

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001354-WC

P & D SOLUTIONS CORPORATION

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-01199

SHANE A. GILL; HON. A. THOMAS DAVIS,
ADMINISTRATIVE LAW JUDGE; WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: P & D Solutions Corporation (P & D) petitions this Court to review an opinion of the Workers' Compensation Board entered May 27, 2005, which affirmed the finding of the Administrative Law Judge (ALJ) that a proposed spinal fusion surgery was compensable. We affirm.

In April 2001, Gill sustained a work-related injury to his lower back while employed by P & D. Gill ultimately

received an award of permanent partial disability benefits based upon a five percent (5%) impairment rating.

In March 2004, Gill filed a motion to reopen seeking to compel P & D to pay for a spinal fusion surgery as recommended by Gill's treating physician, Dr. David Rouben. P & D countered that the proposed surgery was neither reasonable nor necessary and offered expert opinion to that effect.

In the opinion and order, the ALJ found that the proposed spinal fusion surgery was both reasonable and necessary for the cure and treatment of Gill's injury. The ALJ, thus, found the spinal fusion surgery to be compensable. The ALJ also refused P & D's request to select Gill's treating physician. The ALJ found that Gill was receiving reasonable treatment from his treating physician, Dr. Rouben.

Being unsatisfied with the ALJ's decision, P & D sought review in the Workers' Compensation Board (the Board). The Board found the ALJ's finding that the proposed spinal fusion surgery was necessary to be supported by substantial evidence of a probative value and affirmed the ALJ's decision. This review follows.

P & D contends the Board erred by affirming the ALJ's decision that the proposed spinal fusion surgery was compensable. Specifically, P & D alleges that the ALJ made various incorrect findings of fact and failed to follow the

proper legal precedent. Having reviewed the record and the applicable case law, we disagree with P & D's position.

Kentucky Revised Statutes (KRS) 342.020(1) mandates that medical treatment is compensable when reasonably necessary for the cure and/or relief of a work-related injury. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Moreover, the burden of proving that a treatment is unreasonable is placed upon the employer. Nat'l Pizza Co. v. Curry, 802 S.W.2d 949 (Ky.App. 1991). To meet such burden, the employer must show that the treatment is unproductive or outside the type of treatment generally accepted by the medical profession as reasonable. Square D Co., 862 S.W.2d 308.

In this case, P & D argues the ALJ improperly found that the proposed spinal fusion surgery was reasonable and necessary based upon objective medical evidence. P & D contends that there is simply no objective medical evidence to support the ALJ's finding.

In the opinion, the ALJ specifically pointed out:

On November 24, 2003, Dr. David Rouben, plaintiff's treating physician, sent plaintiff a letter notifying plaintiff of the findings of a diskogram taken on the L3-4 and L4-5 discs of plaintiff's low back. Dr. Rouben reported to plaintiff that his L3-4 disks showed no evidence of overt pathology, but that the L4-5 disk "was consistent and reproduced your typical and usual pain." (Rouben 11/24/03 Letter, p.1) Dr. Rouben concluded from the diskogram that

the source of plaintiff's pain is the L4-5 disk space segment. Dr. Rouben further stated:

That having been said, we now feel rather confident that the source of your pain is the L4-5 disk space segment. This corroborates the MRI performed January 6, 2003. To this end, the protracted period of time that you have had to undergo with regard to your discomfort and pain has now come to what I would consider conclusion because we have affirmed the legitimacy of your pain and focalization of the anatomic abnormality of your pain as emanating from the L4-5 disk space segment. You have failed all prior treatment options. There is really nothing else we can offer to you other than a structural stabilization and fusion through a minimally invasive technique.

Dr. Rouben opined that spinal fusion surgery was the only treatment option left for Gill and that there existed a good chance such surgery would improve Gill's symptoms. The ALJ chose to rely upon the expert testimony of Dr. Rouben. Although there was testimony to the contrary, it was totally within the province of the ALJ to attach more weight and credibility to the expert opinion of Dr. Rouben. Moreover, we cannot say that the ALJ felt compelled to give more credence to Dr. Rouben's testimony because he was Gill's treating physician. Considering the ALJ's opinion as a whole, it is clear the ALJ properly

considered the opinion of each expert and found Dr. Rouben's testimony most persuasive. Simply put, the record does not compel a finding that the proposed spinal fusion was unnecessary for the cure and/or relief of Gill's injury.

P & D also complains the ALJ made various incorrect findings of fact; for instance, P & D disputes the finding that Gill's two treating physicians agreed that diagnostic studies indicated surgical treatment was necessary. Even if P & D were correct, the record, nonetheless, supports the ALJ's finding that the proposed spinal fusion surgery was reasonable and necessary for the cure and treatment of Gill's injury. Accordingly, we hold the Board properly affirmed the ALJ's decision that the proposed spinal fusion surgery be compensable. See Western Baptist Hosp. v. Kelly, 827 S.W.2d 685 (Ky. 1992).

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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