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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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 20, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000286-WC

BRENDA ROBINS — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-002039-WC
WORKERS' COMPENSATION BOARD NO. 02-64160

CLAIRE'S STORES, INC.;
HONORABLE IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Administrative Law Judge (ALJ) found in this post-settlement medical dispute and reopening that the claimant's right shoulder condition was work-related and the disputed treatment compensable. The ALJ found that her present neck condition resulted from age-related degenerative changes, which rendered the surgery and other related treatment and medication non-compensable, and found no bad faith in the employer's refusal to pay for the disputed expenses. The Workers' Compensation Board (Board) affirmed and the Court of Appeals affirmed the Board.

Appealing, the claimant argues that the Court of Appeals applied a standard of review that renders an appeal of factual findings an exercise in

futility. She also argues that the employer's medical evidence provided inadequate support for the findings in its favor. We disagree and affirm.

The claimant sought workers' compensation benefits for neck and right shoulder injuries and for a related psychological injury that resulted from her attempt to catch a computer that fell from a counter on August 6, 2002. Dr. Valencia began to treat her for complaints of neck pain shortly after the accident and prescribed physical therapy, various pain medications, and periodic injections. An MRI performed in March 2003 revealed a right rotator cuff tear. Dr. Vaughn performed a diskectomy and fusion at C 4-5 and C 5-6 in June 2003.

The parties settled the claim in November 2004 based on a lump sum that represented a 25% partial disability in exchange for the claimant's agreement to dismiss her injury claim "as to all issues except payment of all past, present and future medical expenses, including all outstanding medical bills to date which shall be paid by the Defendant/Employer and shall remain open per KRS 342." The settlement provided another lump sum for the claimant's agreement to dismiss her entire psychological claim with prejudice.

The claimant did not return to work after the settlement. She continued to receive medical treatment for complaints of neck pain and muscle spasms and also for complaints of right shoulder pain that caused numbness and weakness in her right hand. Drs. Valencia, Vaughan, and Cunningham oversaw her treatment.

The employer requested Dr. Gladstein to conduct a medical records review, which he performed in April 2008. He noted that the initial x-rays were normal, that a cervical spine MRI revealed some degenerative changes, but that the claimant did not "exhibit any focal neurologic deficit or signs of nerve root entrapment." Yet, Dr. Vaughan performed an anterior cervical diskectomy and fusion and "[a]s might be expected, the patient's symptoms did not improve significantly." Dr. Gladstein noted that the claimant's psychological and psychiatric evaluations showed elements of depression and somatization disorders, personality dysfunction, and symptom magnification. He opined that the 2002 injury probably caused a cervical strain and possibly a right shoulder strain and concluded that she had received excessive physical therapy and medical treatment, including an unnecessary surgery. He stated that continuing such treatment would only reinforce the concept that a serious pathology existed; that anodyne therapy[1] was unnecessary; and that any need for right shoulder surgery would result from degenerative changes rather than the work-related injury. He thought that the claimant could be followed by her family physician at the present time; that she "should be well versed in a home exercise program;" and that "her care should be supportive at best." Noting her six-year history of chronic pain complaints, he stated that she should "avoid

[1] An anodyne is "[a] compound less potent than an anesthetic that is capable of relieving pain." STEDMAN'S MEDICAL DICTIONARY 96 (28TH ed. 2006). Opium, morphine, and codeine are among the anodyne compounds. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 98 (24th ed. 1965).

addicting analgesics," which he considered not to be in her best medical interest.

Having received Dr. Gladstein's report, the employer filed the first of the medical disputes and motions to reopen that are presently at issue in August 2008. The motion contested liability for all unpaid medical expenses as well as for any future medical expenses for the 2002 injury. The matter was assigned for further adjudication, after which the parties submitted proof.

The claimant testified when deposed in November 2008 that her previous neck and shoulder complaints continued. She stated that the neck pain improved initially after the surgery but eventually became constant and more severe. She stated that she saw Dr. Valencia on a monthly basis or as needed. Although he gave her a Kenalog shot every four to six weeks, she was not sure that it relieved her pain. He also prescribed Neurontin, Skelaxin, Hydrocodone, and Phenergan. The claimant testified that she continued to see Dr. Vaughan annually and that Dr. Cunningham treated her shoulder condition with an injection, which helped, but also recommended surgery.

The claimant testified at the hearing that Dr. Valencia had not been paid since June 2008. Hospital and radiologists' bills also had not been paid. She denied experiencing any non-work-related accident or any injury except the 2002 injury presently at issue.

Dr. Muffly examined the claimant in May 2004 and performed an independent medical evaluation (IME) on her behalf in March 2009. The 2009 IME report indicates that he diagnosed chronic neck pain, which he attributed

to a progression of degenerative changes at the C6-7 level as a result of the fusion, and a right rotator cuff tear as verified by MRI testing performed in 2003 and 2007. He thought that she needed continued medical treatment; considered her medications, intermittent injections, and intermittent physical therapy to be appropriate treatment; and noted that Dr. Cunningham recommended arthroscopic surgery on her right shoulder.

