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

December 10, 2012 Session

STEPHEN TAYLOR v. AIRGAS MID-SOUTH, INC., ET AL.

Appeal from the Chancery Court for Obion County
No. 28,100 W. Michael Maloan, Chancellor

No. W2012-00621-WC-R3-WC - Mailed January 24, 2013; Filed February 26, 2013

In this workers' compensation appeal, it is undisputed that the employee sustained a compensable injury, that the employer was providing medical care as required by the workers' compensation statute, and that the employee sought and received a spinal fusion treatment without informing or consulting with his employer. The trial court ordered the employer to pay for the unauthorized treatment, and the employer has appealed from that decision. 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 in accordance with Tennessee Supreme Court Rule 51. We reverse 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 Reversed.

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

Ronald L. Harper and Jeffrey E. Nicoson, Memphis, Tennessee, for the appellants, Airgas Mid-South, Inc. and Hartford Underwriters Insurance Company.

Jay E. DeGroot, Jackson, Tennessee, for the appellee, Stephen Taylor.

MEMORANDUM OPINION

Factual and Procedural Background

Stephen Taylor worked as a delivery driver for Airgas Mid-South, Inc. His job consisted of transporting canisters of compressed gases to various customers. He injured his lower back in November 2006 when he slipped and fell to the ground while attempting to climb into his truck. He promptly reported the injury, and it was accepted as compensable by Airgas. He was treated initially by Dr. Heather Gladwell, an orthopaedic surgeon. Dr. Gladwell provided conservative treatment. Mr. Taylor's condition did not improve, and he was referred to Dr. Wendy Cran-Carty, a pain management specialist, in April 2007. Dr. Cran-Carty prescribed various medications and also administered several steroid injections to control Mr. Taylor's symptoms. She continued to be the authorized physician for Mr. Taylor at the time the trial occurred.

In October 2007, Dr. Cran-Carty recommended a referral to Dr. Roy Schmidt for consideration of implantation of a spinal cord stimulator. However, the workers' compensation case manager instead referred Mr. Taylor to Dr. John Brophy, a neurosurgeon, for evaluation. Dr. Brophy examined him on November 21, 2007. Dr. Brophy also reviewed an existing MRI study. He concluded that Mr. Taylor had degenerative disc disease and lumbar pain without radiculopathy. He opined that surgery was not indicated, including the spinal cord stimulator proposed by Dr. Cran-Carty. Mr. Taylor was later evaluated by Dr. Parisoon, another neurosurgeon, who likewise recommended against surgery.

In June 2010, while still under Dr. Cran-Carty's care, Mr. Taylor was referred by his primary care physician, Dr. Kumar Yogesh, to Dr. Bassam Hadi, another neurosurgeon. Dr. Hadi recommended a lumbar fusion "as an option of last resort, because he had — not had any relief from his previous therapies." However, Dr. Hadi testified that, because of the length of time that had passed from the original injury (three and one-half years), there was a significant possibility that the surgery would not relieve Mr. Taylor's symptoms. Mr. Taylor decided to proceed with the surgery. It is undisputed that he did not inform or consult with Airgas concerning that decision. He explained: "At that time I was — I had been tired of living in pain and that was what I felt my option was, to try and get some relief because I had been shot down in every other way that we could possibly get it fixed except for a pain management doctor."

Dr. Hadi performed a fusion of the L4 and L5 vertebrae on July 12, 2010. The procedure did not bring about any improvement of Mr. Taylor's symptoms. Dr. Hadi subsequently commented to Dr. Yogesh that he "regretted doing the surgery." In light of the failure of Mr. Taylor to improve following the surgery, Dr. Hadi concluded that arthritic

problems, possibly unrelated to the work injury, were the actual cause of Mr. Taylor's pain. However, in support of his decision to perform the surgery, he testified: "We had a patient that was 30-some odd years old, had not done well for three years and had a definite problem on MRI. And I think the risks were justified at that point to go forward with the surgery to attempt to give him some relief, although the risks were real."

Mr. Taylor also continued to receive treatment from Dr. Cran-Carty. In February 2011, she recommended a trial use of a neurostimulator. The temporary placement of this device took place in September 2011 and resulted in a 50% reduction of Mr. Taylor's symptoms. A permanent neurostimulator was surgically implanted shortly before the January 2012 trial of this case. Airgas paid for that procedure.

Dr. Samuel Chung, a physiatrist, performed two evaluations of Mr. Taylor. The first was in March 2009, before the surgery. At that time, he assigned an 8% whole body permanent impairment to Mr. Taylor. He deferred to Drs. Brophy and Parisoon regarding the necessity of any surgical treatment. Dr. Chung evaluated Mr. Taylor again in March 2011. At that time, he determined that Mr. Taylor had a 28% impairment to the body as a whole as a result of his original injury and the fusion procedure performed by Dr. Hadi.

