

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

February 27, 2012 Session

SAMMY T. ROBERTSON v. ROADWAY EXPRESS, INC.

Appeal from the Circuit Court for Bradley County

No. V-08-263 J. Michael Sharp, Judge

No. E2011-01384-WC-R3-WC-MAILED-MAY 9, 2012/FILED-JUNE 8, 2012

Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation 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. The employee injured his lower back on August 22, 2005. The trial court approved a settlement of his workers' compensation claim in 2008. The order approving the workers' compensation settlement provided for future authorized medical treatment in accordance with Tennessee Code Annotated section 50-6-204. In January 2011, the employee's treating physician recommended a surgical procedure. The employer's medical utilization review provider determined that the medical necessity of the procedure was not documented, and the employer denied approval for the procedure. The employee appealed the decision to the Department of Labor and Workforce Development ("the Department"), and the Department's medical director did not overturn the utilization review decision. The employee then filed a petition in the trial court, seeking an order requiring the employer to authorize the surgery. The trial court granted the petition but denied the employee's application for attorney's fees. The employer has appealed, contending that the trial court erred by granting the petition, that the employee failed to exhaust his administrative remedy, and that the petition is barred by res judicata and collateral estoppel. The employee has appealed from the denial of an award of attorney's fees. We vacate the judgment of the trial court and dismiss the case without reaching the merits of the appeal.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Circuit Court Vacated**

THOMAS R. FRIERSON, II, SP. J., delivered the opinion of the Court, in which SHARON G. LEE, J., and LARRY H. PUCKETT, SP. J., joined.

Stephen K. Heard and Adam O. Knight, Nashville, Tennessee, for the appellant, Roadway Express, Inc.

Robert G. Norred, Jr., Cleveland, Tennessee, for the appellee, Sammy T. Robertson.

MEMORANDUM OPINION

Factual and Procedural Background

Sammy T. Robertson (“Employee”) was employed by Roadway Express, Inc. (“Employer”), as a driver. Employee alleged that he sustained a compensable injury to his back on August 22, 2005. The parties settled the claim, and the settlement was approved by the trial court by order entered October 24, 2008. The order provided, *inter alia*, that lifetime future authorized medical treatment would remain open pursuant to Tennessee Code Annotated section 50-6-204.¹

In January 2011, Employee’s authorized physician, Dr. Steven Craig Humphreys, recommended that Employee undergo a surgical fusion/decompression of L3-4, L4-5, L5-S1, and, possibly, L2-3 vertebrae. Employer submitted the recommendation to Coventry Health Care, a utilization review provider. On January 26, 2011, Dr. Gregory Goldsmith, an orthopaedic surgeon, issued a report on behalf of Coventry indicating that the medical necessity of the requested surgical procedure had not been documented. Consequently, the request for the recommended surgery was not certified. Dr. Goldsmith’s report stated in pertinent part as follows:

As per medical records, the patient complains of back pain and bilateral leg pain with numbness, tingling and weakness. However, there is no comprehensive examination presented for review. An updated neurologic examination, including sensory/motor/reflex status is also needed. The M[agnetic] R[esonance] I[maging] reported a right paracentral disc protrusion at L5-S1, compressing the right S1 nerve root origin. Based on the submitted clinical information, the documentations of failure of conservative management

¹ Tennessee Code Annotated section 50-6-204(a)(1) (2008) provides in pertinent part that “[t]he employer or the employer’s agent shall furnish free of charge to the employee the medical and surgical treatment . . . made reasonably necessary by accident as defined in this chapter, that is reasonably required”

including Physical Therapy progress notes, adequate pain medications and official report of the injections were not provided for review. Furthermore, there was no psychological assessment done to the patient regarding post surgical outcomes. The necessity of the requested surgical procedure is not established.

In accordance with Department rules, Employee appealed the decision to Dr. Robert D. Kirkpatrick, the Department's Medical Director, who, on April 11, 2011, issued a letter upholding the utilization review decision with the following explanation:

I have reviewed the medical records as presented on the above noted patient regarding the utilization review decision done by Coventry Workers' Comp Services on January 26, 2011. With the limited clinical information provided, I cannot support overturning the utilization review decision. This decision relates only to medical necessity and not to causation and/or compensability.

