

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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

2011-SC-000181-WC

JEFF WALTERS

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-001572-WC
WORKERS' COMPENSATION NO. 06-80957

ASHMARK, INC., D/B/A DONATO'S PIZZA;
DR. GLEN MCCLUNG, REAL PARTY IN INTEREST;
HONORABLE RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Administrative Law Judge (ALJ) found in this medical reopening that both a past and proposed surgery were reasonable and necessary treatment for the claimant's shoulder condition but that the condition did not result from his work-related injury. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the claimant argues that the ALJ violated 803 KAR 25:010, § 13(14) by addressing causation, which was not listed on the Benefit Review Conference (BRC) Memorandum as being a contested issue.

We affirm. The parties stipulated in this reopening of a settled claim that a work-related injury occurred, but they failed to stipulate the nature of the

injury. Thus, the ALJ acted within the scope of their dispute over whether a proposed surgery was “reasonably required for the cure and [relief] of the effects of the subject injury” by deciding not only whether the surgery was reasonable and necessary medical treatment but also by deciding the nature of the injury and whether the surgery was related to its effects.

The claimant injured his right shoulder while working for the defendant-employer on June 20, 2006, when he attempted to swing a trash bag into a refuse container. He reported the incident to his supervisor and sought medical treatment the following day. An MRI performed on June 24, 2006 revealed a right rotator cuff tear and various other shoulder abnormalities, including acromioclavicular joint arthritis.

Dr. Allen first saw the claimant on July 10, 2006. He diagnosed a significant rotator cuff tear and impingement of the AC joint for which he recommended corrective surgery. The request was submitted to Dr. Fadel for utilization review.

Dr. Fadel recommended approving the surgery on July 20, 2006. He noted that the MRI revealed degenerative changes but also revealed an intramuscular hematoma, which he viewed as being evidence of an acute injury. He concluded from the description of the June 20, 2006 incident that a pre-existing partial rotator cuff tear was completed when the claimant attempted to lift the trash bag at work.

Dr. Allen performed the surgery, after which Dr. Fadel reported again on August 2, 2006 that the rotator cuff tear was work-related. After submitting

the opinion, Dr. Fadel received and reviewed Dr. Allen's July 28, 2006 operative note. It stated that Dr. Allen performed a partial acromionectomy and acromioplasty and resection of the distal inferior clavicle with debridement of the acromioclavicular joint. He also debrided and repaired "a chronic rotator cuff tear with significant inflammation and chronic synovitis."

Dr. Fadel's third report, dated August 3, 2006, opined that the rotator cuff tear "clearly predated the work injury." He explained that the operative note referred to chronic conditions; did not mention a hematoma; and contained nothing to indicate that a portion of the tear was acute. He concluded that the work-related injury's contribution to the tear was "unclear" but appeared to be "minimal if any." The employer notified the claimant shortly thereafter that voluntary temporary total disability benefits and medical benefits would be terminated on August 10, 2006.

The claimant filed an application for benefits in September 2006. He alleged that the work-related incident caused either a rotator cuff tear or a worsening of a pre-existing tear, producing a rotator cuff defect, partial subscapular defect, biceps tendon subluxation, and degenerative changes of the glenohumeral joint. Moreover, surgery for the condition caused deltoid atrophy and subacromial roughness.

The employer relied on an independent medical evaluation by Dr. Moskal to deny that the work-related incident caused or contributed to causing the rotator cuff tear or any of the other abnormalities. Dr. Moskal reported that the only indications from the medical records that the June 20, 2006 incident

caused any harm were the claimant's complaints of pain and the pre-surgical MRI report, which noted a hemotoma involving the infraspinatus muscle. Dr. Moskal noted that, having received the operative report, Dr. Fadel no longer viewed the hematoma as indicating that the rotator cuff tear was acute. Dr. Moskal agreed the hematoma did not indicate an acute tear. He opined that the medical records contained no evidence of a shoulder injury and that the pre-surgical MRI revealed only a chronic, longstanding tear. He also opined that atrophy of the supraspinatus and infraspinatus muscles existed before the surgery and that the atrophy of the deltoid muscle and irregular surface of the acromion resulted from the surgery.

The parties agreed to settle the claim based on the 5% permanent impairment rating assigned by Dr. Allen. The agreement did not include a waiver or buyout of past or future medical benefits or the right to reopen. An ALJ approved the agreement in March 2008.

