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Commonwealth Of Kentucky

Court of Appeals

NO. 2018-CA-000217-WC

WASHINGTON SCHOOL DISTRICT. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-08-96678

JAMES LOGSDON; JONATHAN WEATHERBY, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT,[1] J. LAMBERT AND K. THOMPSON, JUDGES.

[1] Judge Debra Hembree Lambert concurred in this opinion prior to her accepting election to the Kentucky Supreme Court effective January 7, 2019.

LAMBERT, J., JUDGE: Washington County School District has petitioned this Court for review of the decision of the Workers' Compensation Board (the Board) reversing and remanding the decision of the Administrative Law Judge (ALJ) in James Logsdon's medical fee dispute related to proposed left knee surgery. We affirm.

Logsdon sustained a work-related injury to his left knee on November 5, 2007, while lifting a heavy case from a car. He underwent arthroscopic knee repair as a result. He filed a workers' compensation claim against his employer, Washington County School District (the Employer), and the two parties entered into an agreement as to compensation that was approved by the ALJ on June 6, 2008. At that time, Logsdon had incurred $7,678.85 in paid medical expenses and had received $1,255.92 in temporary total disability benefits. For his settlement, Logsdon received a lump sum of $5,000.00, representing $13.92 per week for 425 weeks. This negotiated settlement did not include a waiver or buyout of past or future medical benefits, vocational rehabilitation, or the right to reopen.

Seven years later, on June 23, 2015, the Employer moved to reopen Logsdon's claim to initiate a medical fee dispute to contest a proposed left knee arthroscopy by Dr. Daniel V. Hunt as it was not reasonable or necessary for the cure and/or relief of Logsdon's 2007 work injury. Utilization Review physician

Dr. Peter Kirsch stated in his May 26, 2015, Utilization Review Notice of Denial as follows:

> This patient suffered injury on 11/06/2007 in the form of a torn lateral meniscus. He was noted to have as well, advancing existing degenerative change in the left knee. Surgical correction of the torn meniscus was corrected on 1/18/2008. He was released from care on 03/10/2008, 12 weeks [sic] later he re-injured his knee (on about 6/9/10). Apparently no corrective surgery was carried out. Scans again noted to have advancing degenerative change (progressive). Now he has end stage arthritis and a knee arthroplasty is requested. I do not support the request as in my opinion the active effects of the injury has [sic] ceased by 03/10/2008. The tissues were healed and there was no significant objective residual. Therefore, the request for a left knee arthroscopy is not medically reasonable and necessary for the cure and/or relief of the work injury of 11/05/2007.

By separate motion, the Employer moved to join Dr. Hunt as a party to the claim as he was the medical provider proposing the surgical treatment. The matter was assigned to ALJ R. Scott Borders, who entered an order reopening the claim for a medical fee dispute by order entered July 17, 2015. The ALJ stated that the Employer had made a *prima facie* showing for reopening with the report from Dr. Kirsch. Dr. Hunt was also joined as a party, and the ALJ scheduled a telephonic conference the following month.

The parties attended a telephonic Benefit Review Conference (BRC) on September 16, 2015, after which the ALJ listed the contested issues as the reasonableness and necessity and/or the work-relatedness of the proposed left knee

arthroscopy. The case was to be resolved by an agreed order in lieu of holding a hearing.

Almost one year later, on June 21, 2016, the Employer moved to join Dr. Mark Duber as an additional medical provider.[2] In the motion, the Employer stated that during the telephonic BRC the previous year, Logsdon had agreed to withdraw his request for a left knee arthroscopy performed by Dr. Hunt. However, an agreed order was never entered. Logsdon then obtained a new physician, Dr. Duber, who recommended the same surgery in May 2016. Because the original medical fee dispute was never resolved and concerned the same proposed treatment, the Employer sought permission to add Dr. Duber as a party. In his report from the May 19, 2016, new patient office visit, Dr. Duber diagnosed Logsdon with severe arthritis in his left knee with deformity, stated that his condition was exacerbated by a work injury, and recommended knee replacement. Dr. Duber noted Logsdon had been injured in 2012 and that Logsdon reported his pain had been significant since that time. The matter was reassigned and transferred to ALJ Jonathan Weatherby.

The ALJ held a telephonic status conference in September. In the order entered following the status conference, the ALJ stated that the basis of the Employer's challenge was the reasonableness and necessity of the treatment,

[2] This motion was granted on March 15, 2017.

entered a proof schedule of 45 days, and scheduled a telephonic BRC/hearing in October.

Logsdon filed the September 12, 2016, medical record of Dr. Duber, in which Dr. Duber stated that the recommended total left knee arthroplasty was reasonable and necessary for Logsdon's left knee symptoms and that his left knee symptoms were causally related to his November 5, 2007, work injury and the January 18, 2008, arthroscopy. Dr. Duber stated that the work injury exacerbated Logsdon's left knee osteoarthritis. Logsdon filed additional records from Dr. Duber comprised of reports of his office visits, the last one on September 19, 2016. During that visit, Logsdon reported that his arthritic pain had become exacerbated after his work injury to the point that he could not function.