...

On April 19, 2011, Employee filed in the trial court a "Motion and/or Petition to Enforce Judgment" requesting the trial court to enforce its October 2008 order approving the parties' settlement by requiring Employer to provide the procedure recommended by Dr. Humphreys and that Employee be awarded attorney's fees. In response, Employer contended that Employee had failed to exhaust all his administrative remedies and that the trial court was without subject matter jurisdiction. Thereafter, on May 6, 2011, Employee filed the affidavit of Landon Lackey, a specialist with the Department, containing the following statement:

Attached hereto is a letter from Dr. Robert Kirkpatrick to Robert G. Norred, Jr. and others which was an adjudication by the Department on the utilization review decision appeal. This letter is a ruling and there will be no further rulings made by the Department with regards to the utilization review and this matter stands as a closed file at this time.

In addition to this affidavit, the trial court was presented with various documents that included Dr. Humphreys's records, Dr. Goldsmith's report, and Dr. Kirkpatrick's letter. On May 25, 2011, the trial court ordered Employer to provide to Employee the medical benefits recommended by Dr. Humphreys. The trial court, by subsequent Order, denied Employee's

request for an award of attorneys' fees. Employer has appealed, contending that the trial court erred by ordering Employer to pay for the medical treatment recommended by Dr. Humphreys. It also contends that Employee failed to exhaust his administrative remedy and that the remedy sought by Employee is barred by the doctrines of *res judicata* and collateral estoppel. Employee asserts that the trial court erred by denying his motion for attorneys' fees.

Standard of Review

We are statutorily required to review the trial court's factual findings "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008 & Supp. 2011). Following this standard, we are further required "to examine, in depth, a trial court's factual findings and conclusions." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). We accord considerable deference to the trial court's findings of fact based upon its assessment of the testimony of witnesses it heard at trial, although not so with respect to depositions and other documentary evidence. Padilla v. Twin City Fire Ins. Co., 324 S.W.3d 507, 511 (Tenn. 2010); Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). We review conclusions of law de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). Although workers' compensation law must be liberally construed in favor of an injured employee, the employee must prove all elements of his or her case by a preponderance of the evidence. Crew, 259 S.W.3d at 664; Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 543 (Tenn. 1992).

Subject Matter Jurisdiction

Employer asserts that the trial court did not have subject matter jurisdiction to hear Employee's petition because Employee failed to exhaust his administrative remedy by not first participating in a benefit review conference. Subject matter jurisdiction is derived, "either explicitly or by necessary implication, from the Tennessee Constitution or from legislative acts." Staats v. McKinnon, 206 S.W.3d 532, 542 (Tenn. App. 2006).

The existence of subject matter jurisdiction depends on the nature of the cause of action and the relief sought. Landers v. Jones, 872 S.W.2d 674, 675 (Tenn. 1994). In Lynch v. City of Jellico, 205 S.W.3d 384, 390-91 (Tenn. 2006), the Tennessee Supreme Court noted that "(a)s part of the Workers' Compensation Reform Act of 2004, the legislature decided that parties having a workers' compensation dispute over injuries occurring after January 1, 2005, must exhaust an administrative process, called a benefit review conference, before

filing suit.” In Southern Cellulose Products, Inc. v. DeFriese, No.E2008-00184-WC-R3-WC, 2009 WL 152313 (Tenn. Workers Comp. Panel Oct. 28, 2009), the panel observed that “[i]t is a settled rule that where a statute provides an administrative remedy, such remedy must first be exhausted before the courts will act.” Id., at *6 (citing Bracey v. Woods, 571 S.W.2d 828, 829 (Tenn. 1978)).

It is undisputed that a benefit review conference was not conducted before Employee filed his trial court petition. Nevertheless, based on Mr. Lackey’s affidavit, Employee contends that Dr. Kirkpatrick’s letter of April 11, 2011, constituted a final ruling by the Department, and therefore, the administrative process was exhausted.

An analysis of the nature of utilization review system in Tennessee workers’ compensation cases is appropriate in determining whether Employee exhausted his administrative remedy. The establishment of the utilization review system is provided for at Tennessee Code Annotated section 50-6-124. A summary of additional statutory provisions related to utilization review was elucidated by the Tennessee Supreme Court in Kilgore v. NHC Healthcare, 134 S.W.3d 153, 157 (Tenn. 2004) as follows:

In 1992, the legislature enacted a number of statutes authorizing and creating programs for the management and the “utilization and quality of medical care services” in workers’ compensation cases. See Tenn. Code Ann. § 50-6-122(a)(1) (1999). The legislature defined “utilization review” in workers’ compensation cases as the “evaluation of the necessity, appropriateness, efficiency and quality of medical care services provided to an injured or disabled employee based on medically accepted standards and an objective evaluation of the medical care services provided” Tenn. Code Ann. § 50-6-102(17) (Supp. 2003). The legislative intent in adopting utilization review is to make “quality medical care services . . . available to injured and disabled employees[,]” while “establishing cost control mechanisms to ensure cost-effective delivery of medical care services” Tenn. Code Ann. § 50-6-122(a)(1)(1999).

To implement utilization review programs, the Commissioner is required by statute to establish “a system of utilization review of selected outpatient and inpatient health care providers to employees claiming benefits under the Workers’ Compensation Law” Tenn. Code Ann. § 50-6-124(a) (1999); see also Tenn. Comp. R. & Regs. 0800-2-6-.02(2) (2003) (“The

Commissioner of Labor shall provide or contract for certain utilization review services.”). In addition, employers are then permitted to implement their own utilization review programs by contracting with a utilization review provider. See Tenn. Code Ann. § 50-6-124(d) (1999). In short, utilization review provides a mechanism for employers to review and evaluate the cost, reasonableness, and necessity of medical services provided to employees in workers’ compensation cases. See Tenn. Code Ann. § 50-6-122(a)(1),(2) (1999).

The Department has promulgated general rules with reference to the utilization review system in workers’ compensation cases. These rules are applicable to all recommended treatments for work-related injuries or conditions whenever the recommendation is made. Tenn. Comp. R. & Regs. 0800-02-06-.02(1). Rule 0800-02-06-.05 of the Tennessee Comprehensive Rules and Regulations mandates utilization review as follows:

(1) The parties are required to participate in utilization review under this Chapter whenever a dispute arises as to the medical necessity of a recommended treatment.

(2) Utilization review is required to be performed pursuant to the requirements of this Chapter whenever it is mandated by T.C.A. § 50-6-124 or the Division’s Medical Cost Containment Program, Medical Fee Schedule, or In-Patient Hospital Fee Schedule rules contained in Chapters 0800-02-17, 0800-02-18, and 0800-02-19, respectively.

With reference to appeals of a utilization review decision, Rule 0800-02-06-.07(4) further provides that:

If the determination of the Division is a denial of the recommended treatment, then the parties may file a request for benefit review conference or may request a waiver of the benefit review conference requirement, as applicable.

With reference to benefit review conferences, Tennessee Code Annotated section 50-6-239 provides in pertinent part as follows:

(a) In all cases in which the parties have any issues in dispute, whether the issues are related to medical benefits, temporary

disability benefits, or issues related to the final resolution of a matter, the parties shall request the department to hold a benefit review conference.

(b) The parties to a dispute shall attend and participate in a benefit review conference that addresses all issues related to a final resolution of the matter as a condition precedent to filing a complaint with a court of competent jurisdiction, unless the benefit review conference process is otherwise exhausted pursuant to rules promulgated by the commissioner.

...

