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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 29, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000067-WC

ROBERTA D. MCCAULEY — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-000826-WC
WORKERS' COMPENSATION BOARD NO. 92-43525

HUMANA SOUTHWEST HOSPITAL;
HONORABLE J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal concerns motions by an employer and injured worker to reopen the settled award for a 1992 lumbar spine injury. An Administrative Law Judge (ALJ) determined that the employer was not liable for contested medical expenses related to a fall in the claimant's home in 2003, a surgery performed in 2006, housekeeping services, a whirlpool, and various out-of-pocket expenses. The ALJ also determined that the period for seeking increased permanent disability benefits had expired. The Workers' Compensation Board and Court of Appeals affirmed, and this appeal by the claimant followed. We affirm for the reasons stated herein.

The claimant worked for the defendant-employer as a nurse. She sustained a work-related lumbar spine injury in 1992 for which she underwent surgery at L 4-5 in 1993, 1994, and 1995. The parties agreed to settle the workers' compensation claim in 1996 for a 40% occupational disability. The claimant moved to Florida in 1997 and began treating with Dr. McCarthy. After the move, she worked as a medication nurse and as a residential care coordinator before quitting altogether in May 2000. She underwent another surgery at L 4-5 in 2002.

Disputes over medical treatment began in December 2003, when the employer filed a motion to reopen to contest an August 2003 bill from South Bay Hospital for treating a head injury incurred in a fall in the claimant's home. An attached hospital record noted a history of extensive low back and cervical spine problems. Physical examination revealed numbness in the lower extremities and weakness in the left leg. The employer certified that it mailed a copy of the motion to the hospital, to the claimant's attorney of record, and to the claimant at 10922 Sail Brooke Dr., Riverview, Florida 33569.

On February 13, 2004, the Chief ALJ (CALJ) joined the hospital as a party and granted the hospital and the claimant 20 days to show cause why the motion should not be sustained. The order indicates that a copy was mailed to the hospital and the claimant's attorney of record but does not indicate that a copy was mailed to the claimant. Neither she nor the hospital responded. Thus, the CALJ determined in an order entered on March 24,

2004, that the expenses were not compensable and absolved the employer of liability. No appeal was taken although the order indicates that a copy was mailed to the hospital, to the claimant's attorney of record, and to the claimant at the Florida address.

On September 30, 2005, the claimant filed a pro-se motion to reopen. She alleged a change of disability, newly discovered evidence, and a dispute over medical expenses from August 2003 to the present. Among the documents attached to the motion were a bill for cervical spine x-rays; a bill for inpatient services relating to an October 8, 2002, surgery; a bill for skilled nursing services provided from April 5, 2005, through May 9, 2005, apparently related to a sacral decubitus ulcer; and utilization review denials of a whirlpool and a recommended L 3-4 laminectomy. The claimant listed her address as the same Florida address to which copies of the employer's motion and the CALJ's March 2004 order were mailed. In November 2005 an attorney entered an appearance on her behalf and she moved to amend her motion to include a claim for "past due Temporary Total Disability (TTD) benefits which would be allowable following Plaintiff's lumbar surgery if ordered."

When deposed in February 2006, the claimant acknowledged that she missed two weeks' work after injuring her back in a slip and fall at work in 1981 and missed 45 days after lifting a patient in the mid 1980s. Although Office of Workers' Claims records documented a settlement regarding an August 1984 back injury in a slip and fall at work, she did not recall the

incident. She testified that she settled a civil action regarding a low back injury incurred in a 1989 motor vehicle accident.

The claimant testified that the injury that is the subject of this claim occurred in October 1992, while she was trying to lift a patient. She testified that she developed a sacral decubitus ulcer in 2005 from soaking in the bathtub on a cushioned bathmat after the carrier determined that a home whirlpool was not medically necessary. When confronted with Dr. McCarthy's treatment notes, which indicated that the ulcer developed after using a heating pad for too long, she stated that the history was incorrect. She acknowledged that the disputed expenses concerning the ulcer had been paid; that all expenses from the October 2002 surgery had been paid; and that expenses for a motorized wheel chair and a trailer to pull it had also been paid. She stated that the carrier refused her request for a housekeeper.

The claimant testified that her legs buckled due to the back injury, causing her to fall numerous times. She stated that she was admitted to South Bay Hospital following a concussion sustained in a fall at home in July 2003 and sought reimbursement for the portion of the bill that she had paid personally. Although she claimed to be unaware of the employer's motion to reopen with respect to the expense, she admitted that she received the CALJ's March 2004 order that found it not to be compensable.

Dr. McCarthy, a board-certified orthopedic surgeon, began treating the claimant in 1997. Treatment notes indicate that he diagnosed post

laminectomy syndrome and performed the 2002 surgery at L 4-5. On July 24, 2003, the claimant reported that she had fallen at home and was in severe pain. She asked to be hospitalized. Dr. McCarthy noted on February 4, 2005, that the claimant had developed a decubitus ulcer in the sacral area from using a heating pad. Later, he recommended professional wound care. He noted on May 12, 2005, that the ulcer had healed. In June 2005 he discussed surgery at L 3-4, but the carrier refused to approve the procedure based on a lack of objective clinical findings.

When deposed in April 2007, Dr. McCarthy opined that the degeneration at L 3-4 resulted from the 1992 injury. He testified that the L 4-5 fusion increased stress at L 3-4 as well as the rate at which the L 3-4 joint degenerated, basing the opinion on unspecified medical literature. He acknowledged the previous injuries and degenerative disc disease but stated that the L 4-5 fusion, which was performed as a consequence of the 1992 injury, contributed to the need for surgery at L 3-4. He stated that the usual time to reach maximum medical improvement (MMI) after the 2004 surgery would be three months but that the claimant did not reach MMI between the 2004 and 2006 procedures because they were related. In his opinion she reached MMI from both surgeries on February 27, 2007.

Dr. McCarthy's notes indicated that the claimant reported falling periodically and that she had an unsteady gait and numbness in her left leg. He responded affirmatively when asked if there was a relationship between the

falls and her radicular symptoms. He also noted that EMG provided objective evidence of L5 nerve root compromise, stating "usually that involves a partial foot drop which subjects people to losing their balance." He responded affirmatively when asked if he thought that happened in the claimant's case.

Dr. McCarthy was questioned about why he was reluctant to recommend the L 3-4 surgery as of October 12, 2006. He explained that the claimant had had multiple surgeries, was emotionally unstable and depressed, had a lot of litigation issues, and was not an ideal patient on whom to perform surgery. He acknowledged that he deferred to Dr. Boyer because he did not think that the surgery was medically necessary at the time. He stated, however, that the claimant appeared to be somewhat better since having it.

Dr. Boyer performed surgery at L 3-4 in October 2006. He completed a questionnaire in January 2007, responding "yes" when asked whether the surgery was "in any way related to her work injury of October 12, 1992 for which Dr. McCarthy performed an L 3-4 [sic] decompression in October 2002." He also responded "yes" when asked whether the 2006 surgery corrected the sequella of the 1992 injury and multiple surgeries. He thought that the claimant would reach MMI on April 30, 2007.

Dr. Companioni, a board-certified orthopedic surgeon, evaluated the claimant for the employer in April 2006 and reviewed medical records dating to 1981. A physical exam revealed no significant paravertebral spasm. Although the claimant had marked giveaway weakness in both legs, there was no

atrophy and straight leg raising was negative. Records from Dr. Eugene Jacob indicated that she had "complained of chronic low back pain for years" and was diagnosed with spondylolysis in 1984. February 1987 notes referred to complaints of left leg radicular pain. Surgery was discussed in April 1987, and she received an epidural block for severe radicular pain in July 1988.

Dr. Companioni noted the multiple back injuries and evidence of pre-existing degenerative disc disease. Although he thought that the claimant's present back complaints were "somewhat" related to the 1992 injury and surgeries, he found nothing in the records or radiologic studies to relate further surgery at L 2-3 or L 3-4 to the injury. He thought that the claimant was a very poor surgical candidate and that the proposed surgery at L 3-4 was not medically indicated. He also thought that she did not need a wheelchair or a housekeeper and, in fact, would benefit from physical activity.