Mr. Taylor was thirty-six years old at the time of trial. He left high school in the twelfth grade but later obtained a GED. Before going to work for Airgas, he had worked as a binder operator and as a tow truck driver. He had been terminated from his job with Airgas in January 2007 as a result of several customer complaints.

The trial court issued its decision in the form of a letter to counsel and adopted Dr. Chung's 28% impairment rating. The trial court found that Mr. Taylor had been terminated for misconduct — so that his award of permanent disability benefits was capped at one and one-half times the anatomic impairment[1] — and awarded 40% permanent partial disability benefits. The trial court also ordered Airgas to pay all expenses associated with Dr. Hadi's surgery. Judgment was entered in accordance with those findings. Airgas has appealed only from that portion of the judgment requiring it to pay for Dr. Hadi's treatment.

[1] Mr. Taylor has not disputed this determination on appeal.

Standard of Review

Appellate review of decisions in 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

Airgas asserts that the trial court erred by ordering it to pay for the unauthorized medical treatment provided by Dr. Hadi. Airgas points out that it provided medical treatment for Mr. Taylor's injury as required by the workers' compensation law, that he made no effort to consult with, or even inform, Airgas of the proposed surgery, and that the procedure was not necessary for the treatment of the work injury, as evidenced by Dr. Hadi's after-the-fact conclusion that arthritic changes, rather than a disc injury, caused his continuing symptoms.

Our analysis begins with a review of the relevant provision of the Workers' Compensation Law:

> The employer or the employer's agent shall furnish, free of charge to the employee, such medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members, and other reasonable and necessary apparatus, including prescription eyeglasses and eye wear, such nursing services or psychological services as ordered by the *attending* physician and hospitalization, including such dental work made *reasonably necessary* by accident as defined in the chapter.

Tenn. Code Ann. § 50-6-204(a)(1)(A) (Supp. 2012) (emphasis added). Tennessee courts have interpreted and applied this statute in many cases, several of which are discussed in this opinion. With very rare exception, the employee has been required to secure the

authorization of the employer before obtaining medical care for which the employer is financially responsible.

However, Mr. Taylor cites *Atlas Powder Co. v. Grant*, 293 S.W.2d 180 (Tenn. 1956), for the proposition that there are circumstances in which the employer must pay for unauthorized medical treatment. We agree that *Atlas* does so hold. However, the majority opinion in *Atlas* provides little analytical guidance, and later cases have limited the holding in *Atlas*. *See, e.g.*, *Buchanan v. Mission Ins. Co.*, 713 S.W.2d 654, 657 (Tenn. 1986) (quoting with approval the dissenting opinion in *Atlas*). The Supreme Court has emphasized that an employee must generally consult with the employer before incurring medical expenses:

> If this statute [Tenn. Code § 50-1004 (1950), codified as amended at § 50-6-204(a)(1)(A)] means what it says then the employer is to 'furnish' and the employee 'shall accept the same'. This language makes it clear that the intent of the statute was for the employee to certainly do not less than consult his employer before incurring the expenses called for by that statute if the employee expects the employer to pay for it. The opposite would seem to be against public policy.

Procter & Gamble Defense Corp. v. West, 310 S.W.2d 175, 178 (1958). The Court later recognized, however, that an employee may be justified in incurring medical expenses without first consulting with employer. *See, e.g.*, *Rice Bottling Co. v. Humphreys*, 372 S.W.2d 170, 172 (Tenn. 1963).

In *Rice Bottling Co.*, the Court reversed the trial court's ruling that "employee was justified in incurring further [unauthorized] medical expense to be paid by employer, without consulting employer." *Id.* at 173. The Court defined "justified" in this context as "a reasonable excuse" and explained that "the question is not whether the employee needed further medical service but whether the employee was justified in obtaining further medical service, without consulting employer, yet expecting employer to pay for same." *Id.* The Court did not provide a "categorical" test for making this determination but noted that the inquiry must "depend upon the circumstances surrounding" the action. *Id.*

In *Buchanan v. Mission Ins. Co.*, 713 S.W.2d 654 (Tenn. 1986), the Court relied upon *Rice* to hold that the employee was not relieved of the responsibility to consult with the employer before obtaining unauthorized medical care which she expected the employer to pay. The Court found that the record lacked "sufficient justification for [the employee's] unilateral abandonment of the medical services that her employer was required to provide." *Id.* at 657. In language similar to that of *Rice*, the Court made clear that any exception to the

statute requiring prior authorization was narrow and that "no general rule governing these situations can be gleaned from the cases." *Id.* at 658. A similar analysis was employed in *Dorris v. INA Ins. Co.*, 764 S.W.2d 538, 540-41 (Tenn. 1989) ("It has long been held that the intent of [the Workers' Compensation Law] is for the employee to do no less than to consult his employer before incurring expenses called for by the statute if the employee expects the employer to pay for them.").

