, did not prescribe or order the hydrotherapy tub. If he had, the Employee would be able to rely on the presumption that the treatment was reasonably necessary. *See Russell v. Genesco, Inc.*, 651 S.W.2d 206, 211 (Tenn. 1983) ("[A]ny treatment 'as ordered' by the attending physician[s] [designated by employer] is presumed to be necessary and 'reasonably required.'"). *See also Mayo v. Lumbermans Mut. Cas. Co.*, 1999 WL 339221 at *3 (holding that a therapeutic pool prescribed by the treating physicians satisfied the statute); *McMillan v. McKenzie Special Sch. Dist.*, No. W2000-02165-WC-R3-CV, 2001 WL 34090141, at *4 (Tenn. Workers' Comp. Panel July 12, 2001) (holding that a scooter and special bed prescribed by treating physicians were compensable medical benefits).

In the absence of a prescription or order, it was necessary for Employee to show that the tub and related modifications were reasonable necessary.[4] Employee introduced only doctors' notes stating that Employee would "benefit from a hydrotherapy tub at home" and that "a bathtub facility with whirlpool capacity" would "be of benefit." The fact that he would benefit from such treatment falls short of the requirement that Employee show the necessity and reasonableness of such treatment.

In *Myatt v. Textron Aerostructures*, No. 01S01-9409-CV-00108, 1995 WL 572058 (Workers' Comp. Panel Aug. 22, 1995), the employee suffered a serious back injury. The trial court ordered the employer to pay for a hot tub and contour chair. The appellate panel stated:

> With regard to the defendant's alleged obligation to pay for a hot tub and contour chair, medical benefits are governed by the provisions of Tennessee Code Annotated section 50-6-204. It is there provided that the employer shall furnish such medical and surgical treatment as may be

[4] Just why Employee did not obtain a prescription or a definite order from his treating physician is not apparent from the record.

> reasonably required. A disputed item of medical expenses, to be compensable, must be reasonably required.
>
> The trial court found that the special chair and hot tub were necessary for the treatment of the plaintiff's condition. Our review of the record reveals that the contour chair was prescribed by Dr. Cochran [the treating physician], which is sufficient proof that it was a necessary medical appliance. The hot tub was not prescribed. After Mr. Myatt had purchased it at a cost of $5,650.00 he discussed it with Dr. Cochran and requested a prescription. The doctor testified that it was not central to his treatment. There was no proof that it was necessary, or that the price was reasonable. We disallow judgment for the cost of the hot tub.

Myatt, 1995 WL 572058, at *2.

The comments contained in the medical notes that the hydrotherapy tub would be of benefit to the employee falls short of the exactitude required in expert testimony necessary to find that the tub was "reasonably necessary."

The decision of this court relates only to the request made by Employee at the time of his February 2010 motion to authorize installation of the hydrotherapy tub. The Employer's obligation to furnish necessary and reasonable treatment, etc., pursuant to Tennessee Code Annotated section 50-6-204 (a) (1) (A) continues. Nothing contained herein would prejudice Employee's further request for the hydrotherapy tub should it be adequately supported by a showing of reasonableness and necessity.

Conclusion

The trial court's order is reversed. Costs are taxed to Jerry Lindsey and his surety, for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE

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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 on appeal are taxed to the Appellee, Jerry Lindsey, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM