

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky **FINAL**

2006-SC-000577-WC

DATE 11-26-07 E.A. Gault, Jr.

KAREN SUE DEATON AND MCKINNLEY MORGAN

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2006-CA-000317-WC
WORKERS' COMPENSATION NO. 02-80125

HAZARD APPALACHIAN REGIONAL HOSPITAL;
HON. A. THOMAS DAVIS, II, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

KRS 342.310(1) permits an Administrative Law Judge (ALJ) to assess the whole cost of a proceeding, including attorney's fees, against a party who "brought, prosecuted, or defended [the proceeding] without reasonable ground."

An ALJ denied the claimant's request for an award of attorney's fees and costs after she prevailed in the medical fee dispute that her employer filed. Finding no abuse of the discretion in the decision, the Workers' Compensation Board and the Court of Appeals affirmed. Having concluded that the ALJ's refusal to award attorney's fees and costs was not an abuse of discretion because medical evidence provided a reasonable ground for the employer to contest the proposed expenses, we affirm.

The claimant began working for the defendant-employer as a registered nurse in 1983. She sustained injuries to her neck, back and right arm on March 4, 2002, while

attempting to restrain an out-of-control patient. She later settled her claim for a lump sum that was based on a 7% impairment. Although she waived her right to past and future medical expenses regarding the back condition, she reserved her right to future medical expenses regarding the other conditions and her right to reopen regarding those conditions.

After undergoing right cubital release surgery, the claimant returned to work. She testified subsequently that a course of physical therapy prescribed by her family physician, Dr. Chaney, had helped with her pain. At some point, thereafter, the employer's workers' compensation carrier sent her to Dr. Muha. In June, 2004, he sought approval for additional physical therapy and for repeat EMG/NCV testing of both her upper and lower extremities. Relying on utilization review reports from Dr. Huffman that recommended denying both requests, the employer denied the requests. It also filed the motion to reopen and medical fee dispute that resulted in this appeal. The medical evidence consisted of reports from Drs. Muha and Huffman.

Dr. Huffman reviewed the physical therapy request. He summarized a June 10, 2004, telephone call with Dr. Muha as indicating that the claimant was a relatively new patient, that he was in the process of collecting her medical records, that he was uncertain physical therapy would help because the injury was over two years old, and that he had not yet formulated a complete care plan because he did not know for certain what her prior treatment had been. Dr. Huffman concluded that there was no medical justification for physical therapy, noting that the injury was over two years old. In his opinion, Dr. Muha should gather the previous medical records, review them, and then decide the best course of action for treating the claimant's pain. The report cited

to portions of Milliman & Robertson, Inc., Healthcare Management Guidelines, and to the Official Disability Guidelines as being the criteria for the denial.

On July 9, 2005, Dr. Muha noted that the claimant continued to complain of neck and low back pain, numbness in the upper extremities that was greater on the right side, and sharp, stabbing pain in her left leg. He noted that nerve conduction studies performed two years earlier had revealed compression of the right ulnar nerve in the cubital area. A December, 2002, MRI had revealed a small bulge at L1-L2, and a November, 2002, MRI had revealed a minimal bulge at C5-6. He recommended repeat EMG/nerve conduction studies, stating that they might be beneficial in determining the nature of the cervical neck pain and radiculopathic symptoms and of the lower extremity radiculopathic symptoms.

Dr. Huffman reviewed the request and determined that there was no justification for bilateral EMG/NCV studies of the upper and lower extremities; therefore, he recommended denying it. He noted that the claimant's injury was over two years old and found "no relationship to the initial injury." Noting that the prior MRI revealed no encroachment on the nerves in the cervical or lumbar area, he concluded that an EMG was not indicated for the current complaints and physical findings. He cited portions of the OECM Guidelines as support for his conclusion.

A November 3, 2004, letter from Dr. Muha indicated that his working diagnosis included: bilateral upper extremity neuropathy, left lower extremity neuropathy, mild right lower extremity neuropathy, cervical neck pain, and low back pain. He stated that the claimant had weakness and numbness in both upper extremities; reproducible neuropathic symptoms upon ulnar nerve palpation, bilaterally; left lower extremity

numbness; and bilateral, radiating pain in her lower extremities. EMC/NCV studies in May, 2002, had revealed pathology in both her right and left ulnar nerves, and she had undergone surgery on the right. Dr Muha recommended either EMG/NCV studies of the upper and lower extremities or an orthopedic evaluation to help decide whether additional surgery was needed. He stated that physical therapy could be postponed

After reviewing the evidence, the ALJ determined that Dr. Muha could not recommend a comprehensive treatment plan until after the diagnostic studies were performed. Noting that he still found good reason for performing them despite the length of time since the injury, that he recommended an orthopedic evaluation, and that he thought that further surgery might be needed, the ALJ determined that the claimant was entitled to the procedures. Noting that physical therapy had helped to relieve her pain previously and would enable her to continue to work, the ALJ concluded that she was entitled to receive it.

Having prevailed in the medical fee dispute, the claimant sought an award of attorney fees and costs under KRS 342.310(1). Pointing to the ALJ's statement that a comprehensive treatment plan could not be completed until the diagnostic studies were performed, she asserted that the employer brought the proceeding without reasonable grounds. Therefore, it would be unconscionable to require her to bear the cost of defending it. After the ALJ denied the motion, she appealed.

KRS 342.310(1) provides as follows:

If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses,

deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted, or defended them. (emphasis added).

KRS 342.310(1) is permissive; therefore, an ALJ may exercise discretion when determining whether a particular set of facts warrants the imposition of sanctions. As explained in Sexton v. Sexton, 125 S.W.3d 258, 272 (Ky. 2004), the standard for reviewing an exercise of discretion is whether the decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles," in other words, whether it constituted an abuse of discretion. The present facts reveal no abuse of discretion.

KRS 342.020(1) requires an employer to pay for reasonable and necessary medical expenses. As construed in Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993), it does not require an employer to approve treatment that is shown to be unproductive or not generally accepted by the medical profession as being reasonable in the worker's situation. Mitee Enterprises v. Yates, 865 S.W.2d 654 (Ky. 1993), makes it clear that an employer must pay or contest a post-award medical expense within the specified period after receiving a statement and that it is the employer's burden to prove that the expense is unreasonable or unnecessary for treating the injury. See also National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991). A function of the utilization review process is to help employers determine whether to approve or contest a proposed medical expense. The fact that a worker prevails on the merits of a medical fee dispute will not, by itself, compel a finding that the employer acted without reasonable ground in filing the dispute, nor will the fact that an employer sends the worker to a physician whose recommendation the employer later contests.

When considering the motion for attorney's fees and costs, the ALJ was required to determine whether the employer acted without reasonable ground in prosecuting the medical fee dispute. The record indicated that Dr. Muha had recommended additional physical therapy before obtaining and reviewing the claimant's medical records and before preparing a treatment plan. The employer refused to approve the treatment after Dr. Huffman indicated that there was no medical justification for it at that time. Likewise, the employer refused to approve the diagnostic testing after Dr. Huffman determined that there was no medical justification for such testing more than two years after the injury; that it was unrelated to the initial injury; and that MRI revealed no encroachment on the nerves in the cervical or lumbar area. In both instances, Dr. Huffman supported his recommendation with references to medical guidelines. Under the circumstances, the employer had reasonable grounds to contest the proposed expenses; therefore, the decision to deny the claimant's motion was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles. It was not an abuse of discretion.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Abramson, Cunningham, Minton, Noble and Scott, JJ.,
concur. Schroder, J., recuses.

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