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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: May 24, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 6-14-07 E.I.A. Grouch P.C.

2006-SC-000758-WC

LISA MAE DAVIS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-001995-WC
WORKERS' COMPENSATION NO. 04-96773

CARHARTT, INC.
WORKERS' COMPENSATION BOARD
AND ARBITRATOR DWIGHT T. LOVAN — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Arbitrator determined that the claimant underwent carpal tunnel surgery without following the procedures set forth in the approved Alternative Dispute Resolution (ADR) Program to which her labor union and employer agreed. On that basis, the Arbitrator dismissed her claim for medical and temporary total disability (TTD) benefits. The Workers' Compensation Board and the Court of Appeals affirmed, and the claimant appeals. We are not convinced that the ADR agreement diminished the claimant's rights under Chapter 342 or violated KRS 342.277(3); therefore, we affirm.

The claimant testified that she began working for the defendant-employer in 2001, primarily as a sewing machine operator. At some point, she began to experience numbness, tingling, and "drawing" in her hand. She informed the employer, continued to work, and obtained medical treatment. After undergoing surgery, she sought TTD

and medical benefits.

Dr. Lee, a general practitioner, diagnosed carpal tunnel syndrome, tenosynovitis of the right wrist, and right ulnar neuropathy in April, 2002. Despite medication and a round of physical therapy in 2003, the claimant's symptoms waxed and waned until January, 2004. At that time, Dr. Lee imposed restrictions on lifting and forceful grasping with either hand and noted that the claimant was off work.

Dr. MacDougal, a hand surgeon, first saw the claimant in October, 2003. He diagnosed "complex myofascial pain syndrome, documented bilateral carpal tunnel syndrome, worsening despite care." Although he thought that carpal tunnel releases were the claimant's only hope of improving, he also noted that the surgery "has an excellent chance of not improving her functional capacity especially the longer that we get into it and if she develops into a true class II, grade II." On February 27, 2004, he noted that the claimant's condition persisted but that she was in no acute distress.

Dr. Morgan, an orthopedic surgeon, saw the claimant on December 10, 2003. He examined her and reviewed her records for the purpose of giving a second opinion regarding the proposed surgery. He diagnosed carpal tunnel syndrome and "concurred" that the condition was not responsible for all of her complaints. In his opinion, it was "unlikely that carpal tunnel release would benefit this patient" if her wrists did not improve with the medications that he injected. However, she would be a surgical candidate if her symptoms improved but later recurred.

Rhonda Hardy, the employer's human resources manager and ADR program administrator, also testified. Her understanding was that Dr. MacDougal proposed a possible surgery but indicated that the benefits might be minimal. She explained that she had suggested a second opinion because she was uncomfortable with an equivocal

recommendation for surgery.

Shirley LaPradd, the union steward, testified that her job was to act as a liaison between employees and the company and to help employees through the workers' compensation process. She stated that she had helped the claimant and brought her file to the deposition. Her recollection was that two physicians had indicated that surgery would not help the claimant. A third opinion was scheduled for February 23, 2004, but was cancelled because the claimant was ill. Her file contained a letter bearing that date, which indicated that the appointment had been re-scheduled for Monday, March 8. Although she did not recall the exact date that she and the claimant reviewed the letter, she thought that it occurred before March 1, 2004. She stated that she and the claimant signed the letter in each other's presence, in the office, primarily for verification purposes.

The claimant testified that Dr. Lee's conservative medical treatment and physical therapy failed to alleviate her symptoms. She then saw Dr. MacDougal, who told her that she needed surgery. Consulted for a second opinion, Dr. Morgan prescribed cortisone injections that seemed to make the condition worse rather than alleviate it. Therefore, in January, 2004, she returned Dr. MacDougal, who continued to recommend surgery. The claimant acknowledged that she had discussed the matter with both the union representative and with plant representatives at the time. She asserted, however, that the ADR agreement was poorly explained to employees and that she did not realize that it required her to obtain a third opinion. She acknowledged that she was scheduled to see a third physician in Nashville but asserted that she cancelled the appointment due to illness. Stating that she was frustrated by the delay and in constant pain, she underwent the surgery on March 1, 2004, without having seen

the third physician.

The claimant acknowledged that she had received and signed the February 23, 2004, letter notifying her that the third opinion was re-scheduled for March 8, 2004. She stated, however, that she did not recall when that occurred. Noting that no date appeared by her signature, she implied that she thought it was after the surgery.

Article III, Paragraph H of the parties' December 12, 2003, ADR agreement presented the Arbitrator with a threshold issue. As approved by the claimant's labor union and the Department of Workers' Claims, it provides as follows:

> Both the employer and the employee shall be bound by the opinions and recommendations of the authorized providers selected in accordance with this Agreement. In the event of disagreement with an authorized provider's findings or opinion, the sole recourse for either party shall be to obtain a second opinion from another authorized provider and to present the second opinion through the dispute prevention and resolution procedures established in this Agreement. If the second opinion disagrees with the first physician the sole recourse will be to get a third opinion and the third opinion will be binding. Any party aggrieved by the final opinion shall have the right to seek review of the medical opinions through the dispute resolution process. (emphasis added).

Relying on the agreement, the employer noted that Dr. MacDougal's recommendation for surgery was equivocal and that Dr. Morgan would not recommend surgery because the injections were ineffective. It argued that the agreement required the claimant to obtain a third medical opinion to resolve the matter and permitted her to seek review if she disagreed with the third opinion. Therefore, having failed to obtain the opinion, she was not entitled to review.

The Arbitrator found it to be clear from the evidence that the claimant's union representative and her employer made every effort to apply the agreement as it was written and to communicate the ADR procedure to her accurately, including the

procedure for resolving medical disputes. Yet, it was equally clear that she failed to follow the procedure. Although Dr. MacDougal recommended surgery, he "constantly reiterated his belief that [it] was unlikely to provide significant improvement." Dr. Morgan stated that surgery would not be appropriate unless the injections provided temporary relief; therefore, the claimant's testimony that her symptoms worsened after the injections indicated that surgery was inappropriate. The Arbitrator determined that the claimant received notice of the re-scheduled evaluation before March 1, 2004, but proceeded with surgery without undergoing the evaluation.

Arguing that it must be assumed under such circumstances that the third opinion would have been negative, the claimant maintained that the ADR agreement entitled her to seek review of the reasonableness and necessity of the surgery. The Arbitrator determined, however, that the evaluation notes and thought processes of all three physicians were necessary for a proper review. Concluding that the terms of the agreement were mandatory and that the claimant failed to comply with them, the Arbitrator dismissed the matter.

The claimant does not dispute that she failed to comply with the terms of the ADR agreement but argues that paragraph H is invalid. She reasons that KRS 342.020 entitles her to choose her own physician and obtain reasonable and necessary medical treatment. She argues that Paragraph H imposes additional requirements and burdens by permitting her employer to restrict her choice of physicians and to require a second or third medical opinion before she can obtain medical treatment.

As the court noted in Spears v. Carhartt, Inc., ___ S.W.3d ___ (Ky. 2006), KRS 342.277 and the regulations permit workers and employers to agree to procedures for resolving disputed claims that are different from those found in Chapter 342. KRS

342.277(3) provides, however, that an agreement "that diminishes the rights of any of the parties" under Chapter 342 is invalid. 803 KAR 25:150, §§ 2 and 3 specifically require ADR programs to afford injured workers procedural due process as well as the same rights to income and medical benefits that are provided in Chapter 342.

The claimant's argument ignores the fact that her complaints involve the terms of an agreement that her labor union reached with her employer on her behalf. An approved ADR agreement is a contract to resolve disputes in a manner different from that set forth in Chapter 342; therefore, the parties are bound by its terms. Paragraph H of the agreement clearly states that "the sole recourse" for resolving a dispute between two medical opinions is to obtain a third medical opinion which is binding. It grants a right of review only after the third opinion is obtained.

This case involves a pre-award medical dispute. Although an employer serves its own interest as well as an injured worker's by providing prompt and reasonable medical treatment voluntarily, R. J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915 (Ky. 1993), explains that an employer has no obligation to pay medical benefits or any other compensation until an award is rendered. KRS 342.735(3) permits an injured worker to seek pre-award medical benefits but states explicitly that it is the worker's burden to prove that the disputed treatment is both reasonable and necessary. After an award is rendered, the statute shifts the burden to the employer to show that disputed medical treatment is unreasonable or unnecessary.

KRS 342.020(1) requires an employer to pay for reasonable and necessary medical treatment for the effects of a work-related injury but does not give an injured worker an unfettered choice of physicians or treatments even after receiving an award. In fact, KRS 342.020(7) permits an employer to be granted leave to select a worker's

physician upon motion and proof that the worker is not receiving proper medical treatment. Both KRS 342.020(1) and (3) permit employers to provide medical services through a managed health care system. If an employer does so, KRS 342.020 entitles injured workers to: 1.) elect to continue treatment with "a physician who provided emergency medical care or treatment" (KRS 342.020(1)); 2.) obtain a second opinion outside the managed health care system if a physician within the system recommends surgery (KRS 342.020(4)(d)); and 3.) obtain services outside the managed health care system that are unavailable through the system (KRS 342.020(4)(e)). KRS 342.035 authorizes the adoption of regulations concerning medical fees, utilization review procedures, and the incorporation of managed care concepts.

Contrary to the claimant's assertion, paragraph H of the ADR agreement did not prevent her from obtaining reasonable and necessary medical care. It required her to obtain a third medical opinion to resolve a dispute regarding surgery and permitted her to seek review if the third opinion was unfavorable. Although she asserts that the requirement diminishes her rights under Chapter 342 and is contrary to public policy, nothing entitles a worker to have the merits of a disputed medical treatment decided based on only two conflicting medical opinions. KRS 342.205 requires an injured worker claiming compensation to undergo a medical examination at the employer's request and suspends any proceedings for so long as the worker refuses to do so. Likewise, KRS 342.315(1) permits an Administrative Law Judge to order a university evaluation "whenever a medical question is at issue," without regard to the number of previous evaluations the worker has undergone.

We are not convinced that the procedure set forth in paragraph H of the ADR agreement imposed any greater restrictions than Chapter 342 on the claimant's right to

benefits or to a hearing. Nor are we convinced that paragraph H violates Kentucky public policy by requiring a difference of medical opinion to be resolved by a third physician but permitting the losing party to seek review. Having failed to obtain a third medical opinion to resolve the dispute regarding surgery, the claimant was not entitled to a hearing; therefore, the Arbitrator did not err in dismissing the matter.

The decision of the Court of Appeals is affirmed.

All concur.

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