IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
January 13, 2014 Session

JUDY McCLENDON v. FOOD LION, LLC

Appeal from the Chancery Court for Hamilton County
No. 10-0996 W. Frank Brown, III, Chancellor

No. E2013-00380-WC-R3-WC-MAILED-JUNE 11, 2014 / FILED-JULY 11, 2014

Employee settled her workers' compensation claim in 1997, with her employer agreeing to provide future medical benefits. Her authorized treating physician later retired, and in November 2007, the employee selected a new physician from a panel provided by her employer. The new physician recommended a home exercise program, which the employee believed was not adequate treatment. She filed a petition requesting a new panel of physicians. Her employer opposed the petition, contending that it had provided treatment in accordance with the law and the terms of the settlement. The trial court ordered the employer to provide a panel of orthopaedic surgeons to evaluate the employee's current need for treatment. The employer has appealed, and 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 of the trial court and remand for further proceedings.

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

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J. and BEN H. CANTRELL, SR. J., joined.

Nicholas S. Akins and J. Allen Callison, Nashville, Tennessee, for the appellant, Food Lion, LLC.

Ronald J. Berke, Chattanooga, Tennessee, for the appellee, Judy McClendon.

OPINION

Factual and Procedural Background

In 1994, Judy McClendon ("Employee") sustained a gradual injury to her right shoulder, ribs and upper back in the course of her employment with Food Lion, LLC ("Employer"). In February 1997, the trial court approved the settlement of her claim for workers' compensation benefits.[1] The settlement agreement provided that Employer would pay Employee's future medical expenses related to the injury. Dr. Thomas Moses, an orthopaedic surgeon, was the authorized treating physician. In 2006, Dr. Moses retired from the practice of medicine. In response to a November 7, 2007 request from Employee for a new panel, Employer provided a panel of physicians to take over her treatment. Employee selected Dr. Timothy Strait, a neurosurgeon, from that list.

Employee saw Dr. Strait on March 27, 2008. She took the position that this appointment with Dr. Strait was for a one-time evaluation. Employer contended that Dr. Strait became her authorized treating physician. Dr. Strait's initial diagnosis was that

> In all likelihood [Employee's] pain is muscular in origin. In general there has been more than ample time for this soft tissue injury to fully recover. I would recommend a physical therapy evaluation to provide her with a series of exercises to perform at home when she develops this shoulder pain.

The physical therapy evaluation took place on April 21, 2008, after which Dr. Strait recommended a home exercise program.

Employee was not satisfied with this recommendation and requested from Employer an additional panel of physicians. After Employer denied her request, Employee filed this action in the Chancery Court for Hamilton County on November 24, 2010. Her complaint sought a declaratory judgment confirming the terms of the

[1]The record contains few details about the injuries and the terms of the settlement. The order approving the settlement was apparently lost. However, the parties are in agreement concerning the terms of the settlement relevant to this appeal. The trial court entered an order on February 25, 2011, restating those terms.

1997 settlement and was accompanied by a motion requesting that Employer be required "to give a proper statutory panel of treating back specialists." On February 28, 2011, the trial court entered an order setting out the terms of the 1997 settlement and finding that "future medical benefit[s] should remain open . . . with Dr. Timothy Strait as the authorized treating physician or any physician pre-approved by [Employer's] worker's compensation insurance company."

On May 17, 2011, Employee filed a "Motion for Panel of Physicians," in which she asserted that Dr. Strait was not an appropriate treating physician because he was a neurosurgeon rather than an orthopaedic surgeon. Employer filed a response in opposition to this motion. The record does not contain an order disposing of this motion.

On October 20, 2011, Employee filed a complaint under the same docket number as the previously-described pleadings. In her complaint, she again asserted that Dr. Strait was not an appropriate treating physician for her condition and requested the trial court order Employer to provide her with a panel of orthopaedic physicians. Employer filed an answer denying that Employee was entitled to the relief she requested. On July 18, 2012, Employee filed a "Motion for Panel of Orthopaedic Specialists," asserting that appropriate treatment for her injuries fell outside the specialty of neurosurgery. Employee's motion was supported by her own affidavit, which asserted that her soft tissue injuries required orthopaedic treatment. Employer filed a response in opposition to the motion, asserting that Employee had "failed to demonstrate how or why [orthopaedic] treatment is reasonable or medically necessary." Employer also pointed to the findings of Dr. Strait, who did not believe that Employee's injuries required additional treatment or any further orthopaedic evaluation. The trial court issued a memorandum opinion and order on August 17, 2012, finding that it could not properly determine the reasonableness of Employee's request or the ability of Dr. Strait to treat her injuries without evidence of the nature of her injury and the best way to treat it. Because Employee's affidavit failed to describe with adequate specificity the exact nature of her injuries, the trial court denied her motion.