(d) The commissioner is authorized to promulgate rules concerning all aspects of the administrative process related to benefit review conferences pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

The Commissioner has promulgated applicable rules covering the administrative process related to benefit review conferences in accordance with subsection(d). A benefit review conference is defined by Rule 0800-2-5-.01(3) of the Tennessee Comprehensive Rules and Regulations as “a non-adversarial, informal dispute resolution proceeding to resolve workers’ compensation disputes as provided in the [Tennessee Workers’ Compensation] Act.” Requests for the benefit review conference must be signed by the requesting party, Tenn. Comp. R. & Regs. 0800-2-5-.04(1), and the conduct of the benefit review conference shall be within the control of the workers’ compensation specialist. Tenn. Comp. R. & Regs. 0800-2-5-.07(6)(a).

The Tennessee Comprehensive Rules and Regulations provide as follows regarding exhaustion of the benefit review conference procedure:

(1) The Benefit Review Conference Process shall be deemed exhausted only upon occurrence of any of the following:

(a) Issuance of a Benefit Review Report which indicates an Order Denying Benefits based upon non-compensability of the claim has been issued by a Workers’ Compensation Specialist, provided that:

(b) Reaching a mediated settlement, as evidenced by a signed document executed by the proper parties and the Workers' Compensation Specialist;

...

(c) Issuance of an impasse report signed and dated by a Workers' Compensation Specialist.

(d) Conducting and completing mediation by private Rule 31 mediator, provided the Department has failed to conduct a BRC within 60 days of receipt of such a request, pursuant to Tenn. Code Ann. § 50-6-239(c);

(e) Issuance of a written waiver signed by the Director of the Benefit Review Program or the Director's designee;

(2) When a Benefit Review Report is issued, such Report shall specify whether the Benefit Review Process is exhausted. The date and time noted on the Report issued by a Workers' Compensation Specialist shall determine when the Benefit Review Process is exhausted.

(3) If the parties have mutually agreed to a settlement without a Benefit Review Conference, the parties shall not be required to exhaust the Benefit Review Conference Process before submitting the settlement to an appropriate Court or to the Workers' Compensation Specialist for approval. If the settlement is not approved, the parties shall then be required to exhaust the Benefit Review Conference Process.

(4) The Benefit Review Conference Process shall not be deemed exhausted upon the occurrence of the following:

(a) The filing of a Request for Assistance or a determination thereof on grounds other than non-compensability pursuant to Tenn. Code Ann. §§ 50-6-236 or 50-6-238;

(b) Any penalty Orders pursuant to Title 50, Chapter 6 of Tennessee Code Annotated;

(c) Withdrawal of a Request for Assistance or Request for Benefit Review Conference;

(d) Involuntary dismissal pursuant to Tenn. Code Ann. § 50-6-203(f) (2005 Repl.)

Tenn. Comp. R. & Regs. 0800-2-5-.07(6)(a).

Application of these Departmental rules was addressed in the case of Holland Grp. v. Sotherland, No. M2008-00620-WC-R3-WC, 2009 WL 1099275 (Tenn. Workers' Comp. Panel Apr. 24, 2009), where the employee filed a Request for Assistance with the Department seeking medical treatment and temporary disability benefits for an alleged work injury. In Sotherland, the panel discussed the benefit review conference, quoting various statutory provisions requiring participation in and exhaustion of the benefit review conference before proceeding to court:

Parties having a workers' compensation dispute involving injuries occurring after January 1, 2005, must exhaust an administrative mediation process known as a benefit review conference. See Tenn. Code Ann. § 50-6-203(a)(1) (“[n]o claim for compensation . . . shall be filed with a court having jurisdiction to hear workers' compensation matters . . . until the parties have exhausted the benefit review conference”); Tenn. Code Ann. § 50-6-225(a)(1) (“in case of a dispute over or failure to agree upon compensation . . . the parties shall first submit the dispute to the benefit review conference process”); Tenn. Code Ann. § 50-6-239(b) (“parties to a dispute shall attend and participate in a benefit review conference that addresses all issues related to a final resolution of the matter as a condition precedent to filing a complaint with a court”). The benefit review conference has been described as a “nonadversarial, informal dispute resolution proceeding designed to mediate and resolve workers' compensation matters.” Lynch v. City of Jellico, 205 S.W.3d 384, 391 (Tenn. 2006). The law is clear that “[o]nly when the parties cannot reach an agreement at the benefit review conference may they proceed to court.”

The legislature has authorized the Department to promulgate rules “concerning all aspects of the administrative process related to benefit review conferences.” Tenn. Code Ann. § 50-6-239(d). The Department has exercised that authority by enacting rules providing that the benefit review conference process is “deemed exhausted only” if a workers’ compensation specialist denies the claim as noncompensable, the parties settle the case, an “impasse report” is signed by a workers’ compensation specialist, the parties complete private mediation, or the Department grants a waiver, none of which occurred in this case. See Tenn. Comp. R. & Regs. 0800-2-5-.09(1). Moreover, the benefit review conference process “shall not be deemed exhausted upon the occurrence of . . . [t]he filing of a Request for Assistance or a determination thereof on grounds other than noncompensability.” Tenn. Comp. R. & Regs. 0800-2-5-.09(4).

2009 WL 1009275, at *2; see also Alstom Power, Inc. v. Head, No. E2011-01122-COA-R3-CV, 2012 WL 554440 (Tenn. Ct. App. Feb. 21, 2012).

The workers’ compensation specialist in the case before us did not issue a Benefit Review Report indicating an Order denying benefits based upon non-compensability. The affidavit of Mr. Lackey simply reflected that the letter of Dr. Kirkpatrick constituted a ruling and that no further rulings would be made by the Department with regard to utilization review. Dr. Kirkpatrick’s letter dated April 11, 2011 specifically stated that the decision related “only to medical necessity and not to causation and/or compensability.” In addition, the parties did not settle the case, an impasse report was not signed by a workers’ compensation specialist, the parties did not complete private Rule 31 mediation, and the Department did not grant a written waiver. See Tenn. Comp. R. & Regs. 0800-2-5-.09(1)(e).

In sum, we conclude that, based on statutory provisions and rules noted herein, parties are required to exhaust the benefit review conference process as a condition precedent to filing suit. It is undisputed that a request for a benefit review conference was not filed in this case. The benefit review process was never initiated and, therefore, was never exhausted; consequently, the trial court did not have subject matter jurisdiction to hear the case, and Employee’s petition should be dismissed. See Alstom Power, 2012 WL 554440, at *4 (holding that trial court lacked subject matter jurisdiction and therefore properly dismissed employer’s petition for writ of certiorari where benefit review conference had not been exhausted before petition was filed).

Because the trial court lacked subject matter jurisdiction, we do not adjudicate the remaining issues raised in this case. As explained by the court in Dishmon v. Shelby State Community College, 15 S.W.3d 477 (Tenn. App. 1999), when a trial court is adjudged to be without subject matter jurisdiction the merits of the appeal are not reached:

Judgments or orders entered by courts without subject matter jurisdiction are void, see Brown v. Brown, 198 Tenn. at 610, 281 S.W.2d at 497; Riden v. Snider, 832 S.W.2d 341, 343 (Tenn. Ct. App. 1991); Scales v. Winston, 760 S.W.2d 952, 953 (Tenn. Ct. App. 1988). The lack of subject matter jurisdiction is so fundamental that it requires dismissal whenever it is raised and demonstrated. See Tenn. R. Civ. P. 12.08. Thus, when an appellate court determines that a trial court lacked subject matter jurisdiction, it must vacate the judgment and dismiss the case without reaching the merits of the appeal. See J.W. Kelly & Co. v. Conner, 122 Tenn. 339, 397, 123 S.W. 622, 637 (1909).

Conclusion

Judgment of the trial court is vacated, and the case is dismissed. Costs are taxed to the appellee, Sammy T. Robertson, for which execution may issue if necessary.

THOMAS R. FRIERSON, II,
SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
February 27, 2012 SESSION

Sammy T. Robertson v. Roadway Express, Inc.

**Circuit Court for Bradley County
No. V-08-263**

No. E2011-01384-WC-R3-WC

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 appeals 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 of this appeal are taxed to the appellee, Sammy T. Robertson for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM