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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: AUGUST 23, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9-13-07 [illegible]

2006-SC-000774-WC

ERIC SMITH APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2006-CA-000439-WC
WORKERS' COMPENSATION NO. 96-06851 and 96-08146

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

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In a post-settlement medical fee dispute, an Administrative Law Judge (ALJ) determined that the claimant failed to show a causal relationship between his work-related injury and the disputed medical and temporary total disability (TTD) benefits. The Workers' Compensation Board and the Court of Appeals affirmed, but the claimant continues to assert that the decision was erroneous insofar as it denied treatment for anxiety and depression and that it was erroneous under Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 Ky. App. 1997), with regard to the cause of his surgeries. Because the evidence did not compel favorable findings on either matter, we affirm

The claimant sustained a work-related low back injury on June 5, 1996. He and his employer settled the workers' compensation claim in 1997, under terms that entitled

him to a 30% permanent partial disability and compensation for reasonable and necessary medical treatment due to the effects of the injury. He later began to experience leg pain and underwent surgery in March, 2002, which decreased the pain by 80% for about six months. Although private health insurance paid for the surgery, the employer later reimbursed the cost and paid some TTD benefits. After Dr. Gilbert recommended a lumbar fusion, in January, 2004, the employer submitted the matter for utilization review and sent the claimant to Dr. Vaughn for an independent medical evaluation (IME). Dr. Vaughn concluded that the evidence did not support performing the procedure, after which Drs. Wolens and Garretson reviewed the medical records and agreed with Dr. Vaughn. Thus, the employer refused to authorize the procedure.

The claimant obtained a second opinion from Dr. Lockstadt, who agreed with Dr. Gilbert that a fusion would be appropriate. On August 2, 2004, he filed a Form 112, medical fee dispute and motion to reopen, seeking an order requiring the employer to pay for the proposed surgery, for certain other costs for treating his back, and for psychological treatment. Attached to the motion to reopen was a copy of a Form 114 request for the reimbursement of personally-paid medical expenses, dated April 26, 2004. Also attached were various documents regarding 81 charges incurred during the period from September 27, 2001, through March 31, 2004. In a concurrent motion, the claimant sought TTD benefits for an unspecified period. Three days after filing the medical fee dispute and related motions, he underwent the surgery. Private medical insurance paid part of the cost.

The parties submitted numerous medical records and reports, among which were reports from Dr. Shraberg, a psychiatrist, and from Dr. Kriss, a neurosurgeon who

evaluated the claimant both before the settlement and in February, 2005.

Dr. Shraberg conducted an extensive review of the claimant's medical records, examined him, and conducted psychological testing. He diagnosed a dependent personality, an adjustment disorder that the claimant associated with the 1996 injury but that had resolved, and chronic opiate dependency. In his opinion, psychiatric treatment was unnecessary and the use of psychotropic medication would not be beneficial.

Dr. Kriss stated that there was an undeniable objective change in the claimant's condition since the prior evaluation and that he would have assigned a 10% permanent impairment rating in 1996 but would presently assign a 20% rating and impose restrictions. However, he did not attribute the change of condition to the 1996 injury. He explained that the "gold standard" myelogram and post-myelogram CT scans from November, 1997, revealed no significant structural problem with the discs on the left side and no indication of nerve compression on the left. The only subsequent objective change was S1 nerve root compression on the left and an L5/S1 disc herniation on the left. Because any permanent structural change from the injury should have been evident by November, 1997, he concluded that the nerve root compression and disc herniation occurred naturally rather than as a result of the injury. Therefore, although the surgeries proved to be reasonable and necessary treatment for relieving the claimant's symptoms, neither the symptoms nor the surgeries were due to the 1996 injury.

At the hearing, the claimant submitted an exhibit that documented 225 charges for treatment, prescriptions, and mileage over the period from September 27, 2001, through January 19, 2005. Although the exhibit related each charge to a physician or

medication, it contained no physician's statement relating any of the charges to the 1996 injury.