On December 12, 2012, Employee filed another motion requesting that Employer be required to provide her with a panel of orthopaedic specialists. This motion was supported by a more detailed affidavit from Employee, in which she described her symptoms, her previous treatment prescribed by Dr. Moses, and the

effect of that treatment. Employer filed a response in opposition, pointing to the previously-filed opinions of Dr. Strait and the 2008 physical therapy evaluation. Employer asserted that Dr. Strait was qualified to treat Employee's injuries and argued that the court should rely on Dr. Strait's recommendations because Employee failed to present medical evidence sufficient to rebut Dr. Strait's opinions. On January 13, 2013, the trial court ordered Employer to "furnish [Employee] with a list of orthopedic specialists for a second opinion, so that the physician can examine her and make a diagnosis of her present condition, and whether such is related to her March 1994 compensable injury[.]" The court further stated that, if necessary, it would "review the matter after reviewing the physician's second opinion."

Employer has appealed, contending that the trial court erred in ordering Employer to provide a new panel of physicians and that the court incorrectly weighed the evidence in reaching its conclusion.

Analysis

We are statutorily required to review the trial court's factual findings "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." Tenn. Code Ann. § 50-6-225(e)(2). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

Tennessee Code Annotated section 50-6-204(a)(1) (1991), in effect at the time of Employee's injury, provides: "The employer or employer's agent shall furnish free

of charge to the employee such medical and surgical treatment, medicine, medical and surgical supplies . . . made reasonably necessary by accident as herein defined, as may be reasonably required[.]"[2] Under this provision, an employee has the burden of demonstrating that a given medical treatment not authorized by the employer is reasonable and medically necessary. Moore v. Town of Collierville, 124 S.W.3d 93, 98 (Tenn. 2004). The question of whether a particular medical treatment is "made reasonably necessary" must be answered based upon the proof presented at the time the treatment is proposed. Hegger v. Ford Motor Co., No. M2007–00759–WC–R3–WC, 2008 WL 4072047, at *4 (Tenn. Workers' Comp. Panel Sept. 2, 2008) (citing Roark v. Liberty Mut. Ins. Co., 793 S.W.2d 932, 935 (Tenn. 1990)).

In this case, Employee has the burden of demonstrating that a medical treatment other than that recommended by Dr. Strait is reasonable and medically necessary. Through her detailed affidavit, Employee has alleged that deep tissue massage, as formerly prescribed by Dr. Moses, is a reasonably necessary treatment. Employer asserts that this is insufficient, arguing that Employee may only rebut Dr. Strait's medical opinions with expert medical evidence, not merely an affidavit. Employer points to Smith v. Intex Enterprises, No. E2009–02557–WC–R3–WC, 2011 WL 768678 (Tenn. Workers' Comp. Panel Mar. 7, 2011), in support of this position. In Smith, an employee requested from her employer "a panel of physicians for some unspecified medical treatment" and filed a series of post-judgment motions to this effect. 2011 WL 768678, at *2. The trial court granted the employee's request. Id. On appeal, we reversed, holding that the matter was not ripe for judicial determination because the employee did not allege nor was there evidence to suggest that the employee required a particular medical treatment. Id.

Unlike Smith, however, Employee in this case has stated that a particular form of treatment, deep tissue massage, is reasonably required for her injury. This allegation is supported by her detailed affidavit declaring that her previous physician, Dr. Moses, had ordered this treatment over a period of years and that it has proven to be the only effective treatment for her pain. Therefore, Smith is inapposite to this case, and Employee's affidavit may be considered along with the medical evidence to determine the effectiveness of particular treatments and the suitability of Dr.

[2] The same language is presently codified in Tennessee Code Annotated section 50-6-204(a)(1)(A) (2008 & Supp. 2013).

Strait's medical speciality in managing Employee's muscular pain.

Though expert medical evidence is generally required in workers' compensation cases to prove causation and permanence, once these are established, the extent of an injury may be determined from lay testimony and other evidence in addition to medical evidence. Hinson v. Walmart, Inc, 654 S.W.2d 675, 677 (Tenn. 1983). In such cases, "a trial court should consider both lay and expert testimony . . . and is not bound to accept a physician's opinion." Fritts v. Safety Nat. Cas. Corp., 163 S.W.3d 673, 680 (Tenn. 2005); Hinson, 654 S.W.2d at 677. Moreover, the Supreme Court has consistently held that an employee's assessment as to his or her own physical condition is competent testimony that is not to be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972).