Dr. Muffly testified when cross-examined by the employer that the claimant's cervical disc condition resulted from the combined effects of her 2002 injury and pre-existing arthritic changes that would worsen with age. He had not seen Dr. Vaughan's operative note and did not know whether the 2002 injury necessitated the cervical fusion or whether the claimant would have required the procedure had she not been injured. He stated that he thought the shoulder problem had resolved when he examined the claimant in 2004 and related the changes evident on the 2007 MRI to the natural aging process.

Dr. Muffly testified on direct examination that the 2002 injury exacerbated the pre-existing degenerative changes in the claimant's neck and shoulders, causing them to be disabling. He thought that her neck pain needed to be monitored by a physician and that it required intermittent medications as well as physical therapy and/or a shot during "a bad spell." He stated that he considered bi- or tri-monthly visits to Dr. Valencia to be more appropriate than monthly visits.

Dr. Travis performed an IME for the employer in December 2008. He attributed the cervical fusion to a natural degenerative process, stressing that

the operative report failed to mention any significant soft disc extrusion that one would relate to an acute injury. He noted that the fusion was solid; that nothing in the post-surgical diagnostic tests or neurological portion of his examination explained the continued neck pain; and that the several Waddell signs he observed during the physical examination were indicators of symptom magnification. He recommended continued cervical traction and home exercise and also recommended that the claimant "should be completely weaned from opiods."[2]

Dr. Travis testified when deposed that among the claimant's current medications were Hydrocodone every six hours, Skelaxin twice a day, a 5% Lidoderm patch every 12 hours, Neurontin twice a day, and Wellbutrin once a day. He stated that she had a pre-existing cervical spine condition but that it appeared to have been asymptomatic until the 2002 injury. He thought that her initial neck pain probably resulted from the injury but saw no cause for her continued pain complaints.

A November 2008 affidavit from Dr. Valencia stated that he had treated the claimant for her work-related injuries and stressed that the treatment was both reasonable and necessary for their cure and/or relief. A February 2009 affidavit from Dr. Vaughan stated that he had treated the claimant for her work-related injuries, most recently in December 2008. He stated that the

---

[2] Opium, opium derivatives, and drugs with similar effects are classified as narcotics, *i.e.*, drugs with potent analgesic effects, significant mood and behavioral alteration, and the potential for dependence and tolerance. See STEDMAN'S MEDICAL DICTIONARY 1281 (28TH ed. 2006).

treatment was both reasonable and necessary for their cure and/or relief and that her injuries required continued treatment for the foreseeable future.

The employer claimed to have paid nearly $48,000 in medical expenses as of January 27, 2009. The issues presented for a decision included the cause of the claimant's conditions; the reasonableness and necessity of any unpaid medical expenses related to the August 2002 injury; and whether the employer showed bad faith in refusing to pay certain medical expenses.

The ALJ found that the claimant's shoulder condition was work-related and warranted further treatment by an orthopedic surgeon. Relying on Drs. Travis and Gladstein and the absence of any neurological deficits, the ALJ concluded that the work-related neck injury was only a strain or sprain; that the surgery and present medical treatment were for non-work-related degenerative changes, which were non-compensable; and that the employer was not liable for Hydrocodone, Zanaflex, Neurontin, and Phenergan. Finally, the ALJ rejected the claimant's assertion of bad faith, which she based on the refusal to pay for further treatment that appeared to the employer to be non-productive and/or unrelated to the 2002 injury. The ALJ noted that the employer remained free at reopening to question causation and work-relatedness with respect to the claimant's ongoing medical care because the parties settled the initial claim.[3] Having found that there was evidence the rotator cuff tear had healed at one point and that the surgery and other

[3] KRS 342.125(7) provides that "no statement contained in the [approved settlement] agreement . . . shall be considered by the [ALJ] as an admission against the interests of any party" at reopening.

disputed expenses were unreasonable and unnecessary for treating the cervical strain or sprain, the ALJ found no act of bad faith by the employer.

The claimant raises two arguments on appeal. First, she takes issue with the standard set forth in *Western Baptist Hospital v. Kelly*,[4] which the Court of Appeals relied upon to reaffirm the ALJ's decision. She complains that the *Western Baptist* standard renders judicial review of the administrative decision in a workers' compensation case an exercise in futility. Second, she acknowledges the ALJ's role as fact-finder but takes issue with several of the ALJ's interpretations of the medical evidence.

I. STANDARD OF REVIEW.

In a post-settlement medical reopening, the worker has the burden to prove causation and the employer has the burden to prove that the contested treatment was unreasonable and/or unnecessary for a work-related injury.[5] The ALJ determined that the claimant sustained a work-related supraspinatus tendon defect or a rotator cuff tear, which warranted further medical treatment, but that the work-related neck injury amounted to no more than a cervical strain or strain, which required no further treatment. The ALJ also found that the surgery, continued medications, and other treatment for the claimant's neck condition were not compensable because they addressed non-work-related degenerative changes rather than the 2002 injury. The ALJ

---

[4] 827 S.W.2d 685 (Ky. 1992).

[5] *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. App. 1997).

concluded that the employer committed no act of bad faith in refusing payment.

KRS 342.285 designates the ALJ as the fact-finder. It prohibits the Board from re-weighing the evidence but permits the Board to reverse an ALJ's decision on a number of grounds, such as that it is contrary to Chapter 342, clearly erroneous under the evidence, or arbitrary or capricious. The claimant acknowledges that KRS 342.285 gives the ALJ the sole discretion to determine the quality, character, and substance of evidence;[6] to believe or disbelieve various parts of the evidence;[7] and to choose among the reasonable inferences to be drawn from testimony.[8] Despite her argument to the contrary, neither Chapter 342 nor the regulations entitles a treating physician's opinions to any particular weight, and KRS 342.315(2) evinces the intent not to afford them particular weight.[9]

The claimant's burden on appeal was to show that the ALJ's decision was arbitrary, unreasonable, or otherwise erroneous as a matter of law.[10] She could do so by showing that the ALJ misunderstood the evidence or misapplied the law. She could also do so by showing that overwhelming favorable evidence

---

[6] *See Transportation Cabinet, Department of Highways v. Poe*, 69 S.W.3d 60, 62 (Ky. 2001); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

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

[8] *Jackson v. General Refractories, Co.*, 581 S.W.2d 10 (Ky. 1979); *Blair Fork Coal Co. v. Blankenship*, 416 S.W.2d 716 (Ky. 1967).

[9] *Sweeney v. King's Daughters Medical Center*, 260 S.W.3d 829 (Ky. 2008); *Wells v. Morris*, 698 S.W.2d 321 (Ky. App. 1985).

[10] *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986); *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission*, 379 S.W.2d 450 (Ky. 1964).

compelled favorable findings concerning the cause of her neck complaints and employer bad faith or by showing that no substantial evidence supported the findings for the employer regarding reasonableness and necessity.[11] Contrary to her assertion, nothing in *Western Baptist Hospital v. Kelly*[12] changed that standard or denies a party a meaningful avenue to appeal an arbitrary decision.

In *Kelly* the Board reversed a finding that the worker failed to meet her burden of proving causation. The Board explained that the evidence compelled a decision in her favor because her medical evidence was uncontradicted and there was no substantial evidence that her injury was not work-related. Thus, the ALJ's finding was arbitrary. The Court of Appeals affirmed, after which the employer appealed yet again to the Supreme Court. Also affirming, the Supreme Court reminded the employer of the longstanding principle that an appellate court's function is to decide legal issues and not to re-interpret or re-weigh the evidence.

II. CONCLUSIONS.

The claimant attempts to show that the Board and the Court of Appeals should have reversed the ALJ's decision, complaining that the record does not support a number of statements made in the ALJ's opinion. Having reviewed her arguments and the record, we find nothing to warrant reversal.

---

[11] *Special Fund v. Francis*, 708 S.W.2d at 643.

[12] 827 S.W.2d 685 (Ky. 1992),

The opinions of Drs. Gladstein and Travis provided substantial evidence that the claimant had no neurological deficits; that her work-related neck injury amounted to no more than a cervical strain, which required no further medical treatment; and that the surgery and continued treatment to her neck addressed non-work-related degenerative changes rather than the injury. Having found that the cervical strain required no further treatment and that the claimant's present neck pain was non-work-related, the ALJ's statements that she should "discontinue" rather than "avoid" addicting analgesics; that she should be weaned from Hydrocodone; that she "has had an exorbitant amount of medication;" and that Hydrocodone and Wellbutrin have antagonistic effects were merely gratuitous. Evidence that the claimant's neck pain could result from scar tissue and/or the fusion would not support a finding that pain medication was compensable because the ALJ found that the surgery, itself, was non-work-related. Finally, the opinions of Drs. Gladstein and Travis supported a conclusion that continued use of Hydrocodone was unproductive and, thus, unreasonable.

The claimant asserts that the ALJ erred by finding no bad faith because Dr. Gladstein's report failed to support the employer's decision to discontinue paying medical bills. We disagree.

The employer had a reasonable basis for refusing to pay for the disputed treatment voluntarily. Dr. Gladstein evaluated the claimant in 2008. He clearly thought that the work-related cervical strain required no further

treatment and that the surgery and disputed medical treatment related to non-work-related degenerative changes. He also thought that the claimant had received excessive treatment for her work-related injury. Although Dr. Gladstein diagnosed a possible shoulder strain, Dr. Muffly thought that the shoulder problem had resolved when he examined the claimant in May 2004, before the settlement.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT,
BRENDA ROBINS:

Johnnie Turner
Johnnie L. Turner, PSC
P.O. Box 351
114 South First Street
Harlan, KY 40831

COUNSEL FOR APPELLEE,
CLAIRE'S STORES, INC.:

Johnny Logan Griffith
Porter, Schmitt, Banks & Baldwin
327 Main Street
P.O. Drawer 1767
Paintsville, KY 41240-1767