

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
FEBRUARY 28, 2002 Session**

DARRYL PHILLIPS V. DEROYAL INDUSTRIES

**Direct Appeal from the Scott County Chancery Court
No. 8492 Billy Joe White, Chancellor**

Filed July 8, 2002

No. E2001-01655-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The employer appeals the trial court's award of medical bills for testing and hospitalization by an unauthorized physician. The employee cross-appeals contending (a) that he was justified in seeking treatment by the unauthorized physician and that all medical bills should have been awarded, and (b) that the trial court erred in failing to award all temporary total benefits due. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Scott County Chancery Court is Affirmed.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and JOHN K. BYERS, SR. J., joined.

David J. Silvus, Allen, Kopet & Boyd, Knoxville, Tennessee, for the Appellant, Derooyal Industries.

Mark E. Blakely, Baker, Donelson, Bearman & Caldwell, Knoxville, Tennessee, for the Appellee, Darryl Phillips.

MEMORANDUM OPINION

Facts

Darryl Phillips suffered a back injury on January 18, 2000 in the course and scope of his employment with Deroyal Industries (“Deroyal”). He was initially treated by Dr. Timothy Smith. Subsequently, Deroyal tendered a panel of physicians and Mr. Phillips chose Dr. Allen Rice, a general practitioner, who treated him for a time and returned him to work with restrictions despite the fact that Mr. Phillips stated he could not perform his job. Mr. Phillips returned to Dr. Smith who referred him to Dr. Cletus J. McMahon, Jr., an orthopedic surgeon. Dr. McMahon admitted Mr. Phillips to the hospital for a period of eight days and directed the performance of numerous tests. Dr. McMahon diagnosed a lumbar strain (the same diagnosis made by Dr. Rice and Dr. Smith), and prescribed a regimen of physical therapy. Mr. Phillips never advised Deroyal that he was dissatisfied with the treatment by Dr. Rice.

About four weeks after being released from the hospital, Mr. Phillips moved the court for an order requiring Deroyal to pay for treatment by Dr. McMahon. The trial court entered an order requiring Deroyal to provide a panel of three orthopedic surgeons from which Mr. Phillips could choose one to provide treatment. Dr. P. Merrill White was selected and he saw Mr. Phillips on April 19, 2000. Dr. White determined that Mr. Phillips had a lumbar strain, that he had reached maximum medical improvement, that no further treatment was needed and that he should not have any restrictions. Mr. Phillips continued to treat with Dr. McMahon until released at maximum medical improvement on September 29, 2000 with restrictions.

The trial court held that Dr. McMahon was not an authorized treating physician and Deroyal was not responsible for his services, but ordered Deroyal to pay for the hospitalization and tests ordered by Dr. McMahon. The trial court also did not award any temporary total disability benefits after April 19, 2000.

Standard of Review

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers’ compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452 456 (Tenn. 1988). Conclusions of law are subject to *de novo* review with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293 (Tenn. 1997). When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994).

Issues

The issues presented may be summarized as follows:

1. Did the trial court err in awarding the employee hospital and medical test expenses ordered by an unauthorized physician?
2. Did the trial court err in failing to award medical expenses of an employee- selected physician when the designated physician did not treat the employee?
3. Did the trial court err in not awarding temporary total disability benefits until the employee reached maximum medical improvement?

Discussion

I

The first two issues are related and will be discussed together. Tenn. Code Ann. § 50-6-204(d)(7) provides:

If the injured employee refuses to comply with any reasonable request for examination or to accept the medical or specialized medical services which the employer is required to furnish under the provisions of this law, such injured employee's right to compensation shall be suspended and no compensation shall be due and payable while such employee continues such refusal.

