IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 15, 2006 Session

TERRY HAMBRICK v. VECELLIO & GROGAN, INC.

Direct Appeal from the Chancery Court for Unicoi County
No. 5723 – Honorable G. Richard Johnson, Chancellor
Filed January 31, 2007

No. E2005-01793-WC-R3-WC - Mailed December 21, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated § 50-6-225 (e)(3) (2005) for hearing and reporting of findings of fact and conclusions of law. The Employer appeals an order requiring it to furnish certain medical treatment for a previous injury. We Affirm in part, and Modify in part.

Tenn. Code Ann. § 50-6-225(e)(3) (2005) Appeal as of Right; Judgment of the Unicoi County Chancery Court Affirmed in part, and Modified in part.

T. E. FORGETY, JR., Special Judge, delivered the Opinion of the Court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and THOMAS R. FRIERSON, II, Special Judge, joined.

Steve C. Rose, West & Rose, Kingsport, Tennessee, for the Appellant, Vecellio & Grogan, Inc.

Howell H. Sherrod, Sherrod Goldstein & Lee, Johnson City, Tennessee, for the Appellee, Terry Hambrick.

MEMORANDUM OPINION

Facts

This action arose on September 17, 2004 when Terry Hambrick filed a "Motion to Compel", seeking medical treatment claimed to be necessary as a result of a previous compensable injury. The Motion was filed in the original compensation proceeding. The employer, Vecellio & Grogan, answered the Motion and alleged that certain of the treatments sought by Plaintiff – e.g., blood pressure, cholesterol, depression and/or other medications – were not related to the original, compensable injury. The order entered by the trial court provided that Plaintiff was entitled to "medical treatment from his physicians, Dr. Paul Brown and Dr. Marc Aiken, for all necessary and reasonable care...". However, the transcript of the trial judge's memorandum opinion, attached to the order, was more specific as to what treatment was ordered. The Defendant has appealed from this order.

The Plaintiff's original compensation claim was heard in the trial court on October 5, 1995. The court found that Mr. Hambrick had suffered, on August 4, 1993, a "physical injury … as a result of which he sustained *cervical and lumbar back pain*". The court found this injury compensable, and awarded benefits for 85% disability to the body as a whole. The Employer was ordered to "pay all future medical bills, including psychiatric and psychological expenses…". Vecellio & Grogan appealed to this Court, and on November 20, 1996 we rendered an opinion which modified the trial court's judgment, and which reduced the Plaintiff's disability award to 25% to the body as a whole. In that opinion, we noted that Mr. Hambrick had been treated for neck and back pain, and had been diagnosed at least as somewhat depressed. We also noted the medical and other proof which indicated that the Plaintiff exaggerated his pain; was able, but not motivated to return to work; and was "maybe happy to go on the porch", though this would "dramatically exacerbate" his symptoms. Finally, we noted that Dr. Paul Brown

> had treated the Plaintiff for a number of years for various illnesses, one of which was hypertension which he attributed in part to pain, but he declined to reference the hypertension to the accident…

At the hearing on the present Motion to Compel, Mr. Hambrick presented without objection, two letters from Dr. Paul Brown. In his letter of January 23, 2003, Dr. Brown opined that the following medications were necessary and associated with his previous injury:

> Verapamil – for increased blood pressure due to pain
> Accupril – blood pressure, related to pain
> Soma – muscle spasm associated with the injury
> Darvocet – pain associated with the injury
> Paxil and/or Elavil – for depression

By letter dated April 14, 2005, Dr. Brown noted that Mr. Hambrick had recently developed problems in his "lower extremities which have required the attention of Dr. Aiken". Dr. Brown also related these problems indirectly to the original injury – although he noted that that injury was only to the lumbosacral area.

Dr. Neal Jewell of Appalachian Orthopedic, who conducted an independent medical exam of Mr. Hambrick for the Defendant, noted that the Plaintiff was currently taking some fourteen medications.[1] Of these, Dr. Jewell related only the Ultram, Celebrex, Hydrocodone, and Carisoprodol to his musculoskeletal problems. Dr. Jewell also opined that Mr. Hambrick's knee problems were related to routine, everyday wear and tear – affected by Plaintiff's size and weight – rather than the original injury.

The trial judge ordered the Employer to provide all the prescriptions requested by Dr. Brown in his letter of January 23, 2003, and to provide treatment to the Plaintiff's hips and knees.

Standard of Review

We review questions of fact *de novo* upon the trial court record, with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225 (e)(2) (2005); *Galloway v. Liberty Mut. Ins. Co.*, 137 S.W.3d 568, 570 (Tenn. 2004). However, we review questions of law *de novo* without any presumption of correctness. *Galloway*, 137 S.W. 3d at 570; *Leab v. S & H Mining Co.*, 76 S.W.3d 344, 348 (Tenn. 2002). Where the expert medical testimony differs, the trial court has the discretion to accept the opinion of one expert over that of another. *Story v. Legion Ins. Co.*, 3 S.W.3d 450, 455 (Tenn. 1999); *Hinson v. Wal-Mart Stores Inc.*, 654 S.W.2d 675, 676-77 (Tenn. 1983). When the medical evidence is presented by deposition rather than live, we may draw our own conclusions about the weight and credibility of that evidence, since we are in the same position as the trial judge was. *Story*, 3 S.W.3d at 455; *McIlvain v. Russell Stover Candies, Inc.*, 996 S.W.2d 179, 183 (Tenn. 1999).

