IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: January 25, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-0187-WC

DATE Feb 15, 07 [illegible]

JOHN RONNIE OSBORNE — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-001844-WC
WORKERS' COMPENSATION NO. 98-73105

EAGLE COAL CO. #10,
DR. BALLARD WRIGHT,
HONORABLE JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE, AND KENTUCKY
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The claimant injured his back at work in 1998 and was later found to be partially disabled by a 15% impairment, half of which was due to the injury. Several years later, after the employer filed various medical fee disputes, the claimant alleged a worsening of condition and moved to reopen. He argued that he had become totally disabled.

In a decision that was affirmed by the Workers' Compensation Board (Board) and the Court of Appeals, an Administrative Law Judge (ALJ) denied the claimant's motion to reopen and also determined that medical expenses he incurred after July 1, 2004, were not compensable. Appealing, the claimant maintains that the law of the case doctrine barred the ALJ from relying on any opinion from a university evaluator or other physician who stated that the injury caused no permanent impairment at

reopening. He also asserts that the ALJ misapplied KRS 342.125 when finding that his condition had not worsened at reopening. We affirm in both respects.

The claimant testified in the initial proceeding that he had been injured in a 1988 automobile accident and missed three months' work; that he had injured his back and neck in the early 1990's; that he had injured his back again in a non-work-related motor vehicle accident on May 6, 1998, but missed only one day of work. Medical evidence indicated that he complained of severe low back pain after the accident; that he requested additional Lortabs; and that he was referred to Dr. Bean, a neurosurgeon.

The work-related lumbar injury that is the subject of this appeal occurred on July 13, 1998, when the claimant was pulling on a miner cable. Dr. Bean, his treating neurosurgeon, diagnosed a lumbar sprain. He released the claimant to return to work on October 13, 1998, and was of the opinion that the injury caused no permanent impairment. However, the claimant failed to return to work and began pain management treatment with Dr. Wright. Among other things, records from Dr. Wright indicated that the claimant admitted taking more than the prescribed amount of medication and that he tested positive on at least two occasions for drugs that were not prescribed for him.

The claimant's application for benefits alleged that lumbar, cervical, and psychiatric conditions resulted from the injury and that the injury was totally disabling. He testified that he began receiving social security disability benefits in 1999.

On August 4, 2000, an ALJ determined that the claimant was partially disabled, that the work-related lumbar injury caused half of his 15% impairment, and that his cervical and psychiatric conditions were not work-related. Finding that the claimant lacked the physical capacity to return to coal mining, the ALJ enhanced his income

benefit by 50%. The award of medical benefits noted specifically that the employer was liable only for treatment of the lumbar condition. The Board affirmed the decision, rejecting the claimant's arguments that his injury was totally disabling and that his entire impairment was work-related.

Dr. Wright continued to treat the claimant after the award. On November 30, 2001, he noted that the claimant had reached maximum medical improvement and that conservative treatment had failed. He continued to prescribe various medications, epidural blocks, facet injections, and other therapies that provided the claimant with periods of relief from pain but not complete relief.

Dr. Travis evaluated the claimant for the employer in July, 2003. He noted that the claimant had a normal neurological exam with no objective findings and that he exhibited significant symptom magnification (5/5 Waddell's findings). MRI from July, 1998, and October, 2001, revealed no pathological changes, no indication of nerve root compression that would account for low back or radicular pain, and only mild dessication at L5-S1. Dr. Travis thought that there was no neurological reason why the claimant could not return to work. He recommended no further treatment and indicated that the claimant was not a candidate for a morphine pump or any pain procedure. Noting the prior history of narcotic abuse, Dr. Travis also recommended that the claimant undergo a psychological evaluation and be weaned from narcotics. He assigned a 0% impairment under DRE lumbar category 1.

In November, 2003, the employer filed a motion to reopen in order to contest certain treatments that Dr. Wright prescribed, asserting that they were unrelated to the lumbar injury, unreasonable, and unnecessary. It also contested any similar future medical expenses. The motion was granted, and the matter was assigned to an ALJ

for the presentation of evidence.

In March, 2004, Dr. Primm evaluated the claimant for the employer and noted multiple somatic complaints with no objective findings. He reported evidence of symptom magnification and probable drug-seeking behavior or chronic drug addiction. In his opinion, the work-related injury was the cause of the claimant's complaints by history, but there were no objective findings that it was the cause of his present complaints. Moreover, Dr. Primm was not convinced that there was an organic cause for the lower back and leg pain. He assigned a 0% impairment under DRE lumbar category 1. He thought that the claimant had received more than an adequate trial of injections for pain and had experienced no real improvement; therefore, a morphine pump was not likely to improve his condition significantly. Dr. Primm did not recommend any invasive procedures.

Faced with conflicting evidence from the parties' experts, the ALJ ordered a university evaluation under KRS 342.315. The order directed the evaluator to address the reasonableness and necessity of the proposed pain management therapies and of a referral to a drug treatment facility for detoxification and/or treatment for a work-related condition.

Dr. Goldman performed the evaluation on July 1, 2004, and completed a Form 107 report. It indicates that he took a history and conducted an extensive physical examination, noting specific findings and observations. He also summarized the course of treatment and various post-award diagnostic test results. Dr. Goldman diagnosed chronic pain syndrome and mild degenerative disc disease but also noted specific evidence of symptom magnification as well as 5/5 Waddell's signs. Asked whether the claimant's injury was the cause of his complaints, Dr. Goldman responded as follows:

> Though [the work-related injury] may have been the cause of some low back discomfort for 6-10 weeks following the initial episode, his persistent complaints of pain some six years later, in the absence of any significant anatomical findings, and in the presence of evidence of symptom magnification, lead to my opinion that the injury was not the cause of his current complaints.

Dr. Goldman assigned a 0% impairment rating under DRE lumbar category 1 and stated that the claimant required no work restrictions due to the injury. However, he also thought that the claimant lacked the physical capacity to return to coal mining because he had not worked in six years and had become deconditioned. In his opinion, the proposed morphine intrathecal pump, sacroiliac joint injections, and radio frequency thermal coagulation were not reasonable or necessary treatments for the effects of the work-related injury. Also in his opinion, the need for medications to protect the claimant's gastroesophageal system from the effects of medications for chronic pain syndrome and the need for a referral to a drug treatment or detoxification program was not attributable to the work-related injury.

Several weeks later, the claimant filed a motion to reopen, alleging that his condition had worsened and that his disability had increased since the award. He later testified that medical treatment had provided some relief from his symptoms but that his pain was more severe. He acknowledged that he had not worked since the injury but testified that he was less able to work presently than he had been in 2000. He spent 90% of his time at home, playing the guitar and watching television.

A March, 2005, statement from Dr. Wright indicated that the requested medical treatment was reasonable and medically necessary for the treatment of the claimant's chronic pain and, to the best of his knowledge, related to the claimant's injury at work.

After considering the evidence, the ALJ determined that the claimant had been

found to have a 7½ % impairment due to the work-related injury in the initial proceeding but that there was no objective medical evidence of a worsening of condition. Moreover, his testimony regarding the severity of his condition was essentially the same as in the initial proceeding. Convinced that he failed to sustain his burden of proving a change of disability, the ALJ dismissed the request for increased income benefits. Turning to the question of medical benefits, the ALJ relied on the claimant's testimony that Dr. Wright's treatment had helped to ease his pain and determined that medical treatment performed before July 1, 2004, was compensable. Noting, however, that the claimant failed to rebut Dr. Goldman's clinical findings and opinions, the ALJ relied on his testimony that the work-related injury did not cause the claimant's present complaints of pain and dismissed all claims for medical treatment after July 1, 2004.