Although not always so articulated, the cases suggest that for an employer to be required to pay for unauthorized medical care, the employee must prove (1) justification, i.e, a "reasonable excuse," for not consulting with her employer before incurring medical expenses, *see, e.g.*, *Dorris*, 764 S.W.2d at 541; *Buchanan*, 713 S.W.2d at 657; *Harris v. Kroger Co., Inc.*, 567 S.W.2d 161, 163 (Tenn. 1978),*Rice Bottling Co.*, 372 S.W.2d at 173, and (2) the "necessity and reasonableness" of the unauthorized medical care, *Moore v. Town of Collierville*, 124 S.W.3d 93 (Tenn. 2004) (*citing Baggett v. Jay Garment Co.*, 826 S.W.2d 437, 439 (Tenn. 1992)). This analysis is consistent with the text of Tennessee Code Annotated section 50-6-204(a)(1)(A), which requires the employer to pay for the services of the "attending physician," which we interpret to mean the employer authorized physician, provided the services are "reasonably necessary" as a result of the on-the-job accident.

In this case, the trial court considered only whether the unauthorized medical treatment of Mr. Taylor was reasonable and necessary without expressly considering whether he was justified in not consulting with the employer before obtaining the treatment. Accordingly, we conclude that the decision of the trial court should be reversed and the case remanded for further consideration of the evidence by the trial court as it relates to the two-part analysis that we have described. A remand is necessary because the trial judge is the first arbiter of the facts in a worker's compensation case and because whether the employee was justified in not consulting Airgas before obtaining unauthorized medical treatment is a question of fact. *See Rice Bottling Co.*, 372 S.W.2d at 173 (noting that whether an employee was justified depended "upon the circumstances surrounding" the action). Accordingly, on remand the trial court shall determine, and make a specific finding as to, whether the employee was justified in his actions and, if so, whether the unauthorized medical care was reasonable and necessary as a result of the on-the-job injury.

Circumstances relevant to the trial court's determination on remand include the undisputed facts that Airgas was providing medical services as required by Tennessee Code Annotated section 50-6-204 (a)(1)(A) and that Mr. Taylor did not consult with Airgas concerning Dr. Hadi's surgery. Mr. Taylor argues that he was excused from doing so because the care provided by Airgas failed to provide relief from his symptoms. Mr. Taylor also points out that the workers' compensation case manager did not allow him to be referred to Dr. Schmidt by Dr. Cran-Carty, who was the authorized physician. The role of the case

manager in the worker's compensation context is controlled by Tennessee Code Annotated section 50-6-123(b)(1)-(5), which provides the following duties:

> (1) Developing a treatment plan to provide appropriate medical care services to an injured or disabled employee;
> (2) Systematically monitoring the treatment rendered and the medical progress of the injured or disabled employee;
> (3) Assessing whether alternate medical care services are appropriate and delivered in a cost-effective manner based on acceptable medical standards;
> (4) Ensuring that the injured or disabled employee is following the prescribed medical care plan; and
> (5) Formulating a plan for return to work with due regard for the employee's recovery and restrictions and limitations, if any.

Certainly, the statute gives the case manager a voice in the treatment of the employee. However, the case manager cannot veto the treatment prescribed by the authorized physician who has been selected by the employee pursuant to Tennessee Code Annotated section 50-6-204(a)(4)(A). Whether the case manager exceeded her authority in directing or denying a specific medical treatment by a particular medical provider is an appropriate factor to consider in determining whether Mr. Taylor was justified in obtaining unauthorized medical care.

Our review of the record indicates that Mr. Taylor was not pleased with the results of his authorized medical treatment. Such an opinion, even if sincerely held, does not, standing alone, justify a failure to consult the employer. *Lane v. Olsten Staffing Servs.*, No. E2001-00380-WC-R3-CV, 2002 WL 126329 (Tenn. Workers' Comp. Panel Jan. 31, 2002); *Phillips v. Deroyal Indus.*, No. E2001-01655-WC-R3-CV, 2002 WL 1455351 (Tenn. Workers' Comp. Panel July 8, 2002); *see also Foster v. Gallagher-Basset Ins.*, No. M2004-02348-WC-R3-CV, 2006WL 266571 (Tenn. Workers' Comp. Panel Jan. 27, 2006). We also note that Mr. Taylor was represented by counsel. He had the opportunity to raise his concerns with his employer, with the Tennessee Department of Labor and Workforce Development, or, since the case was filed in June of 2009 (a year before the surgery) with the trial court. Instead, he chose to undergo significant back surgery through an unauthorized provider.

The trial court is better situated to consider all the relevant factors and make a specific finding as to whether the employee was justified in his actions and, if so, whether the unauthorized medical care was reasonable and necessary as a result of the on-the-job injury.

Conclusion

The award of medical expenses related to Dr. Hadi's medical treatment is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion. Costs are taxed to Stephen Taylor, for which execution may issue if necessary.

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DONALD E. PARISH, Special 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, Stephen Taylor, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM