

RENDERED: SEPTEMBER 29, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-001234-WC

DOYLE CARNES, SR.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-32502

S. F. & S. COAL COMPANY, INC.;
HONORABLE A. THOMAS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2006-CA-001329-WC

S. F. & S. COAL COMPANY, INC.

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-32502

DOYLE CARNES, SR.; HONORABLE A. THOMAS
DAVIS, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,¹ SPECIAL JUDGE.

WINE, JUDGE: The claimant, Doyle Carnes, and the liable employer, S. F. & S. Coal Company, Inc., petition and cross-petition for review of an opinion and order by the Workers' Compensation Board (Board) which affirmed the administrative law judge's (ALJ) opinion and order on remand from the Kentucky Supreme Court. Carnes contends that the ALJ improperly denied his claim for reimbursement of pharmacy bills submitted following the remand. S. F. & S. Coal argues that the ALJ erred in finding that the other disputed medical expenses were compensable. We agree with the Board that Carnes failed to timely or properly submit the pharmacy bills, and that the ALJ did not clearly err in finding the other medical expenses to be compensable. Hence, we affirm.

The underlying facts of this action are not in dispute. Carnes last worked for S. F. & S. Coal in 1994. In August 1995, he filed an application for benefits in which he alleged that he suffered from coal workers' pneumoconiosis due to approximately 23 years' exposure to coal dust while working underground for various mining companies. After presentation of proof, Carnes settled his claim with S. F. & S. Coal for a total

¹ Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

disability based upon category 2 pneumoconiosis. Subsequently, the ALJ apportioned 25% of the liability for income benefits to S. F. & S. Coal and 75% to the Special Fund. Under the terms of the agreement, S. F. & S. Coal remained responsible for payment of reasonable and necessary medical expenses for the treatment of Carnes' pneumoconiosis.

In October 2002, S. F. & S. Coal filed a motion to reopen to resolve a medical fee dispute over expenses incurred for diagnostic testing and procedures to investigate a mass in Carnes' upper right lung lobe. The contested services included a thoracic surgical consult, CT scan of the lungs, ventilatory function studies, a needle biopsy of the mass, bronchoscopy, video-assisted thorascopic explorations of the right chest, and a wedge resection of the mass. The pathological report that came out of these procedures established that the mass was not cancerous, but was related to Carnes' pneumoconiosis.

S. F. & S. Coal argued that the purpose of the procedures was not to diagnose Carnes' pneumoconiosis - that condition had been previously diagnosed in the 1995 action. Rather, S. F. & S. Coal contended that the purpose of the procedure was to determine whether Carnes had lung cancer or mesothelioma. Thus, S. F. & S. Coal asserted that the diagnostic procedures were not reasonable or necessary for the treatment or cure of Carnes' pneumoconiosis. In an opinion

rendered July 23, 2003, ALJ Bonnie Kittinger agreed with S. F. & S. Coal and found that the procedures were not compensable.

On appeal, the Board reversed, holding that under KRS 342.020, compensation is available not only for the cost of curing work-related diseases but also for the cost of "relief from the[ir] effects." The Board concluded that the medical expenses were compensable to the extent that they were reasonable and necessary because of the work-related pneumoconiosis. Because ALJ Kittinger had not made the necessary findings to determine whether the procedures were reasonable based on this standard, the Board remanded for additional findings. On appeal, this Court affirmed the Board.

On further review, the Kentucky Supreme Court affirmed this Court, holding that ALJ Kittinger had applied the wrong standard to determine the compensability of the diagnostic procedures:

The ALJ erred in the present case by viewing the diagnostic purpose of the disputed procedures as entirely controlling the question of compensability rather than considering that the claimant's physicians would have had no reason to perform the disputed procedures had he not suffered from pneumoconiosis which caused a mass on his lung. As a result, the ALJ failed to consider whether any of the services were reasonable and necessary for the cure and/or relief of the claimant's pneumoconiosis and its effects. In fact, the ALJ's recitation of the evidence evinced a lack of awareness regarding Dr. LeMense's notes from November

8, 2001, indicating that he was less concerned about the possibility of a malignancy than about the possibility of a chronic mycobacterial or fungal infection for which the claimant was at an increased risk due to his pneumoconiosis. Likewise, as the Board pointed out, both the mass in the claimant's lung and his anxiety over its cause were effects of his pneumoconiosis. For that reason, medical services to relieve the anxiety were compensable to the extent that they were both reasonable and necessary.

Upon remand, the matter was assigned to ALJ A. Thomas Davis. The parties submitted the issue regarding compensability of the diagnostic procedures based on the existing record. On July 6, 2005, Carnes tendered a "Notice of Filing of Unpaid Medical Bills," with 14 pages of statements from various pharmacies attached. The prescriptions were filled between February 1999, and May 2005, and include a wide variety of medications prescribed by different doctors. S. F. & S. Coal contested the compensability of these expenses, arguing that the prescriptions were not: (1) related to the treatment of Carnes' pneumoconiosis; (2) written by designated treating physicians pursuant to a completed Form 113; and (3) submitted for payment within 60 days from the date of service on a completed Form 114.

ALJ Davis agreed with S. F. & S. Coal that the pharmacy bills were not timely presented for payment and therefore were not compensable. However, ALJ Davis also concluded that most of the diagnostic procedures were reasonable

and necessary for the treatment. Therefore, ALJ Davis ordered S. F. & S. Coal to pay for all of the procedures and attendant services except for the repeat video-assisted thorascopic surgery with biopsy performed on June 6, 2002. The Board affirmed both findings on appeal and cross-appeal for review, and this petition and cross-petition followed.

Carnes again argues that ALJ Davis erred in rejecting the pharmacy bills as untimely. Carnes notes that S. F. & S. Coal had previously denied responsibility for payment of medical bills related to his pneumoconiosis. He contends that it would have been futile for him to submit the pharmacy bills until the Supreme Court had ruled on the issue.

In response to this argument, the Board noted that S. F. & S. Coal had agreed, by way of settlement, to remain liable for medical treatment related to Carnes' pneumoconiosis. The medical fee dispute brought by S. F. & S. Coal in 2002 does not explain why Carnes failed before 2005 to submit for payment those pharmaceutical expenses incurred from 1999 forward. Furthermore, Carnes presented no evidence before the ALJ to indicate that he had submitted the pharmacy bills for payment prior to the notice of filing tendered on remand in July of 2005.

Moreover, the Board found that Carnes' 2005 submission of the pharmacy bills was well beyond the time period specified

in 803 KAR 25:096, § 11(2). That regulation requires that a request for reimbursement of out-of-pocket payments for prescription medication shall be submitted on a Form 114 within 60 days of incurring the expense. Subparagraph 3 of the regulation further provides that failure to timely submit the Form 114, without reasonable grounds, may result in a finding that the expenses are not compensable.

We agree with the Board that Carnes failed to offer any reasonable grounds for his failure to submit the pharmacy bills prior to July 2005. Had he submitted the bills in accordance with the regulations, the regulations would have provided him with an avenue to resolve the dispute. Consequently, the pending review of the medical fee dispute did not justify Carnes' failure to submit the pharmacy bills in the manner and time specified by the regulations. Consequently, the ALJ properly found the pharmacy bills to be not compensable.

In its cross-petition, S. F. & S. Coal argues that ALJ Davis and the Board incorrectly concluded that the Supreme Court's opinion found as a matter of law that the diagnostic procedures were compensable. S. F. & S. Coal correctly notes that the Supreme Court's opinion and the Board's initial order simply remanded the matter to the ALJ for additional factual findings on the issue of compensability. S. F. & S. Coal contends that ALJ Davis and the Board interpreted the Supreme

Court's opinion as holding that the procedures are compensable as a matter of law.

We are not convinced that ALJ Davis or the Board misinterpreted their role on remand. In its second opinion, the Board suggested that the issue of causation had been decided in Carnes' favor in the prior appeals. The Board later explained, however, that S. F. & S. Coal continues to persist in its position that, since simple pneumoconiosis is a condition that is not treatable, later medical procedures are not compensable. The Board correctly noted the Supreme Court had settled that this is not the standard for determining compensability. Rather, the controlling question is whether the diagnostic procedures were reasonable or necessary because of Carnes' work-related pneumoconiosis.

In his order on remand, ALJ Davis reviewed the evidence based on the standard set out in the Supreme Court's opinion. ALJ Davis specifically found that the procedures would not have been necessary had Carnes not suffered from pneumoconiosis which caused a mass on his lungs. KRS 342.020(1) requires an employer to pay reasonable and necessary medical expenses for the cure or relief of a work-related condition and its effects. National Pizza Co. v. Curry, 802 S.W.2d 949, 951 (Ky. App. 1991). The statute places the burden on the employer to prove that contested post-award medical expenses are

unreasonable or unnecessary for the cure or relief of the condition and its effects. Id. Since the fact-finder found against the party with the burden of proof, S. F. & S. Coal must show that the evidence was such that the finding against it was unreasonable and clearly erroneous. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Because the evidence was not so overwhelming as to require a finding in S. F. & S. Coal's favor, we affirm.

Accordingly, the May 12, 2006, opinion of the Board is affirmed.

ALL CONCUR.

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