Appealing, the claimant raises two arguments. First, he asserts that the finding in the initial proceeding that his injury caused a 7½% impairment was binding at reopening under the law of the case doctrine. On that basis, he argues Dr. Goldman's report was entitled to no weight at reopening because his opinions were inconsistent with the finding. He reasons that because Dr. Goldman stated that the injury presently caused no permanent impairment, he based his opinions regarding future medical treatment on the mistaken impression that the injury was only temporary. Therefore, his opinions (like those of Drs. Travis and Primm, which "contain the same error") could not constitute substantial evidence. Second, he asserts that the ALJ misapplied KRS 242.125 by failing to consider whether his increased pain, by itself, warranted a finding of total disability at reopening.

Although KRS 342.305 permits a final workers' compensation award to be enforced in circuit court as a judgment, KRS 342.125 affords some relief from the

principles of the finality of judgments. It permits an otherwise final award to be reopened upon specified conditions and to be amended prospectively. Under R. J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915 (Ky. 1993), and National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991), it also permits an employer to contest the compensability of post-award medical expenses.

KRS 342.285 designates the ALJ as the finder of fact in workers' compensation proceedings. Consistent with the statute, Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986), explains that a finding that favors the party with the burden of proof must be affirmed if it is reasonable under the evidence. If the party with the burden of proof fails to convince the ALJ, that party's burden on appeal is to show that the favorable evidence was so overwhelming as to compel a favorable finding, in other words, that the finding was unreasonable under the evidence. As the movant contesting post-award medical treatment, it was the employer's burden under R. J. Corman Railroad Construction v. Haddix, supra, and National Pizza Co. v. Curry, supra, to prove that any contested medical treatment was unreasonable or unnecessary for the effects of the work-related injury. As the movant seeking additional income benefits, it was the claimant's burden under KRS 342.125(1)(d) to prove a post-award change of disability as shown by objective medical evidence of a worsening of impairment.

Contrary to the claimant's argument, the law of the case doctrine would not preclude reliance on the opinions of Drs. Goldman, Travis, and Primm simply because they reported that his permanent impairment rating presently was 0%. It was undisputed that the claimant's permanent impairment rating due to the injury had been 7½% at the time of the initial award and that he was entitled to reasonable and

necessary medical treatment for the effects of the lumbar condition. At issue in the reopening were whether the disputed post-award medical treatment was for the effects of the injury, whether his condition had worsened, and whether his present disability from the injury was greater than it had been in 2000.

Opinions found in the reports from Drs. Goldman, Travis, and Primm were not based on a mistake regarding the nature of the claimant's injury or contrary to his award because they addressed his medical status at subsequent points in time. They were competent evidence of his present condition and of the reasonableness and necessity of the disputed medical treatment for the effects of the lumbar injury. Faced with competent medical evidence that the lumbar injury was not the cause of the complaints for which the treatment was prescribed and with no overwhelming evidence from Dr. Wright to the contrary, the ALJ concluded reasonably that the treatment was not compensable.

We are not convinced that the ALJ misapplied KRS 342.125 when dismissing the claimant's request for additional benefits on the grounds that "no objective medical evidence of worsening of condition has been shown and the testimony of the plaintiff as to his assessment of the severity of his condition is essentially the same." Nothing indicates that the ALJ based the decision on the claimant's failure to offer evidence of a greater AMA impairment rating at reopening. The ALJ simply was not convinced that Dr. Wright's testimony contained sufficient objective medical evidence to rebut the evidence found in Dr. Goldman's report. Like the reports from Drs. Travis and Primm, Dr. Goldman's report indicated that the claimant's present complaints of pain were not due to the effects of the lumbar injury and that the injury did not prevent him from performing all types of work. Although the claimant testified that his pain was worse

and more disabling at reopening, the ALJ simply was not convinced that the disability caused by the lumbar injury was any greater than it had been at the time of the initial award. Under the circumstances, a remand for further consideration is unwarranted.

The decision of the Court of Appeals is affirmed.

All Concur.

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