RENDERED: January 8, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000623-WC

CHERNE CONTRACTING CORPORATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-83-000390

LARRY ROWE;
SPECIAL FUND;
JOSEPH H. KELLEY;
HON. SHEILA LOWTHER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Cherne Contracting Corporation (Cherne) appeals from an order of the Workers' Compensation Board (the Board) entered February 13, 1998, which upheld an award of attorneys' fees and costs to appellee Larry Rowe (Rowe) entered by the Administrative Law Judge (ALJ) on September 15, 1997. We affirm.

Rowe suffered a work-related back injury in 1982 while working for Cherne. The "old" Board found Rowe to be 40%

occupationally disabled and entered an award accordingly. Rowe filed a motion to reopen in 1990 and was ultimately found to be 100% occupationally disabled.

Throughout the course of litigation, Rowe has been treated by Dr. Eric Norsworthy (Dr. Norsworthy). Dr. Norsworthy prescribed medication for Rowe's high blood pressure during this time, and indicated that Rowe's high blood pressure is directly related to the 1982 injury. Cherne's compensation carrier paid for the high blood pressure mediation until May 23, 1995. On that date, Cherne's carrier wrote to Rice Drug Store and indicated that it would no longer pay for blood pressure mediation due to a lack of documentation that Rowe's high blood pressure was causally related to the work-related injury.

On January 1, 1996, Rowe filed a motion to reopen against Cherne and the Special Fund regarding Cherne's liability for the blood pressure medication. Attached to Rowe's motion was an affidavit from Dr. Norsworthy stating:

> [Rowe's] hypertension developed since his back injury. The level of pain he continues to live with keeps him in such a state that his blood pressure continues to be elevated.`

Cherne's carrier eventually agreed to pay for the medication pending an independent medical evaluation.

Rowe underwent an independent medical examination by Dr. M. A. Quader (Dr. Quader)on March 27, 1996. In his report, which was submitted to the Department of Workers Claims on April 15, 1996, Dr. Quader indicated that Rowe's pain "may effect the blood pressure." Dr. Quader indicated that Rowe's blood pressure should fluctuate with the severity of his pain, but that Rowe's

blood pressure had been high since 1982. Dr. Quader further noted that while Rowe wanted a Craftmatic adjustable bed, there was no proof that one bed would be better than another.

On May 8, 1996, Cherne filed two supplemental motions to challenge medical expenses. The first motion challenged Cherne's liability for prescriptions for Cardura, Verapamil, Clonidine, and Calan. Cherne alleged that these medications were for Rowe's high blood pressure and that based on Dr. Quader's report it would withhold payment pending a ruling on Rowe's motion. The second motion challenged payment for anti-anxiety drugs, sleeping pills, and high blood pressure medication.

A third motion was filed by Cherne on May 15, 1996. In this motion Cherne denied responsibility for payment of expenses related to Rowe's purchase of the Craftmatic bed. In support of its argument Cherne referred to Dr. Quader's report. Cherne also denied responsibility for payment of expenses related to Dr. Norsworthy's treatment, alleging that the contested visits were not related to Rowe's low back injury.

On May 23, 1996, the Chief ALJ entered an order which sustained Rowe's motion to reopen "to the extent that [Cherne] is directed to pay the contested expenses for hypertension medication." The ALJ indicated that she found Dr. Norsworthy's opinion to be more credible than that of Dr. Quader.[1] Cherne's motion to reopen regarding its liability for the Craftmatic bed

[1]The Chief ALJ rendered this order because the matter had not yet been assigned to an ALJ.

was denied on the ground that a copy of the bill was not attached to the motion.

Cherne filed a petition for reconsideration on June 19, 1996. Cherne argued that a bill for the Craftmatic bed had, in fact, been submitted. Cherne also asked the ALJ to make a specific finding regarding the compensability of Rowe's anti-anxiety medication and sleeping pills. On June 21, 1996, Cherne filed another supplement to its motion to contest arguing that it was not liable for Xanax, an anti-anxiety medication.

In an order entered July 22, 1996, ALJ Zaring Robinson ruled that Cherne was not responsible for expenses relating to the Craftmatic bed. ALJ Robinson further held that Cherne's "supplemental notices with regard to the compensability of anti-anxiety medication are overruled as not being supported by any evidence."

Cherne filed another petition for reconsideration on August 5, 1996, regarding ALJ Robinson's ruling on Xanax. Cherne requested that the matter be assigned for proof time or that it be granted time "to supply a medial report to support its position with respect to the compensability of" Xanax. On August 30, 1996, Cherne filed a supplement to its petition which contained a report from Dr. Quader dated August 9, 1996. In his report Dr. Quader stated that Xanax is a drug used to treat anxiety and that it would not be used to treat low back problems. However, Dr. Quader indicated that he was not in a position to evaluate Rowe's mental condition.