In this case, the trial court accredited Employee's testimony as to the nature and extent of her injuries, while finding it "not . . . reasonable to rely on Dr. Strait's evaluation as to the better treatment option for [her]" since "he is a neurological and spine surgery doctor." These types of credibility determinations are within the discretion of trial courts. See e.g., Luedtke v. Travelers Ins, Co., 100 S.W.3d 188, 191 (Tenn. Workers' Comp. Panel 2000) (explaining that the fact that a doctor did not practice in a certain medical speciality goes to the weight and reliability of the doctor's testimony).

We disagree with Employer's contention that a medical opinion may only be rebutted by expert medical testimony. Since this case does not involve a dispute over causation or permanence but appropriate treatment for pain, the trial court was not bound to accept only Dr. Strait's opinions. Fritts, 163 S.W.3d at 680. To the contrary, an employee's assessment of her own physical condition must be taken into account, McClain, 526 S.W.2d at 459; Way, 482 S.W.2d at 777, particularly where, as here, the employee is describing the pain she is experiencing and the effectiveness of particular treatments in managing that pain. Therefore, the trial court did not err in affording weight to Employee's affidavit.

Though Employee's affidavit may not be sufficient to warrant ordering any specific medical treatment, the trial court found the affidavit was sufficient to raise a question regarding the appropriate treatment option for Employee's pain. Further, the trial court did not rely on Dr. Strait's opinions on managing Employee's muscular

pain given that Dr. Strait does not specialize in orthopaedics but in neurology and spine surgery. Conversely, the court recognized that Dr. Moses, an orthopaedic specialist, was able to effectively manage Employee's pain with deep tissue massage treatments. On the basis of these findings, the trial court ordered Employer to provide a panel of orthopaedic specialists "for a second opinion, so that the physician can examine her and make a diagnosis of her present condition, and whether such is related to her March 1994 compensable injury[.]" We find that the evidence does not preponderate against the trial court's findings in this regard.

Employer also asserts that the trial court lacked the authority under Tennessee Code Annotated section 50-6-204 to order a new panel of orthopaedic specialists since Dr. Strait was already Employee's authorized treating physician. Employer argues that since section 50-6-204 does not explicitly authorize a trial court to order a second opinion, except as authorized under section 50-6-204(a)(4)(D),[3] then "no second opinion is allowed under the Act unless it is explicitly ordered by the [authorized treating physician]." However, we are not persuaded by this argument, as nothing in the statute precludes a trial court from ordering an employer to provide a new panel of specialists that the court finds necessary to effectively treat a particular injury.

Though section 50-6-204 does not explicitly authorize trial courts to order the provision of a new panel of physicians by an employer, nothing in the statute precludes a trial court from doing so. While courts may not amend, alter, or extend the provisions of the Act beyond its obvious meaning, it is well within the spirit of the workers' compensation law to ensure that an appropriate panel of physicians who are qualified to treat a particular injury is provided to an employee. See Valencia v. Freeland and Lemm Constr. Co., 108 S.W.3d 239, 242 (Tenn. 2003) ("Our interpretation of the Workers' Compensation Act is guided by 'a consideration which is always before us in workers' compensation cases—that these laws should be rationally but liberally construed to promote and adhere to the Act's purposes of

[3] Tennessee Code Annotated section 50-6-204(a)(4)(D) provides that "[i]n circumstances where an employee is offered a treating panel as described in subdivision (a)(4)(C), the injured employee shall be entitled to have a second opinion on the issue of surgery, impairment, and a diagnosis from that same panel of physicians selected by the employer." The circumstances of section 50-6-204(a)(4)(C), in which an employee is appointed a panel of five neuroscience or orthopaedic physicians, did not occur in this case.

securing benefits to those workers who fall within its coverage.'"). Since the workers' compensation statute should be liberally construed in favor of compensation and any doubts should be resolved in the employee's favor, Wait v. Travelers Indem. Co. of Ill., 240 S.W.3d 220, 224 (Tenn. 2007), we do not read section 50-6-204 or any other provision as precluding the trial court in this case from ordering Employer to provide a new panel of orthopaedic specialists qualified to treat muscular pain. Therefore, Employer's contention that the trial court lacked the authority to order a new panel of physicians is without merit.

Conclusion

We affirm the decision of the trial court. The case is remanded to the trial court for further proceedings. Costs are taxed to Food Lion, LLC, and its surety, for which execution may issue if necessary.

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JON KERRY BLACKWOOD, SENIOR JUDGE

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JUDGMENT

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 appeals 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 of this appeal are taxed to Food Lion, LLC, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM