TENNESSEE BUREAU OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

Bob Walls	)	Docket No. 2019-05-0371
	)	
v.	)	State File No. 57369-2018
	)	
United Technologies Corp., et al.	)	
	)	
	)	
Appeal from the Court of Workers' Compensation Claims Dale A. Tipps, Judge	)	Heard June 24, 2021 via Microsoft Teams

Concurring in Part and Dissenting in Part

Hensley, J., concurring in part and dissenting in part.

I concur with the majority's conclusion that the preponderance of the evidence supports the trial court's determination that the employer failed to rebut the presumption of medical necessity accorded the opinions of the authorized physicians. However, I respectfully dissent from the majority's remand of the case for the trial judge to "reconsider the issue of attorney's fees and expenses in light of [its] opinion" because, in my opinion, "the light" the majority places on the statutes addressing attorney's fees and costs introduces a statute not presented to or considered by the trial court and incorrectly interprets the statutes.

The Appeals Board has historically avoided interpreting statutes or provisions not presented to or addressed by the trial judge. *See Henderson v. Pee Dee Country Enter., Inc.*, No. 2020-06-1013, 2021 TN Wrk. Comp. App. Bd. LEXIS 8 (Tenn. Workers' Comp. App. Bd. Mar 8, 2021). In their pre-trial briefs submitted to the trial judge, neither of the parties cited section 50-6-226(d)(1)(B), and the transcript of the trial court proceedings fails to reveal any instance of section 50-6-226(d)(1)(B) being cited to or by the trial judge. Indeed, the trial judge's order granting medical benefits and denying attorney's fees did not address section 50-6-226(d)(1)(B) because the judge determined section 50-6-226(d)(1)(A) was the applicable section. Nonetheless, the majority offers its interpretation of section 50-6-226(d)(1)(B) and its conclusion that the employee can choose whether to pursue attorney's fees under section 50-6-226(d)(1)(A) or 226(d)(1)(B), irrespective that the medical benefits sought by the employee were benefits provided for in a court approved

settlement agreement as contemplated in section 50-6-226(d)(1)(A).[1] For this reason, I am compelled to express my interpretation of the two statutes at issue and a brief history of their enactment.

The plain language of section 50-6-226(d)(1)(A) provides workers' compensation judges the discretion to award reasonable attorney's fees and reasonable costs when an employer "[f]ails to furnish appropriate medical . . . treatment or care . . . to an employee provided for in a settlement." A trial judge's discretion to award fees and costs when an employer fails to furnish appropriate medical care provided for in a settlement agreement predates the Workers' Compensation Reform Act of 2013. In 1997, the General Assembly passed Public Chapter 198, which amended section 50-6-204 by adding a new subdivision (b)(2) as follows:

> In addition to any attorney fees provided for pursuant to the provisions of Section 50-6-226, 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 agreement* or judgment under this chapter.

Acts 1997, ch. 198 § 1 (emphasis added); *see also* Tenn. Code Ann. § 50-6-204(b)(2) (1998).

The intention of the General Assembly in passing this statute, as evidenced by its plain language, was to allow injured employees to recover the fees and costs incurred in having to *enforce a court order* requiring the payment of the medical care and other benefits identified in the statute. *Norfleet v. J.W. Goad Constr.*, No. M2001-00425-WC-R3-CV, 2001 Tenn. Lexis 811, at *11 (Tenn. Workers' Comp. Panel Dec. 3, 2001) ("Where an employer refuses to provide reasonably necessary medical benefits, it may be assessed attorney fees and reasonable costs necessary to *enforce a court order* requiring the payment of expenses incurred by the employee for the recovery [of] such expenses." (Emphasis added.)); s*ee also Grissom v. UPS*, No. M2016-00127-SC-R3-WC, 2017 Tenn. LEXIS 4, at *5 (Tenn. Workers' Comp. Panel Jan. 9, 2017); *Minutella v. Ford Motor Credit Co.*, No. M2008-01920-WC-R3-WC, 2009 Tenn. LEXIS 724, at *16-17 (Tenn. Workers' Comp. Panel Nov. 12, 2009); *Dunn-Lindsey v. Wal-Mart Stores, Inc.*, No. W2002-02742-WC-R3-CV, 2003 Tenn. LEXIS 974, at *7 (Tenn. Workers' Comp. Panel Oct. 9, 2003). The statute

[1] In the employee's pre-trial brief, the employee stated that the Tennessee Workers' Compensation Act provides attorney's fees and expenses for *enforcing* medical treatment, quoting from the 2013 version of the statute giving a court the discretion to award attorney's fees and costs when an employer fails to furnish "appropriate medical [and] surgical . . . treatment or care . . . provided for pursuant to a settlement or judgment."

remained unaltered until the 2013 Workers' Compensation Reform Act when it was moved from section 50-6-204(b) to newly created subsection 50-6-226(d) and modified to provide the court of workers' compensation claims discretion to award attorney's fees and costs:

> In addition to any attorneys' fees provided for in this section, the court of workers' compensation claims may award attorneys' fees and reasonable costs, including 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 in a settlement or judgment* under this chapter.

Acts 2013, ch. 289 § 64; Tenn. Code Ann. § 50-6-226(d) (2014) (emphasis added).

As originally enacted, section 50-6-226(d) in the 2013 Act did not include the current subsections 226(d)(1)(A) and 226(d)(1)(B) and was limited to granting the Court of Workers' Compensation Claims the discretion to award attorney's fees and costs when the employer failed to furnish appropriate medical care "provided for in a settlement agreement or judgment." *Id.* As such, the 2013 enactment did not evidence any intention to expand the provisions beyond the statute's original purpose of allowing an injured employee to recover the fees and costs incurred in having to *enforce a court order* requiring the payment of medical and other benefits identified in the statute.

A 2016 amendment modified section 50-6-226(d) by dividing the first sentence, designating the initial part of the sentence as "226(d)(1)," and incorporating the latter part of the sentence as "226(d)(1)(A)." *See* Acts 2016, ch. 1056 § 2. Another 2016 amendment added language in the newly designated section 226(d)(1)(A) to extend the court's discretion to award attorney's fees and costs for an employer's failure to provide benefits beyond those "provided for in a settlement agreement or judgment" to include benefits provided for in an "expedited hearing *order*" or "compensation hearing *order*." Acts 2016, ch. 816 § 6 (emphasis added). Thus, consistent with the original enactment and the statute's incorporation into the 2013 Act, the 2016 amendments continued the statute's purpose of allowing injured employees to recover the fees and costs incurred in having to *enforce an order* requiring the payment of the medical care and other benefits identified in the statute.

The 2016 amendments also added a new section 50-6-226(d)(1)(B) giving the Court of Workers' Compensation Claims the discretion to award fees and costs when the employer

> [w]rongfully denies a claim by filing a timely notice of denial, or fails to timely initiate any of the benefits to which the employee is entitled under this chapter, including medical benefits under Section 50-6-204 or temporary or

> permanent disability benefits under Section 50-6-207, if the workers' compensation judge makes a finding that such benefits were owed at an expedited hearing or compensation hearing.

Acts 2016, ch. 1056 § 2.[2]

Thus, following the 2016 amendments, section 50-6-226(d)(1)(A) provided the court the discretion to award attorney's fees and costs incurred by an employee *to enforce a settlement agreement, order, or judgment* when an employer fails to furnish benefits provided for in the settlement agreement, order, or judgment. Section 50-6-226(d)(1)(B) provided the court the discretion to award attorney's fees and costs incurred by an employee to obtain workers' compensation benefits where an employer "wrongfully denies a claim by filing a timely notice of denial, or fails to timely initiate any of the benefits to which the employee is entitled under this chapter . . . if a workers' compensation judge makes a finding that such benefits were owed at an expedited hearing or compensation hearing." A critical difference in the two subsections is that subsection 50-6-226(d)(1)(A) allowed an employee to recover fees and costs incurred *to enforce a judgment or order providing for benefits*, and subsection 50-6-226(d)(1)(B) allowed the employee to recover fees and costs incurred in proving his or her entitlement to benefits that a judge determined to be owed at an expedited hearing or compensation hearing.

The plain language of these statutory provisions following the 2016 amendments evidences a distinction between the two subsections 50-6-226(d)(1)(A) and 226(d)(1)(B) that lies, in part, in the point in time an employer allegedly fails to provide benefits. In my opinion, section 50-6-226(d)(1)(A) was intended to apply when an employee incurs fees and costs to *enforce a judgment or order* providing for benefits and section 50-6-226(d)(1)(B) was intended to apply when an employee incurs fees and costs to obtain benefits to which the employee is entitled when a workers' compensation judge finds that the employer wrongfully denied a claim by filing a timely notice of denial or failed to timely initiate any of the benefits to which the employee is entitled.[3]

In 2018, section 50-6-226(d)(1)(B) was amended to allow a workers' compensation judge to award attorney's fees and costs when an employer:

---

[2] Acts 2016, ch. 1056 § 2 also deleted "any" preceding the first instance of "attorney's fees" and inserted "reasonable" preceding "attorney's fees and reasonable costs."

[3] In the instant case, rather than deny the employee's claim for benefits, the employer accepted the employee's claim, provided medical and other benefits, and reached a settlement agreement with the employee that was court approved. Subsequently, the employer timely provided additional medical care for the employee's hip injury, including agreeing to allow the employee to be seen and treated by a hip specialist, but thereafter denied surgery that was recommended by the authorized doctors only after utilization review twice concluded the surgery was not medically necessary.

> Wrongfully denies a claim or wrongfully fails to timely initiate any of the benefits to which the employee or dependent is entitled under this chapter, including medical benefits under § 50-6-204, temporary or permanent disability benefits under § 50-6-207, or death benefits under § 50-6-210 if the workers' compensation judge makes a finding that the benefits were owed at an expedited hearing or compensation hearing. For purposes of this subdivision (d)(1)(B), "wrongfully" means erroneous, incorrect, or otherwise inconsistent with the law or facts.

Tenn. Code Ann. § 50-6-226(d)(1)(B) (2018); *see* Acts 2018, ch. 757 § 2. The amendment expanded the court's authority to award attorney's fees and costs in cases involving death benefits and defined "wrongfully," but neither the 2016 nor the 2018 amendments to subsection 50-6-226(d)(1)(B) provided for an award of attorney's fees and costs incurred *to enforce an order or judgment* providing for medical care and treatment.

In my opinion, the authority of the Court of Workers' Compensation Claims to award attorney's fees and costs for an employer's failure to furnish appropriate medical benefits provided for in a settlement agreement or court order is provided in section 50-6-226(d)(1)(A), which is the statute the trial judge relied on in the instant case. Section 50-6-226(d)(1)(A) does not state that attorney's fees may be awarded *only* when there is a bad faith denial of medical care, but it provides a workers' compensation judge discretion to award fees and costs. *See Harville v. Emerson Elec. Co.*, No. W2010-01011-WC-R3-WC, 2011 Tenn. LEXIS 611, at *14 (Tenn. Workers' Comp. Panel July 6, 2011). Regardless, in my opinion, the majority should not offer its interpretation of statutory provisions the parties did not rely on in the trial court and that the trial judge did not address in the order under review, and then vacate the trial judge's order for the judge to "reconsider the issue . . . in light of" the majority's interpretation of the statute.[4]

[4] The majority addresses in detail, *Dunn-Linsey v. Wal-Mart Stores, Inc.*, 2003 Tenn. LEXIS 974, which the majority says involves facts "strikingly similar to the present case." The majority notes the employee in that case requested reimbursement for medical expenses, a "bad faith penalty," attorneys' fees, and costs. The majority found it *significant* that the Appeals Panel in *Dunn-Lindsey* addressed the trial court's award of a bad faith penalty "separately from the employee's claim for attorney's fees" and noted that the Appeals Panel did not "intimate that the attorney's fee award was a sanction or penalty." The reason the Appeals Panel addressed the award of a "bad faith penalty" separately from the attorney's fee award is because the employee requested a "bad faith penalty" under section 50-6-225(l) (2002), which subjects an employer to liability for up to 25% of the medical expenses that an employer "wrongfully fails to reimburse" under a "settlement, judgment or decree" providing for the payment of such expenses. Tenn. Code Ann. § 50-6-225(l) (2002). The "bad faith penalty" at issue in *Dunn-Lindsey* had nothing to do with attorney's fees; accordingly, the Appeals Panel addressed the "bad faith penalty" statute separately from the statute authorizing an award for the attorney's fees and costs incurred by the employee to enforce the parties' settlement agreement. Indeed, the trial court awarded the employee 25% of the medical expenses as a "bad faith penalty" and an additional $11,460 for attorney's fees incurred to enforce the parties' settlement agreement. *See* Tenn. Code Ann. § 50-6-118(d) (2020). In the instant case, the employee did not request a "bad faith penalty" under section 50-6-118(d).

Employee asserts in his brief on appeal that, where there is a court-approved settlement agreement providing for medical benefits, determining the appropriate standard applicable to an award of attorney's fees under section 50-6-226(d)(1)(B) "appears to be a novel question of first impression for the Appeals Board." Indeed, the Appeals Board has not heretofore addressed the application of section 50-6-226(d)(1)(B) to a case in which medical benefits provided for in a court approved settlement agreement have been awarded or denied by the Court of Workers' Compensation Claims. Moreover, the trial judge in this case did not address this "novel question of first impression," as the issue was not presented to the trial judge.

The majority ignores the fact that the parties and the trial judge did not address section 50-6-226(d)(1)(B) prior to this appeal and ignores that the Appeals Board has not heretofore addressed the applicability of section 50-6-226(d)(1)(B) to a claim for attorney's fees based on an employer's failure to authorize medical benefits provided for in a settlement agreement or court order. Nonetheless, the majority has taken the opportunity to interpret section 50-6-226(d)(1)(B) in the context of a claim for benefits provided for in a settlement agreement and has directed the trial court to reconsider the issue in the "light" of its interpretation. In my opinion, even if the majority is of the opinion section 50-6-226(d)(1)(B) is applicable in this case, the Appeals Board should remand the case for the trial court to address that section's applicability without interpreting the statute in the first instance. The majority is, in effect, advising the trial court that section 50-6-226(d)(1)(B) applies, thereby rendering section 50-6-226(d)(1)(A) superfluous and insignificant.