

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000004-WC

ISLAND CREEK COAL COMPANY

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-91-42482

CHARLES O. GAMMON;
DONNA H. TERRY,
Administrative Law Judge;
SPECIAL FUND; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: Island Creek Coal Company appeals from a decision of the Workers' Compensation Board which affirmed an administrative law judge's order that denied the coal company's motion to reopen a benefit award.

Charles Gammon sustained an injury to his back while working for Island Creek and sought workers' compensation benefits.

Island Creek and Gammon settled Gammon's claim by agreeing that he had a 25 percent occupational disability.

Island Creek subsequently moved to reopen the claim. The motion disputed the medical charges of Dr. Barbara Kunkle, Gammon's treating chiropractor. Island Creek initiated a "utilization review" regarding Gammon's chiropractic visits to Dr. Kunkle. The utilization review, performed by Encompass Health Management Systems, involved the opinions of two "doctors." Each concluded that Gammon had reached maximum medical improvement (MMI), and additional medical treatment by Dr. Kunkle would not be necessary.

Arbitrator Walter Bedford gave Gammon 20 days to establish a prima facie case of work relatedness for the contested expenses. Gammon filed a report from Dr. Kunkle which stated that the chiropractor was continuing to treat Gammon for an injury to his low back. According to Dr. Kunkle, the injury caused stretching and tearing of the soft tissue in his back, leading to scarring, weakness and pain. The report went on to say that Gammon was still in the recovery stage and needed to continue treatment, and that continued treatment prevented Gammon from becoming permanently disabled.

After the arbitrator denied Island Creek's motion to reopen, Island Creek requested a de novo review before an administrative law judge. The ALJ issued an opinion and order again denying Island Creek's motion to reopen. The ALJ stated that the utilization review decision contained only conclusive statements regarding the reasonableness of Dr. Kunkle's treatment, with no "medical reasons" for denial of continued care. Island

Creek then appealed to the Workers' Compensation Board, which affirmed the decision of the ALJ.

In order for a claim to be reopened pursuant to Kentucky Revised Statute (KRS) 342.125, the movant must set forth sufficient facts to establish a prima facie case for reopening before the opposing party must respond.¹ In order to reopen the award, Island Creek was required to show that a change in Gammon's physical condition since the settlement has produced a decrease in Gammon's occupational disability.²

Island Creek argues on appeal that the findings of the utilization review reach the required level of proof needed to establish a prima facie case to reopen the award of medical expenses. However, as the Workers' Compensation Board made clear, even if the utilization review was the only evidence considered, it does not establish a prima facie case that the chiropractic treatment by Dr. Kunkle is unnecessary. The utilization review notice of denial letter stated that Dr. Jensen recommended care until February 20, 1998, and that further care past that date would not be necessary. No medical analysis nor reason for this recommendation was given. Furthermore, the letter does not explain who Dr. Jensen is or what his qualifications are. A second level review was performed at Gammon's request. Dr. Skribsted, an Encompass chiropractic advisor, opined that additional care for Gammon was not "medically necessary, corrective or curative for the

¹ Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681 (1972).

² Newberg v. Davis, Ky., 841 S.W.2d 164, 166 (1992).

1/31/91 injury and would be of palliative benefit only." Again, no reasons were given for Dr. Skribsted's opinion.

Without further evidence to explain why continued care by Dr. Kunkle is unnecessary, the conclusive allegations by Drs. Jensen and Skribsted are not enough to create a prima facie case to reopen the award. Island Creek argues that sufficient weight was not given to the utilization report. Even if the ALJ had relied solely on the utilization report, a prima facie case was not presented by Island Creek.

As the ALJ pointed out, Dr. Skribsted's opinion actually advances Gammon's argument that treatment by Dr. Kunkle is still warranted. To characterize treatment as only "palliative" is not to say that it is not compensable. This Court has made it clear that the phrase "cure and relief," as used in KRS 342.020(1), was not intended to mean that only curable work related injuries would be compensable.³ Instead, the phrase "cure and relief" is to be interpreted "cure and/or relief". Id. at 951. Dr. Skribsted stated that further care would only be "palliative." Such "palliative" care could well fall under the relief for which provision is made in KRS 342.020, therefore making it compensable. Hence, Island Creek has not established the required prima facie case.

The order denying Island Creek's motion to reopen is affirmed.

ALL CONCUR.

³ National Pizza Company v. Curry, Ky. App., 802 S.W.2d 949, 951 (1991).

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