The present dispute concerns Dr. McClung's recommendation that additional shoulder surgery be performed. Having reviewed the request, Dr. Moskal opined that the proposed surgery was neither reasonable nor necessary and that it was unrelated to the June 20, 2006 injury. The employer then filed this medical fee dispute and motion to reopen in which it contested the work-relatedness as well as the reasonableness and necessity of the procedure.

The Chief ALJ granted the motion to the extent of ordering additional proof to be taken and joined Dr. McClung as a party. According to the November 7, 2009 BRC Memorandum, the parties stipulated that the claimant

sustained a work-related injury on June 20, 2006. They listed the contested issues as follows: "Is the surgery proposed by Dr. McClung reasonably required for the cure and [relief] of the effects of the subject injury?" The Memorandum contains no stipulation concerning the nature of the injury.

The parties deposed Dr. McClung. When asked whether the claimant's present condition resulted from lifting a garbage bag at work, Dr. McClung responded that his only information in that regard was what the claimant told him. Dr. Moskal testified when deposed subsequently that the rotator cuff tear did not result from the June 20, 2006 injury.

The ALJ found that the proposed surgery was reasonable and necessary medical treatment for the rotator cuff tear and its effects but that the condition was not work-related because it did not result from the June 20, 2006 injury. A petition for reconsideration by the claimant raised three arguments. He argued that the March 2008 settlement established conclusively that a causal relationship existed between the injury and his shoulder condition as well as the initial surgery. Moreover, the BRC Memorandum in the reopening did not list the causal relationship as being contested as required by KAR 25:010, § 13(14). He concluded that the ALJ violated his procedural due process rights by denying benefits based on an issue of which he was not notified.

The Board affirmed, convinced that the ALJ did not err by considering causation and that substantial evidence supported the ALJ's decision.

Addressing the March 2008 settlement, the Board determined that KRS 342.125(7) entitled the employer to raise any issue at reopening that it could

have raised in the initial litigation.¹ Addressing 803 KAR 25:010, § 13(14), the Board noted that the employer had contested work-relatedness since shortly after the initial surgery was performed and raised it again as a ground for reopening. Convinced the claimant understood that the contested issues included causation, the Board noted his failure to object to the employer's brief to the ALJ, which included a causation argument.

The sole issue the claimant presented to the Court of Appeals was: "Whether an Administrative Law Judge can rule on an issue that was not listed as contested as required by 803 KAR 25:010, § 13(14)." Affirming, the court determined that the ALJ did not exceed the scope of the issues stipulated in the BRC Memorandum. This appeal followed.

The claimant argues that the decisions below disregard 803 KAR 25:010, § 13(14) and defeat the purpose of requiring parties to stipulate the contested issues. He predicts that dire consequences will result from what he characterizes as a ruling that causation is subsumed within the issue of reasonableness and necessity. Although his brief to the Court of Appeals failed to include a procedural due process argument, he also argues that the failure to list causation as an issue deprived him of notice that it was an issue. We disagree with the first argument, which renders the unpreserved argument moot.

¹ *Whittaker v. Hurst*, 39 S.W.3d 819, 821 (Ky. 2001); *Beale v. Faultless Hardware*, 837 S.W.2d 893, 896 (Ky. 1992).

803 KAR 25:010, §§ 13(1), (2), and (7) explain that the BRC conference is an informal proceeding of which no transcript is made, the purpose of which is to expedite the processing of a claim and, if possible, avoid the need for a hearing. Other subsections of the regulation direct the parties to attempt to resolve controversies and disputed issues; narrow and define disputed issues; and facilitate a prompt settlement. They direct the ALJ to prepare a stipulation of all contested and uncontested issues, which the parties and the ALJ sign, *i.e.*, the BRC Memorandum. Subsection 14 provides, "Only contested issues shall be the subject of further proceedings."

Although the claimant is correct that 803 KAR 25:010, § 13 precludes an ALJ from deciding issues not listed as being contested, the ALJ did not exceed the scope of the issues listed in the BRC Memorandum by deciding causation as well as reasonableness and necessity. This case concerns the employer's reopening of a settled claim in order to contest both reasonableness/necessity and causation with respect to a proposed surgery. Although the parties stipulated to the existence of a work-related injury, they failed to stipulate to its nature. Thus, faced with the task of deciding whether the surgery was "reasonably required ... [to treat] ... the effects of the subject injury," the ALJ was required to decide not only whether the surgery was reasonable and necessary medical treatment but also to decide the nature of the injury and whether the surgery treated its effects.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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