

RENDERED: OCTOBER 6, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000439-WC

ERIC SMITH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-06851 & WC-96-08146

TWIN PINES, INC.; AIG CLAIMS
SERVICES, INC.; HON. HOWARD E.
FRASIER JR., ADMINISTRATIVE LAW
JUDGE; and WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

VANMETER, JUDGE: Eric Smith petitions for the review of an opinion of the Workers' Compensation Board, which affirmed the decision of an Administrative Law Judge (ALJ). Smith argues that the ALJ erred by finding his medical expenses for both physical and psychological treatment were noncompensable on the reopening of his claim. For the following reasons, we affirm.

¹ Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Smith suffered a work-related injury on June 5, 1996, and immediately began experiencing low back pain. His workers' compensation claim with Twin Pines was settled in May 1997, whereby he received \$93.59 per week for a 30% permanent partial disability. In March 2002, after he began experiencing leg pain, Smith underwent a microdiscectomy at L5-S1. He testified that this surgery alleviated 80% of his leg pain for about six months. Twin Pines eventually reimbursed Smith's private health insurance for this surgery and paid him for a period of temporary total disability benefits.

When Dr. John Gilbert recommended that Smith undergo a lumbar fusion in January 2004, the matter was submitted for a Utilization Review. In August 2004, after several doctors expressed opinions as to whether the lumbar fusion was necessary, Smith filed a Form 112, a Medical Fee Dispute, and a motion to reopen seeking authorization for payment of the proposed surgery. Smith further complained that Twin Pines had declined to pay charges incurred for his physical and psychological care. Three days after initiating the reopening, Smith proceeded with the lumbar fusion from L4-S1. Smith testified that this surgery alleviated his leg pain 100%.

After Smith's claim was reopened, an ALJ found that the lumbar fusion was not related to Smith's work-related injury and thus was not compensable. The ALJ also found that Smith's

psychological treatment was not compensable. The Board affirmed, and this petition for review followed.

The ALJ relied on Dr. Timothy Kriss's opinion in finding that Smith's lumbar fusion was noncompensable. Smith argues that the ALJ erred in so finding, because Kriss opined that the lumbar fusion was "medically reasonable and necessary, simply because it worked and worked well." We disagree.

Pursuant to KRS 342.020(1), an employer

shall pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability[.]

As Smith points out, this court has previously discussed the applicable rule as having "been referred to as the direct and natural consequence rule[:]"²

The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.

Thus, to be compensable, medical expenses must not only be medically reasonable and necessary, but they must also be caused by a work-related injury. An employer may challenge the compensability of a medical expense based on reasonableness,

² *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421, 423 (Ky.App. 1997) (quoting *Larson, Workmen's Compensation Law* § 13.11 (1996)).

necessity, or work-relatedness³ and has the burden of proof when doing so.⁴ Here, the ALJ found that Smith's surgery was noncompensable because it was not caused by his work-related injury. We turn, then, to the issue of whether the ALJ's decision was supported by substantial evidence.⁵

Dr. Kriss noted in his medical report that the objective changes which led to Smith's surgeries were left S1 nerve root compression and left L5-S1 disc herniation, which were not caused by Smith's 1996 work-related injury. Dr. Kriss reasoned that

any such permanent structural objective change should have been readily evident with the "gold standard" lumbar myelogram/post myelogram CT scan test performed a year and a half after [Smith's] accident (which is more than enough time for any permanent structural changes due to the work injury to manifest).

However, a November 1997 myelogram and post-myelogram CT scan did not indicate "any significant structural problem with the discs on the left." Thus, Dr. Kriss opined that the structural change was "a consequence of naturally occurring degenerative change in the many years since the 1996 injury," rather than a consequence of the injury itself.

³ *Cantrell Supply, Inc. v. Liberty Mutual Ins. Co.*, 94 S.W.3d 381, 386 (Ky.App. 2002).

⁴ *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993).

⁵ *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984).

By contrast, Dr. John Gilbert opined that the conditions giving rise to Smith's surgeries were caused by his 1996 work injury. As there was conflicting medical evidence, the question of which evidence to believe was within the ALJ's exclusive province.⁶ An ALJ "has the sole authority to determine the quality, character, and substance of the evidence."⁷ The ALJ here chose Dr. Kriss's opinion, which constituted substantial evidence. Specifically, the ALJ expressed that he found Dr. Kriss's conclusions regarding causation more credible than Dr. Gilbert's conclusions because Dr. Kriss first examined Smith after his work-related injury and prior to any surgeries. On the other hand, Dr. Gilbert did not treat Smith until 2003, some seven years after his work-related injury, and he had to rely heavily on Smith's medical history as opposed to objective medical findings.

This court's holding in *Addington Resources, Inc. v. Perkins*⁸ does not compel a different result. The claimant in *Addington* suffered a work-related injury in 1990 and underwent a "diskectomy with fusion of vertebra at the C5-C6 level."⁹ Then in 1995, after a normal recuperation period, the claimant

⁶ *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993).

⁷ *Id.*

⁸ 947 S.W.2d 421 (Ky.App. 1997).

⁹ *Id.* at 422.

suffered a nonwork-related injury at the C6-C7 level of the vertebra.¹⁰ This court affirmed the ALJ's conclusion that medical expenses incurred as a result of the second injury were related to the first injury.¹¹ In so concluding, the ALJ accepted a doctor's testimony that

were it not for the original injury at C5-6 and the subsequent surgery that resulted therefrom Mr. Perkins would not have had the significant degenerative changes at C6-7 causing the current compression that is the result of his current symptoms. . . . [H]is present herniated disc is related to his original work injury.¹²

Here, by contrast, the ALJ accepted Dr. Kriss's opinion that the degenerative changes Smith experienced were not related to his work injury. Accordingly, we cannot say that the Board erred by affirming the ALJ's decision.

Next, Smith argues that the Board erred by affirming the ALJ's decision that Smith's psychological treatment was not compensable. Smith's entire argument in this regard is as follows:

As to medical treatment for anxiety and/or depression, the Employer had paid for prescriptions in the past, and it was only after the 2004 surgery that they stopped. Because the need for those prescriptions is for the effects of the compensable injury,

¹⁰ *Id.*

¹¹ *Id.* at 423.

¹² *Id.* at 422.

the Employer is still responsible for providing them at their expense.

We disagree.

Following an independent medical evaluation of Smith, Dr. David Shraberg diagnosed him with "Adjustment Disorder of Adult Life associated with the injury of June 5, 1996 resolved" and "Opiate dependency, chronic." Dr. Shraberg assessed Smith's psychiatric impairment at 0% and further opined that Smith did not require any psychiatric treatment. We cannot say that the Board erred by affirming the ALJ's decision to accept Dr. Shraberg's opinion and find Smith's psychiatric bills noncompensable. Nor does the fact that Twin Pines may have previously paid for some of Smith's psychiatric-related prescriptions compel a different result.

The Workers' Compensation Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

McKinnley Morgan
Donald G. Smith
London, Kentucky

BRIEF FOR APPELLEE TWIN PINES:

Hon. Ronald J. Pohl
Lexington, Kentucky