In an order entered September 3, 1996, Chief ALJ Terry held:

> [Cherne] has contested anti-anxiety medication on several occasions and has NEVER, at any time, presented any medical documentation for its refusal to pay for this prescription medication which was apparently prescribed for plaintiff's work injury. Therefore...the defendant-employer has FAILED to present a prima facie case and its petition for reconsideration is OVERRULED.

Chief ALJ Terry further noted that the record showed that none of the contested medical expenses had been submitted for utilization review or medical bill audit under 830 KAR 25:190 and that a physician designation had not been made for Rowe's treatment. Chief ALJ Terry warned the parties that future fee disputes should include an affidavit showing whether the bill had been presented to the appropriate review mechanisms and whether the treatment was rendered by the designated physician.

Despite the ALJ's warning, Cherne filed another motion to reopen to contest payment for Xanax prescriptions. Attached to its order was the same report of Dr. Quader which had previously been submitted on August 30, 1996. Cherne further disputed expenses for a visit Rowe made to the Ohio County Hospital emergency room on February 10, 1996. In its motion, Cherne alleged that utilization review was not required because it was contesting the compensability of the treatment as opposed to its reasonableness and necessity. In his response to Cherne's motion, Rowe argued that the compensability of the Xanax, as well as Dr. Quader's opinion, had already been evaluated and decided. Rowe also maintained that the emergency room visit was related to his work-related injury. ALJ Terry ordered that the matter be reopened by order dated January 3, 1997.

On February 12, 1997, Cherne supplemented its motion to contest to include a challenge to the compensability of a prescription for Ambien. Cherne indicated that it intended "to contest any and all future medical statements relating to treatment and/or prescriptions for anti-anxiety medication including but not limited to Ambien and Xanax." Cherne also requested that its objection to medication and treatment for anxiety be deemed to be continuing.

Dr. Quader was deposed on March 27, 1997, and the transcript of his deposition was entered in the record. Dr. Quader indicated that he had not seen Rowe since March 27, 1996. Dr. Quader indicated that Calan is a drug for hypertension which would not be used to treat a back injury. Dr. Quader further stated that Ambien (a sleeping pill) and Xanax (an anti-anxiety medication) would not be used to treat a back injury. Dr. Quader testified that the fall which precipitated the emergency room visit should be construed as aggravation of a pre-existing condition. On cross-examination, Dr. Quader indicated that acute pain can affect blood pressure.

Dr. Norsworthy was deposed on April 15, 1997, and the transcript of his deposition was entered into the record. Dr. Norsworthy testified that he had treated Rowe since 1982. According to Dr. Norsworthy, Rowe's problems with high blood pressure began six to eight months after his injury. Dr. Norsworthy stated that Rowe's hypertension was caused by the chronic pain from his back injury. Dr. Norsworthy further stated that Rowe had problems sleeping due to pain from the back injury,

thus Ambien was prescribed. Dr. Norsworthy further testified that Rowe's anxiety for which Xanax was prescribed also stemmed from his back injury.

Following the close of proof time, both sides submitted memorandums. Rowe sought payment of attorneys' fees and costs pursuant to KRS 342.310(1). ALJ Shelia Lowther entered an opinion and order in this case on September 15, 1997. ALJ Lowther indicated that the testimony of Dr. Norsworthy was more credible than that of Dr. Quader and found that the medications prescribed by Dr. Norsworthy were reasonable and necessary for treatment of the effects of his 1982 injury. ALJ Lowther also found that the emergency room visit was compensable because Cherne provided no evidence to support its argument that the bill was not timely submitted for payment.

In regard to Rowe's request for attorneys' fees and costs, ALJ Lowther held:

> This Administrative Law Judge considers the remedy set forth in KRS 342.310 to be an extraordinary one. She does not consider it appropriate for this relief to be requested or ordered in a casual fashion.
>
> The Defendant argues that it should not be responsible for any portion of the Plaintiff's costs in this proceeding because its defense is reasonable. It directs the Administrative Law Judge's attention to the fact that it was able to make a prima facie showing, sufficient to have its motion to reopen sustained. This is not the equivalent of winning on the merits of that motion to reopen.
>
> The Administrative Law Judge has carefully considered this issue. She has reviewed in depth the activities in this case since March 23, 1995, when the Defendant issued a letter to Rice Drug Store advising it that the

Defendant would no longer pay for certain prescription medications for Mr. Rowe. The pleadings which have been filed in this case since that time are at least two inches thick. With the exception of a dispute concerning a Craftmatic adjustable bed, the Defendant has been repeatedly ordered to pay for Mr. Rowe's medications. A good example of the character which this litigation has taken on is contained in an order from the Chief Administrative Law Judge dated September 3, 1996. Judge Terry stated, in part, in that order as follows:

> "The defendant-employer has contested anti-anxiety medication on several occasions and has never, at any time, presented any medical documentation for its refusal to pay for this prescription medication which was apparently prescribed for the plaintiff's work injury."

Despite this, the question of payment for the anti-anxiety medication was one which was again presented in this litigation.

The Administrative Law Judge recognizes that medical costs are a crucial factor in workers' compensation. Certainly there can be bona fide disputes concerning the reasonableness and necessity of certain treatment modalities or medications. However, after considering all of the circumstances surrounding the current medical fee dispute, it is the finding of the Administrative Law Judge that the Defendant-employer's actions were unreasonable and it must therefore bear the Plaintiff's entire costs in assuring ongoing payment for his medical expenses. These expenses are to include court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorneys' fees, and all other out of pocket expenses.

Cherne then appealed to the Board, arguing that an employer's denial of liability for payment of medical expenses

should be found to be unreasonable only in the absence of proof supporting the denial or if proof which was previously rejected is reused to form the basis for another motion to contest. Cherne pointed out that when the ALJ found that it had made a prima facie showing and assigned the matter for hearing its penalty under the ALJ's order was compounded. The Board affirmed ALJ Lowther's opinion, finding that "[m]erely proffering contrary medical evidence does not, in our opinion, per se lead to a conclusion that the proceedings were reasonable. It is a matter best left to the sound discretion of the adjudicator making the decision." This appeal followed.

Cherne's sole issue on appeal is that the ALJ committed an abuse of discretion in awarding costs and attorneys' fees to Rowe. Cherne raises three issues before us:

> (1) Whether a defense that has been deemed sufficient to establish a "prima facie case" can subsequently be deemed to have been brought "without reasonable ground" so as to give rise to sanctions and attorneys' fees under KRS 342.310.
>
> (2) Whether sanctions under KRS 342.310 can be assessed against a party when that party has offered medical testimony in support of its position.
>
> (3) Whether the Board erred by insisting that the failure on the part of Cherne to implement utilization review justified the end result.

We believe that the Board's opinion should be affirmed on all three questions.

Under KRS 342.310, an ALJ may award costs upon a finding that "proceedings have been brought, prosecuted, or defended without reasonable ground." KRS 342.310(1). The

question of whether costs should be assessed for frivolous proceedings is one of fact, and we will not reverse the ALJ's decision unless there has been an abuse of discretion. Peabody Coal Co. v. Goforth, Ky., 857 S.W.2d 167, 170 (1993).

Our review of the record shows there was no abuse of discretion in this case. Cherne was ordered to pay expenses related to Rowe's anti-anxiety medication on September 3, 1996 and to submit further fee disputes to appropriate review mechanisms. In complete disregard of the ALJ's order, Cherne again challenged the compensability of anti-anxiety medications using the same proof which had previously been submitted and rejected without submitting the issue to utilization review or medical bill audit in direct contradiction of a previous order. We believe that Cherne's disregard of the orders of the ALJ warrants the award of costs. We adopt the following portion of the Board's opinion as our own:

> Other than prevailing on the dispute involving the Craftmatic bed, Cherne has been unsuccessful in proving any of the other medical treatment and medication received by Rowe has been unreasonable and unnecessary. While that alone, in our opinion, would not justify the imposition of costs under KRS 342.310, the entire pattern of litigation undertaken in this matter supports the finding made by the ALJ that Cherne has initiated these proceedings "without reasonable ground." Contrary to its assertion that the expenses involved in this most recent controversy could not be submitted for utilization review because the issue involved was not the reasonableness and necessity of the treatment, that was the very issued involved.
>
> KRS 342.020 imposes upon an employer the obligation to pay medical expenses that are reasonably required for the cure and relief

> from the effects of an injury. 803 KAR 25:190 requires insurance carriers to fully implement and maintain a utilization review and medical bill audit committee. The Chief ALJ directed that Cherne and Rowe utilize that mechanism prior to initiating any further medical fee disputes. That mechanism may or may not have resolved the dispute here in question, but no attempt was even made by Cherne to utilize it before contesting these latest expenses.

Rowe has asked that we award attorneys' fees and costs associated with Cherne's appeal on the ground that Cherne's appeal is not brought on reasonable grounds. Apparently this same request was made before the Board, and we agree with its disposition of the matter:

> Had Cherne continued to contest the ALJ's ruling with respect to the contested medical expenses, we would have been inclined to impose sanctions for this appeal. However, since Cherne was only contesting the imposition of sanctions, we cannot find these proceedings to have been brought without reasonable ground even though Cherne has again been unsuccessful.

ALL CONCUR.

BRIEF FOR APPELLANT:

Phillipe W. Rich
Louisville, KY

BRIEF FOR APPELLEES, ROWE AND KELLEY:

Joseph H. Kelley
Madisonville, KY

BRIEF FOR APPELLEE, SPECIAL FUND:

David R. Allen
Louisville, KY