In April 2007, Dr. Companioni reviewed records from Drs. McCarthy and Boyer concerning the L 3-4 surgery that Dr. Boyer performed in 2006. Noting the presence of a significant degenerative condition dating to 1981 and spondylolysis as of 1984, Dr. Companioni attributed the changes at L 2-3 and L 3-4 and the 2006 surgery at L 3-4 to an underlying degenerative condition rather than to the effects of the injury. He stated that he understood Dr. McCarthy's hesitation concerning the L 3-4 surgery because patients with post-laminectomy syndrome usually respond poorly to further surgery.

In several August 2007 filings, the claimant requested reimbursement for

more than $12,000.00 in out-of-pocket expenses that included various credit card charges; bills for eyeglasses, dentures, dental fees, allegedly incurred due to various falls; accounting fees for itemizing medical bills and mailing and copying expenses; expenses for a home health aide, a housekeeper, and a Jacuzzi; and airfare charges to meet with her attorney and attend the hearing. She indicated that some of the disputed expenses had been paid by her private insurance carrier but should have been paid under workers' compensation.

At the September 2007 hearing, the claimant testified that, in her opinion, her numerous falls were due to "neuropathy, nerve damage, radiculopathy," which resulted from the 1992 injury. Contradicting her deposition testimony, she stated that she did not receive the CALJ's March 2004 order. Yet, she acknowledged that the order listed her correct mailing address. She testified that the bills submitted with her original motion to reopen had been paid and acknowledged that she failed to submit the out-of-pocket expenses to the employer's carrier.

The issues submitted for a decision included the compensability of the disputed expenses; the claimant's entitlement to TTD benefits; and her entitlement to additional permanent disability benefits.

The ALJ found the claimant not to be a credible witness, noting that she "appears to remember what is beneficial to her position and 'can't recall' history that is not favorable to her." The ALJ noted that the bills attached to the claimant's motion had been paid, including home health services for

treating the decubitus ulcer that had healed in May 2005,[1] and found no convincing medical evidence that the work-related injury warranted housekeeping services or a whirlpool. The ALJ determined that the claimant's failure to appeal the March 2004 order barred consideration of her claim with respect to the fall in her home for which she was treated in August 2003 and, in any event, that no medical evidence established that the fall was caused by or directly related to the 1992 injury. The ALJ also determined that the 2006 surgery was not reasonably necessary for the 1992 injury's effects; that the out-of-pocket expenses were not compensable; that the claimant was not entitled to TTD; and that the four-year period for seeking increased disability benefits had expired; but that the employer remained liable for ongoing treatment of the 1992 injury's effects under KRS 342.020.

The claimant asserts that the ALJ erred by finding that the March 2004 order barred further consideration of the compensability of the fall that resulted in the August 2003 hospital stay and also by failing to find that it resulted from the work-related injury. Taking issue with the ALJ's reliance on Dr. Companioni, she asserts that his opinions concerning the 2006 surgery do not constitute substantial evidence. Finally, she asserts that she was entitled to TTD benefits retroactively, from the date of the October 2002 surgery. We disagree.

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[1] The claimant continues to seek compensation for an unspecified decubitus ulcer. Although Dr. McCarthy noted in December 2005 that she attributed decubitus ulcers to a slip and fall, the record contains no evidence to compel a finding that radiculopathy resulting from the 1992 injury caused the fall.

KRS 342.0011(1) defines an injury as a work-related traumatic event that is the proximate cause producing a harmful change in the human organism. An injured worker has the burden to prove every element of a claim, including work-relatedness.[2] Only after a harmful change is found to be work-related does the employer have the burden to prove that medical expenses attributed to it are unreasonable or unnecessary.[3]

KRS 342.285 gives an ALJ the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences.[4] An ALJ 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 party's total proof.[5] Although a party may note evidence that would have supported a different decision, such evidence is not an adequate basis for reversal on appeal.[6] A decision that favors the party with the burden of proof may not be reversed if it is reasonable under the evidence.[7] A decision against the party with the burden of proof may only be reversed if the contrary evidence is so overwhelming as to compel a favorable finding, i.e., to show that no reasonable person would have decided as the ALJ did.[8]

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[2] Roark v. Alva Coal Corporation, 371 S.W.2d 856 (Ky. 1963); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App.1984); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

[3] Mitee Enterprises v. Yates, 865 S.W.2d 654 (Ky. 1993).