At the BRC, the parties advised the ALJ that additional proof time was needed, and the ALJ scheduled another telephonic conference. The ALJ entered a subsequent order on December 12, 2016, listing the contested issue as the reasonableness and necessity of the proposed surgery. The ALJ permitted Logsdon an additional fifteen days to file rebuttal evidence, stated the parties had waived a final hearing, and submitted the matter as of that date.[3]

The Employer filed the report of Dr. J. Rick Lyon, who performed an independent medical evaluation in October 2016. Dr. Lyon noted Logsdon's

[3] The matter was later removed from submission.

history of a football injury to his knee in 1980, his 2007 work injury and surgery, and an injury at home in 2010. The report states that Logsdon "was at home, stepped up on an object and experienced a painful pop in his left knee. He was diagnosed with a bucket-handle tear of the medial meniscus but has had no treatment performed. Since 2010, he has experienced progressive left knee pain and has been recommended for a knee arthroplasty by both Dr. Hunt and Dr. Duber." Dr. Lyon went on to state:

> The medical records confirm Mr. Logsdon had arthritis at the time of his work injury in November 2007. This arthritis is the expected result of the meniscectomy performed in 1980. However, he underwent a second meniscectomy performed in 2008 following a work event. That procedure also altered the biomechanics of the knee and increased the risk of arthritis. Furthermore, the 2010 meniscus tear, although not addressed, has again altered the knee mechanics. Finally, Mr. Logsdon's obesity is a significant risk factor for the development of knee arthritis.

In his opinion, the proposed knee replacement was

> for the arthritis resulting from the 1980 meniscectomy and obesity. Although the work related meniscectomy may have had an effect on the progression of the arthritis, it is my opinion it was minimal. If asked to apportion the current arthritis and recommended treatment, it is my opinion 10% is related to the 2007 work event and 90% to the obesity and other injuries.

The ALJ held another BRC on June 15, 2017, at which the contested issue continued to be the reasonableness and necessity of the left knee surgery.

On August 14, 2017, the ALJ entered an opinion and order finding that the contested medical expenses were non-compensable. The ALJ stated:

> After a review of the evidence, it is determined that the opinion of Dr. Lyon is persuasive in that the medical records confirmed that the Plaintiff had arthritis at the time of the work injury in 2007 and that arthritis was the expected result of the meniscectomy performed in 1980. Dr. Lyon agreed that the Plaintiff needed a knee replacement but found that it was due to arthritis resulting from the 1980 meniscectomy along with obesity and that while the work-related injury may have affected the progression of the arthritis, the contribution was minimal. This opinion has convinced the ALJ. Therefore, the contested surgery is hereby found not reasonable and necessary for the cure and/or relief of the work injury and, therefore, non-compensable.

Logsdon appealed the ALJ's decision to the Board, arguing that the ALJ erred in ruling that because he had arthritis at the time of his 2007 injury, his current symptoms and proposed treatment were non-compensable. Because the 2008 settlement agreement left future medical benefits open, he argued that "the Employer 'bought' Mr. Logsdon's left knee, pre-existing conditions at all." The Employer had not chosen to raise causation as an issue or seek apportionment for a pre-existing active condition at that time. Logsdon also argued that the ALJ had considered an issue outside of those listed on the BRC order when he decided the case on causation rather than on reasonableness or necessity. The Employer disputed Logsdon's arguments in its responsive brief.

The Board reversed the ALJ's opinion and remanded the matter in an opinion entered January 8, 2018. The Board agreed with Logsdon that the issues of a pre-existing active condition and causation were not properly preserved for the ALJ to consider on reopening. While the 2015 orders identified causation and work-relatedness as a contested issue, the later orders before the new ALJ did not. "It was incumbent upon [the Employer] to clearly set forth all contested issues in any subsequent BRC order, particularly in a situation where the claim has been reassigned to a different judge. For this reason, we believe it has waived the issue for consideration by the ALJ." The Board went on to find that even if the issue had been preserved, Dr. Lyon had apportioned 10% of Logsdon's current arthritis and the need for surgery to the 2007 work injury. "Even in situations involving pre-existing conditions, surgery is compensable if a work injury hastens the need for the surgery. Derr Construction Co. v. Bennett, 873 S.W.2d 824, 827 (Ky. 1994)." Because the ALJ had accepted Dr. Lyon's opinion in its entirety, including that Logsdon's work-related injury contributed to his current condition, the Board concluded that the matter did not need to be remanded for additional facts but rather for the entry of an order requiring the Employer to pay for the proposed treatment. This petition for review now follows.

This Court's standard of review in workers' compensation appeals is well-settled in the Commonwealth. "The function of further review of the [Board]

in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

First, we shall consider whether the ALJ considered issues outside the scope of the BRC order. The Administrative Regulations provide that "[o]nly contested issues shall be the subject of further proceedings." 803 KAR 25:010 § 13(12). Here, the original BRC order specifically listed work-relatedness as a contested issue, while subsequent orders only listed the reasonableness and necessity of the proposed treatment. However, in the original motion to reopen, the Employer made it clear that the medical fee dispute was based upon whether the proposed surgery was reasonable and necessary "for the cure and/or relief of the work injury of 11/5/07."

In order for medical expenses to be compensable, they must be tied to the work injury. KRS 342.020(1) states:

> In addition to all other compensation provided in this chapter, the 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 for the length of time set forth in this section, or as may be required for the cure and treatment of an occupational disease.

The Supreme Court of Kentucky examined this statute in *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993), observing that "KRS 342.020(1) allows a worker to choose her own physician and to have whatever medical treatment is reasonably necessary for the cure and/or relief of her injury."

Based upon our review of the record, we disagree with the Board that the Employer failed to preserve the issue of causation. Inherent in the statutory language is the requirement that the medical treatment be related to the work injury, and the Employer included this as an issue in the original BRC order. Therefore, we must hold that the Board erred in reversing the ALJ's opinion and order on this issue.

Next, we must consider whether the Board correctly applied the law in determining that the ALJ should have found the proposed surgery to be compensable. The Employer "carries the burden of proving the treatment to be unnecessary." *National Pizza Co. v. Curry*, 802 S.W.2d 949, 951 (Ky. App. 1991). This consideration necessarily concerns the ability of the ALJ to decide the evidence presented by the parties.

> The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence. *Paramount Foods, Inc. v. Burkhardt*, Ky., 695 S.W.2d 418 (1985). Where, as here, the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. *Pruitt v. Bugg Brothers*, Ky., 547 S.W.2d 123 (1977).

Square D Co., 862 S.W.2d at 309. And in *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000), the Supreme Court further stated:

> The fact-finder has the sole authority to judge the weight to be afforded the testimony of a particular witness. *McCloud v. Beth–Elkhorn Corp.*, Ky., 514 S.W.2d 46 (1974). The fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Caudill v. Maloney's Discount Stores*, Ky., 560 S.W.2d 15, 16 (1977).

The Board held that because the ALJ accepted the entirety of Dr. Lyon's opinion, it therefore followed that the proposed surgery must be compensable because of Dr. Lyon's belief that Logsdon's work injury minimally affected the progression of his arthritis.

Logsdon cites to *Derr Const. Co.*, 873 S.W.2d at 827, in support of his argument that the proposed surgery was compensable. *Derr Construction* addressed the propriety of an award of future medical benefits rather than a medical fee dispute, but it provides some guidance in this case. The Supreme Court explained:

> KRS 342.120(4) [now KRS 342.120(6)] specifically exempts the employer from paying income benefits for prior, active disability or for disability resulting from the arousal of a previously dormant condition. However, KRS 342.020 contains no such exemption regarding medical benefits. Liability for medical expenses requires only that an injury was caused

> by work and that medical treatment was necessitated by the injury. Regardless of whether an injured worker's disability actually was caused by the arousal of a previously dormant condition rather than by the work-related injury, itself, the employer has been held liable for the payment of medical benefits relative to the injury. . . .
>
> In the instant case the ALJ determined that claimant had sustained a work-related cumulative trauma injury while working for his employer, a determination that was supported by substantial evidence. The ALJ also determined that claimant's arthritic condition, to which the last employment contributed, was caused by the cumulative trauma of his many years of iron work. Regardless of whether future knee implant surgery had been recognized as an eventuality before the incident of October, 1989, there was testimony that the incident had hastened the date on which the surgery would be required. Therefore, although it might seem harsh on the facts of this case to impose liability for future medical expenses necessitated by claimant's arthritic condition on this employer, it has been determined that work done for the employer contributed, at least to some degree, both to the condition and to claimant's resulting disability. Under such circumstances, where work has caused the disabling condition, the resulting medical expenses ought to be borne by the workers' compensation system. *See* Larson, *Workmen's Compensation Law*, § 96.70. This theory is embodied in the language of KRS 342.020. Because KRS 342.020 does not exempt an employer from liability for any portion of a worker's medical expenses in those instances where the work-related injury constitutes a progression or worsening of a prior, active work-related condition, we hold that the employer is responsible for the medical expenses necessary for the cure and relief of the arthritic condition in claimant's knees.

Derr Const. Co., 873 S.W.2d at 827-28. We find this opinion persuasive.

In the present case, while we disagree with Logsdon that the Employer "bought" his left knee in the settlement agreement for purposes of further medical treatment, we nevertheless agree with him that the proposed surgery was compensable. The ALJ specifically accepted Dr. Lyon's opinion that the need for the surgery arose at least in part from Logsdon's 2007 work injury. Had Dr. Lyon not included the statement that the need for surgery, even minimally, arose from the work injury, the result would be different. Because there is no real dispute that the surgery was reasonable and necessary, but rather the dispute centered on whether it was necessitated by Logsdon's work injury, we must hold that the Board did not commit any error in holding that the ALJ improperly found the proposed surgery to be non-compensable.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board reversing and remanding the opinion of the Administrative Law Judge.

LAMBERT, D., CONCURS.

THOMPSON, K., CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Brandy B. Hassman
Lexington, Kentucky

BRIEF FOR APPELLEE, JAMES LOGSDON:

Erin C. Sammons
Lexington, Kentucky