This provision has been construed to require an employee to consult with the employer before engaging an unauthorized physician. *Proctor & Gamble Defense Corp. v. West*, 203 Tenn. 138, 310 S.W.2d 175 (1975). Where an employee incurs medical expenses on his own, the employer is not liable for payment of the expenses absent a showing by the employee that he had a reasonable excuse for not consulting with his employer before incurring such expense. *Harris v. Kroger Co., Inc.*, 567 S.W.2d 161, 163-4 (Tenn. 1978). The initial inquiry for the court is whether Mr. Phillips had a valid excuse for engaging the services of Dr. McMahan without first consulting with Deroyal. Mr. Phillips testified that the authorized physician, Dr. Rice, was treating him but directed that he return to work with restrictions. Because he was in pain and felt he could not do the work, Mr. Phillips began seeing Dr. McMahan without informing Deroyal that he was unhappy with Dr. Rice or that he wanted a second opinion. He first sought authorization to see Dr. McMahan when his attorney filed a motion with the court. There is no evidence that an emergency condition precipitated the visit to Dr. McMahan. We find no reasonable justification in the record for Mr. Phillips's failure to consult Deroyal before commencing treatment with Dr. McMahan. Accordingly, we find no error in the trial court's failure to order Deroyal to pay for the services of Dr. McMahan.

Since the hospitalization and medical tests ordered by Dr. McMahan were directed by an unauthorized physician, Deroyal contends that it should have no liability for the same. In ordering Deroyal to pay the expenses, the trial judge said:

“Now, I do think that the tests that he had run at the hospital were meaningful and helpful and should be paid for by Deroyal because they did tests that were negative and – that brought this diagnosis around. There’s no surgical intervention called for that type thing. And, I think, if McMahon hadn’t done that, one of the other doctors would have had to do it. You can’t just look at a man’s back and tell whether he has ruptured disk or not. It’s necessary to test and he did, but there is just no way that I can approve McMahon as the treating physician under the facts of this case.”

Dr. White, who was an approved physician called as a witness by Deroyal, testified on both direct and cross examination that he utilized the tests ordered by Dr. McMahon in reaching a diagnosis and opinion concerning treatment of Mr. Phillips, but he expressed no opinion concerning whether the hospitalization and tests were necessary or the amounts charged reasonable. The employee has the burden of proving the “necessity and reasonableness” of charges incurred for treatment by providers not designated or otherwise approved by the employer. *Baggett v. Jay Garment Co.*, 826 S.W.2d 437, 439 (Tenn. 1992). Because Dr. White, an approved physician, relied on the tests in reaching his diagnosis and opinion, we can infer, as did the trial judge, that the tests were necessary. Dr. McMahon testified that the charges were reasonable and necessary, and his testimony is uncontradicted. We find, therefore, no error in requiring Deroyal to bear the expense of the hospitalization and tests ordered by Dr. McMahon.

II.

Mr. Phillips asserts that the trial court erred in failing to award any temporary total disability benefits for the period from January 18, 2000 until March 22, 2000, when the employer began providing such benefits and, also, provided another panel of authorized physicians pursuant to a court order. The evidence presented establishes that Deroyal accommodated Mr. Phillips by providing light duty after his injury. He was terminated on February 25, 2000 for violation of Deroyal’s attendance policy. Ben Marney, Production Operations Supervisor, testified that he allowed Mr. Phillips to leave work early one day because he said he was in pain, and Mr. Phillips never returned to work and never informed anyone that he was unable perform the light duty job. The trial court observed the witnesses and apparently was satisfied that the employer had valid reasons to terminate Mr. Phillips for failure to report to work at the light duty assignment. In addition, the employer asserts that Mr. Phillips lost the right to receive temporary benefits when he refused to accept the medical treatment of Dr. Rice, the physician authorized by his employer. Tenn. Code Ann. § 50-6-204(d)(7). We find no basis to reverse the finding of the trial court that no additional temporary total benefits were due.

CONCLUSION

The judgment of the trial court is affirmed. Costs of the appeal are taxed against the Deroyal Industries and its surety.

Howell N. Peoples, Special 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 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the Appellant, DeRotal Industries and its surety, for which execution may issue if necessary.