[4] Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

[5] Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).

[6] McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

[7] Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

[8] Id.

Res judicata, a Latin term meaning "a matter adjudged," relates to the preclusive effect of a previous judicial decision. It stands for the principle that a final judgment on the merits is conclusive of a cause of action (claim preclusion) or a fact or issue (issue preclusion/collateral estoppel) thereby litigated.[9] Contrary to what the claimant implies, this case did not involve a dismissal without prejudice. The CALJ determined in March 2004 that the employer had no liability for medical expenses related to the 2003 fall and served the claimant with a copy of the order at her Florida address. She failed to appeal. Thus, the res judicata doctrine precluded her from attacking the decision in subsequent litigation. In any event, the evidence did not compel a finding that the fall was work-related.

The claimant settled her claim for a 1992 back injury at L 5-6 with the employer and the Special Fund. Thus, she had the burden to convince the ALJ of a causal relationship between the back injury and the fall that resulted in the August 2003 hospitalization. She failed to do so.

The claimant testified that her legs buckled, causing her to fall frequently and that she fell at home in July 2003. Although Dr. McCarthy thought that radiculopathy from the 1992 injury would explain her frequent falls, the ALJ noted that no evidence established that such radiculopathy caused the fall or subsequent hospitalization. The claimant points to no evidence that would compel a finding of causation.

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[9] Yeoman v. Com., Health Policy Board, 983 S.W.2d 459, 464 (Ky. 1998).

Nothing required an ALJ to rely on the testimony of Drs. McCarthy and Boyer with respect to the L 3-4 condition rather than that of Dr. Companioni.[10] Despite the claimant's assertions, this is not a case such as Cepero v. Fabricated Metals Corp.,[11] in which a physician based an opinion of causation on a substantially inaccurate or largely incomplete medical history. Dr. Campanioni examined the claimant, reviewed her pre- and post-injury medical records, summarized them accurately, and properly exercised a physician's judgment when interpreting them. His testimony and utilization review decisions provided substantial evidence to support the denial of housekeeping services, a whirlpool, and the 2006 surgery.

Noting that Dr. McCarthy "wanted nothing to do with the surgery performed by Dr. Boyer," the ALJ rejected his deposition testimony in favor of Dr. Companioni's opinions regarding causation. Contrary to what the claimant implies, Dr. Companioni did not state that she had degenerative disc disease at L 2-3 or L 3-4 as of 1992. He found it clear from her medical history that she had a significant degenerative condition dating to 1981. He considered it to be the source of the pre-existing changes at L 4-5 and subsequent changes at L 2-3 and L 3-4. He also thought that L 3-4 surgery was not medically indicated. Regardless of whether diagnostics revealed no abnormalities at L 3-4 as of June 1993, the evidence permitted reasonable conclusions that the changes found a decade later resulted from an underlying degenerative condition; that

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[10] Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829 (Ky. 2008) (testimony of a treating physician is entitled to no particular weight).

[11] 132 S.W.3d 839 (Ky. 2004).

they would have occurred even without the 1992 injury and L 4-5 surgeries; and, in any event, that the L 3-4 surgery was not reasonably necessary.

Even settled workers' compensation awards are subject to the principles of the finality of judgments and establish the limits of the defendant's liability. At all relevant times, KRS 342.125 has provided, in pertinent part, as follows:

> Reopening shall not affect the previous order or award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen.

As a consequence, changes in income benefits may only be ordered from the date of the motion to reopen. A worker is entitled to any benefits paid before the employer files a motion to reopen in order to reduce the award, and an employer is not required to pay additional benefits for a period that occurs before the claimant files a motion to increase the award.

The ALJ did not err by refusing to award TTD. Although Dr. McCarthy testified that the claimant reached MMI from the 2002 and 2006 surgeries simultaneously in February 2007, he also testified that the usual recovery time from the surgery performed in 2002 was three months. The ALJ determined, however, that the claimant failed to prove a causal relationship between the 2006 surgery and the work-related injury for which the 2002 surgery was performed. The claimant filed her motion to reopen in September 2005, long after the period of TTD from the 2002 surgery expired. Thus, she was not entitled to TTD.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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