Issues

The essence of the issues as stated by the Employer are as follows:

(1) … is the defendant obligated for future medical treatment not connected with the original injury?
(2) The preponderance of the evidence does not support the trial court's order as to the furnishing of certain future medical benefits.

[1] Protonix, Allopurenol, Glucovance, Avandia, Lipitor, Accupril, HCTZ, Celebrex, Paxil, Verapamil, Tricor, Hydrocodone, Soma, and Ultram.

Discussion

In its first issue, the Employer poses the question of whether it will be responsible for future medical treatment not connected to the original injury. Of course it will not be, because an employer can only be liable for the treatment of injuries which "arise out of" and "in the course of" the employment. Tenn. Code Ann. §§ 50-6-103; 50-6-204 (2005). We perceive that the real thrust of Plaintiff's argument is as stated in its second issue – i.e., whether the evidence preponderates against the treatment ordered by the trial judge, and/or whether that treatment is connected to the original injury.

There is no dispute as to certain of Plaintiff's prescriptions. Even Dr. Jewell, the Defendant's independent medical examiner, related the following to the original musculoskeletal injuries: Ultram, Celebrex, Hydrocodone, and Carisoprodol. It was and is, therefore appropriate that these be furnished by the Employer. Dr. Brown found that Soma (a muscle relaxer), and Darvocet (a pain reliever) were associated with the Plaintiff's injury, and there appears to be no issue about these. Accordingly, it is appropriate that the Employer furnish these. It is likewise appropriate that the Defendant furnish the Paxil and Elavil ordered by Dr. Brown. These medications are for depression, and the original trial court order required the Defendant to provide future psychiatric and psychological expenses. Although this court did substantially reduce the percentage of the original disability award, it did not alter the findings as to the provision of psychological type treatments.

We believe however, that the evidence preponderates against the finding that the Defendant should be required to furnish Mr. Hambrick's blood pressure medications (at present, Verapamil and Accupril). Although Dr. Brown attempted in this proceeding to relate the blood pressure problems to Plaintiff's injury, he did not do so in the original trial. Indeed, in this Court's opinion of November 20, 1996, we noted that Dr. Brown had "…declined to reference the hypertension to the accident". The Plaintiff argues that this Court should not consider Dr. Brown's 1994 deposition, which we allowed to be filed as a supplement to the record here, subject to arguments as to relevance and admissibility. As noted above, we discussed parts of this very deposition in our opinion on the original case. Post judgment actions to require medical treatment are properly filed in the original compensation suit – as indeed this one was. One of the reasons for this rule is that it allows the trial judge to have before him the records of the earlier proceeding. *Bazner v. American States Ins. Co.*, 820 S.W.2d 742, 745 (Tenn. 1991). Since the deposition was before the courts in the original case, it was appropriate to allow it to be filed here. Significantly, in that deposition Dr. Brown testified that the Plaintiff suffered from hypertension even before the original accident. Dr. Neal Jewell examined the Plaintiff specifically to try to determine what treatment and/or medications were related to the original injury. And, he did not find the blood pressure medications were related. Of course, the Employee bears the burden of proving every element of his claim. *Roark v. Liberty Mut. Ins. Co.*, 793 S.W.2d 932, 934 (Tenn. 1990). We conclude that the Plaintiff has not met this burden with respect to his blood pressure medication. Although the Defendant also complains about Mr. Hambrick's cholesterol medicine, not even Dr. Brown related it to the injury. Thus, there is no issue about it here.

Finally, we believe the evidence preponderates against the finding that Mr. Hambrick's knee and hip problems are related to the original accident. In the first instance, the original compensation award was for "cervical and lumbar back pain". Nothing in the opinions of the trial court, or this Court, indicate there was any injury to the knees or hips. Moreover, Dr. Jewell found that the problems with the Plaintiff's knees were not related to his injury, but were due to everyday wear and Mr. Hambrick's size and weight. Again, the Plaintiff has not carried the burden of proof on this issue. Accordingly, the Defendant will not be required to furnish treatment for Plaintiff's knee and hip problems.

Conclusion

The judgment of the trial court AFFIRMED, as MODIFIED hereby. Costs of this appeal are taxed one-half to Appellant, and one-half to Appellee.

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TELFORD E. FORGETY., JR., 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 one-half to the appellant, Vecellio & Grogan, Inc., and one-half to the appellee, Terry Hambrick, for which execution may issue if necessary.