

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
June 10, 2003 Session

**KASEY DUNN-LINDSEY v. WAL-MART STORES, INC., D/B/A SAM'S  
WHOLESALE CLUB, ET AL.**

**Direct Appeal from the Chancery Court for Shelby County  
No. 106680-3 D. J. Allisandratos, Chancellor**

---

**No. W2002-02742-WC-R3-CV - Mailed September 8, 2003; Filed October 9, 2003**

---

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer and its insurer insist the trial court erred in assessing a bad faith penalty, awarding attorney's fees and costs and ordering medical expenses paid directly to the injured employee. As discussed below, the panel has concluded the judgment should be affirmed as to the bad faith penalty and award of fees and costs, and remanded to the trial court for further consideration.

**Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed; Cause Remanded**

LOSER, J., SP. J., delivered the opinion of the court, in which HOLDER, J., and GOLDIN, SP. J., joined.

Jay L. Johnson, Allen, Kopet & Associates, Jackson, Tennessee, for the appellants Wal-Mart Stores, Inc. and Insurance Company of the State of Pennsylvania

Keith M. Alexander, Taylor, Jones, Alexander & Sorrell, Southaven, Mississippi, for the appellee, Kasey Dunn-Lindsey

**MEMORANDUM OPINION**

The employee or claimant, Ms. Dunn-Lindsey, initiated this civil action to recover workers' compensation benefits for a work related back injury. The employer denied liability. Before the case could be tried, the parties entered into a settlement agreement, approved by the trial court. By the terms of the settlement, the claimant was to receive future reasonably necessary medical care for her injury. Later, when the employer failed to provide the necessary care, the claimant obtained the care on her own and applied to the trial court for an order requiring reimbursement, as well as a bad faith

penalty, her attorney's fee and costs. After a hearing, the trial court awarded medical expenses in the sum of \$14,980.00, a bad faith penalty of \$3,745.00, an attorney's fee of \$11,460.00 and discretionary costs of \$1,858.69. The employer, Wal-Mart Stores, Inc., and its insurer, Insurance Company of the State of Pennsylvania, have appealed.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

The claimant's original claim was for a work related back injury. The basis of the settlement was disability and medical benefits resulting from a ruptured disc in her lower back, which had been surgically repaired by Dr. Downen Snyder, the employer's chosen surgeon. Dr. Snyder has since retired. Medical benefits were left open in anticipation of a possible recurrence at the same interspace. In March 2000, in the middle of the night, a recurrence awakened the claimant with pain so severe that she was taken immediately to an emergency room, where she was treated with pain medication by a neurosurgeon, Dr. Craig Clark, who also recommended immediate surgery. The appellants refused to authorize emergency surgery, but insisted that the claimant visit a doctor of their choosing, Dr. Parisoon, with whom the claimant was unable to obtain an immediate appointment. Upon the occurrence of another acute episode, the claimant authorized Dr. Clark to perform immediate surgery. The appellants have refused to pay the medical expenses related to the surgery.

The appellants contend the trial court erred in assessing a penalty because Dr. Clark never "made a statement of causation." When a covered employee suffers an injury by accident arising out of and in the course of his employment, his employer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Such care includes medical and surgical treatment, medicine, medical and surgical supplies, crutches, artificial members and other apparatus, nursing services or psychological services as ordered by the attending physician, dental care, and hospitalization. The only limitation as to the amount of the employer's liability for such care is such charges as prevail for similar treatment in the community where the injured employee resides. Tenn. Code Ann. § 50-6-204(a)(4)(A). If an employee receives a settlement, judgment or decree which includes the payment of medical expenses and the employer or workers' compensation carrier wrongfully fails to reimburse an employee for

any medical expenses and treatment, including failure to reimburse for reasonable and necessary medical expenses, in bad faith, after receiving reasonable notice of its obligation to provide such medical treatment, the employer or workers' compensation carrier will be liable in the discretion of the court to pay the employee, in addition to the amount due for medical expenses paid, a sum not exceeding 25 percent of such expenses; provided, that it is made to appear to the court that the refusal to pay such claim was not in good faith and that such failure to pay inflicted additional expense, loss or injury upon the employee. Tenn. Code Ann. § 50-6-225(l) (2002 Supp.).

From our independent examination of the record, it appears the appellants refused to pay the claimant's medical expenses because she chose to follow the advice of a qualified surgeon and accept immediate surgery rather than wait sixteen days to see a surgeon chosen by the appellants. Under such circumstance, the evidence does not preponderate against the trial court's finding that the employer and its insurer were guilty of bad faith. The trial court did not abuse its discretion by awarding the bad faith penalty authorized by the above code section. The issue is resolved in favor of the appellee.

The appellants next contend the attorney's fee awarded by the trial court is excessive in that it exceeds 20 percent of the awarded medical expenses. An attorney's fee for representing an employee for the purpose of recovering workers' compensation benefits may not exceed twenty percent of the amount of recovery or award obtained on behalf of the employee. The fee must be paid by the party who employs the attorney, and is subject to the court's approval. Tenn. Code Ann. § 50-6-226(a)(1). Additionally, a court may award attorney fees and reasonable costs, to include reasonable and necessary court reporter expenses and expert witness fees for depositions and trials incurred when the employer fails to furnish appropriate medical, surgical, and dental treatment or care, medicine, medical and surgical supplies, crutches, artificial members and other apparatus to an employee provided for *pursuant to a settlement or judgment under the Act*. Tenn. Code Ann. § 50-6-204(b)(2). To limit the *additional* fee to 20 percent of the recovered medical expenses would make it virtually impossible for the injured worker to obtain the services of an attorney in cases involving a small amount of medical expenses. We conclude therefore that it was not the intention of the General Assembly to impose such limitation.

The appellants further contend the attorney's fee is excessive and unreasonable because the attorney charged for time traveling to and from the courthouse instead of mailing the documents. There are numerous reasons for a conscientious attorney to personally file documents with the court clerk rather than using mail services. We cannot say the claimant's attorney acted unreasonably in doing so in this case. Moreover, the trial court's finding that the fee awarded is reasonable is supported by the affidavits of three other experienced attorneys who valued an attorney's time to be between \$125.00 and \$250.00 per hour. The claimant's attorney charged approximately \$141.00 per hour. Our independent examination of the record fails to disclose any evidence that the fee and expenses of the attorney were not reasonable. The issue is resolved in favor of the appellee.

The appellants finally contend the trial court erred in ordering the medical expenses paid to the claimant rather than directly to the health care providers. It is not clear from the record whether

the trial court ordered the appellants to pay the medical expenses directly to the claimant or whether it simply awarded the medical expenses without specifying to whom payment was to be made.

For the above reasons, the judgment of the trial court is affirmed. The cause is remanded to the trial court for the purpose of clarifying its order awarding medical expenses and for an award of additional attorney's fees for prosecuting this appeal. The trial court shall take such additional proof as it deems appropriate. Costs are taxed to the appellants.

---

JOE C. LOSER, JR..

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
June 10, 2003

**KASEY DUNN-LINDSEY v. WAL-MART STORES, INC., D/B/A SAM'S  
WHOLESALE CLUB, et al.**

**Chancery Court for Shelby County  
No. 106680-3**

---

**No. W2002-02742-WC-R3-CV - Filed October 9, 2003**

---

**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 Appellants, Wal-Mart Stores, Inc., and Insurance Company of the State of Pennsylvania, for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**