The ALJ rejected the claim for psychological treatment, noting that the settlement mentioned no psychological condition; that no condition was diagnosed until about the time of the 2004 surgery; and that a number of events occurred after the 1996 injury, including the claimant's divorce and the death of his father. Relying on Dr. Shraberg and finding no credible evidence of causation, the ALJ determined that post-injury treatment for anxiety and depression was not causally related to the injury.

The ALJ relied on Dr. Kriss's opinions that the surgeries were not due to the injury, noting that he had examined the claimant both before the settlement and at reopening and based his detailed analysis of causation on objective medical findings. Thus, it was more credible than the brief analysis by Dr. Gilbert, who first examined the claimant seven years after the injury. Although noting that the surgeries proved to be reasonable and necessary treatment for the claimant's degenerative changes, the ALJ rejected the claimant's theory of causation because no medical evidence showed that the degenerative changes resulted from the 1996 injury or that there was any pre-existing degenerative condition which the injury might have aroused.

Addressing any obligation that the employer might have for the disputed medical expenses, the ALJ noted that KRS 342.020(1) and 803 KAR 25:096 required medical bills to be submitted to an employer within 45 days of the date that treatment was initiated and every 45 days thereafter. They required an employer who had been found to be liable for a work-related injury to pay or contest timely-received medical bills within 30 days of receiving them but stayed the 30-day period during utilization review. 803

KAR 25:096, § 11 required a worker to request payment for out-of-pocket expenses within 60 days of incurring the expense.

Holding that expenses related to the surgeries and to the psychological condition were not compensable, the ALJ noted that the claimant submitted the vast majority of his medical bills to a private health insurance carrier rather than to the employer. Also, he failed to show that he requested payment for the personally-paid expenses within 60 days of incurring them. The ALJ also noted that although any medical expenses related to the 1996 injury, identified on the Form 114, and also incurred within 60 days before April 26, 2004, or after April 26, 2004, remained compensable, they could not be identified from the evidence of record. When denying the claimant's subsequent petition for reconsideration, the ALJ directed him to re-file his Form 114, listing only those expenses that were compensable under the previous opinion and order. The claimant appealed.

KRS 342.020(1) requires an employer to compensate a worker for reasonable and necessary medical treatment for the effects of a work-related injury. As illustrated by Addington Resources, Inc. v. Perkins, supra, Kentucky follows the direct and natural consequence rule, under which a subsequent injury or aggravation of a work-related injury is compensable if it is a direct and natural result of the work-related injury. In the present case, Dr. Kriss's testimony supported a conclusion that the post-settlement symptoms and surgeries were not caused by the work-related injury, and there was no medical evidence of a pre-existing dormant, degenerative condition that the injury might have caused to be symptomatic. No contrary medical evidence was so overwhelming as to render the conclusion unreasonable and subject to reversal on appeal.

A psychological condition was neither raised in the initial claim nor mentioned in the parties' settlement agreement. Thus, it was the claimant's burden to prove that the newly-raised condition was due to the work-related injury and required medical treatment. See R. J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993). Whether the employer paid some treatment expenses voluntarily was immaterial to those issues. The claimant has pointed to no evidence that would have compelled the result that he seeks. Under the circumstances, the decision was properly affirmed on appeal.

The decision of the Court of Appeals is affirmed.

All sitting. Lambert, C.J., and Cunningham, Minton, Noble, Schroder and Scott, JJ., concur.

COUNSEL FOR APPELLANT,
ERIC SMITH:

DONALD G. SMITH
McKINNLEY MORGAN
MORGAN, MADDEN, BRASHEAR & COLLINS
921 SOUTH MAIN STREET
LONDON, KY 40741

COUNSEL FOR APPELLEES,
TWIN PINES INC. AND AIG CLAIMS SERVICES, INC.:

RONALD J. POHL
POHL, KISER & AUBREY, P.S.C.
167 WEST MAIN STREET
SUITE 100
LEXINGTON, KY 40507-1323