

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER
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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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-000188-WC

MCDONALD'S

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-000465-WC
WORKERS' COMPENSATION NO. 90-33559

DEBRA PETTY;
HONORABLE LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Court of Appeals affirmed a decision in which the Workers' Compensation Board found that an Administrative Law Judge did not err by denying summarily the employer's motion to reopen and medical fee dispute.

At issue in this appeal is the preclusive effect of the final decision in a previous medical reopening in which the employer asserted that ongoing medical treatment to the claimant's neck and low back was not directly related to the effects of the work-related injury to her neck and low back but to the natural aging process. Also at issue is whether the ALJ erred by failing to address the compensability of the specific expenses the employer contested.

We affirm. 803 KAR 25:012, § 1(6)(c) permits the summary dismissal of a motion to reopen that fails to make the requisite *prima facie* showing. The employer's 2008 motion failed to do so. The final decision in the 2007 reopening precluded re-litigation of whether a post-award improvement in the cervical and lumbar conditions found to be caused by the injury rendered them non-disabling and, hence, any future treatment unnecessary for the injury's effects. No medical evidence submitted with the motion addressed the specific expenses at issue.

The claimant slipped and fell at work on August 30, 1990, injuring her low back, neck, left arm, both legs, and right hand. She obtained chiropractic treatment initially and was later referred to Dr. Twyman, a neurologist. He began to treat her for complaints of neck and low back pain in December 1990.

The claimant's symptoms persisted when her workers' compensation claim was heard. As listed in the 1993 decision, the contested issues included the extent and duration of disability but did not include causation. Dr. Twyman opined that the claimant suffered from chronic pain syndrome and associated fibromyalgia. He limited her to lifting 10 pounds and assigned various other work restrictions. Dr. Templin assigned a 20% permanent impairment rating of which he attributed a 6% rating to a herniated cervical disc and the remainder to limitations on lumbar, cervical, and left shoulder range of motion. Dr. Keeting, the claimant's chiropractor, assigned a 46% rating based on her cervical, lumbar, and radiating pain complaints as well as headaches.

Experts testifying for the employer had treated the claimant shortly after her injury but did not examine her thereafter. They thought that she could return to work. Although they did not assign a permanent impairment rating, they did not assert that her conditions failed to warrant such a rating. The ALJ determined ultimately that the neck and back conditions produced a 50% occupational disability and awarded income and medical benefits with the exception of chiropractic treatment rendered after February 1993.

In 2007 the employer filed a motion to reopen and medical dispute. The motion did not contest specific medical bills or a specific type of treatment but sought relief from all liability for the claimant's future medical care. The employer maintained that the work-related neck and back conditions required no further medical treatment and that her current physical and mental conditions were not directly related to her 1990 injury but to the normal aging process and non-work-related emotional factors. The employer supported the motion with an independent medical report from Dr. Kriss dated January 8, 2007; a report from Dr. Ruth dated January 29, 2007; and a utilization review report from Dr. Goldberg dated March 19, 2007. The motion was granted to the extent that the parties were permitted to submit further proof.

The evidence indicated that Dr. Twyman continued to see the claimant about every six months for chronic neck and low back pain that he attributed directly to the work-related injury. He also treated her for anxiety and depression, migraine and tension headaches, and gastroesophageal reflux disease, all of which he attributed indirectly to the injury.

Dr. Kriss opined that the cervical disc herniation noted in the initial litigation had resolved completely and characterized the low back injury as being a simple musculoskeletal strain or contusion, which no longer required treatment. He attributed the neck and low back conditions for which Dr. Twyman treated the claimant presently to the natural aging process rather than to the 1990 injury and attributed the severity and persistence of her symptoms largely to her psychiatric condition.

Dr. Ruth diagnosed various psychiatric conditions but opined that they were not caused by the claimant's physical complaints or her work-related injury.

Dr. Goldberg opined that there was no objective evidence to support any ongoing treatment for the 1990 accident. He acknowledged that follow-up medical visits might be medically necessary but stated that they would not be directly related to the accident but to the natural aging process and other emotional factors.

The ALJ framed the issue at reopening as being whether the claimant continued to be disabled by the effects of her work-related injury and, thus, entitled to ongoing medical treatment. The ALJ relied on the employer's experts to find that her present condition was not related to the 1990 injury.

Reversing the ALJ, the Board reasoned that KRS 342.020(1) entitled an injured worker to such medical treatment for the effects of an injury "as may reasonably be required at the time of the injury and thereafter during disability," but KRS 342.125(3) and (8) prohibited a reopening of the claimant's

award in 2007 based on a change of disability. The Board noted, however, that its decision did not preclude the employer from contesting “specific medical expenses incurred in the future on work-relatedness or reasonableness grounds.” No appeal was taken and the reopening was dismissed on remand.

The employer filed the present motion to reopen and medical dispute in November 2008 in order to contest a preauthorization request for TENS unit supplies. The employer’s Form 112 denied liability based on Dr. Kriss’s January 8, 2007 report, asserting that the treatment was not work-related.

A supplemental medical dispute filed by the employer in December 2008 was considered together with the November 2008 motion. It contested, among other things, various charges at Rite Aid Pharmacy for prescriptions by Dr. Twyman; a statement for treatment that Dr. Twyman provided on October 31, 2008; and “all prospective care” for the claimant’s neck and back conditions. The employer asserted that the contested treatment was not work-related as demonstrated by the 2007 medical reports from Drs. Kriss, Ruth, and Goldman, copies of which were attached to the motion.

Dismissing the motion summarily without authorizing additional proof, the ALJ reasoned that nothing the employer filed after the Board’s decision in the previous reopening permitted a different result. The employer appealed, but the Board and the Court of Appeals found no error concerning the matters at issue presently. We agree that the ALJ acted properly by dismissing the

motion at the initial step of the reopening process as permitted by 803 KAR 25:012, § 1(6)(c).¹

The employer argues that the Board's decision in the 2007 reopening addressed whether the claimant's condition had changed rather than whether the ongoing treatment was unreasonable and unnecessary for the effects of the 1990 injury. It maintains that the decision did not preclude the latter issue from being considered in 2008. We disagree. The employer's challenge to the compensability of *all* future treatment of the claimant's neck and lower back conditions exceeds the scope of KRS 342.125(3).

An ALJ determined in 1993 that the cervical and lumbar conditions caused by the claimant's injury produced a permanent partial disability. As explained in the Board's decision in the 2007 reopening, KRS 342.125(3) and (8) barred that finding from being amended in a reopening filed more than four years after the original award or order granting or denying benefits or more than four years after December 12, 1996, a period that expired well before 2007. The Board determined as a consequence that KRS 342.125(3) and (8) barred a dispute over whether a post-award improvement in the claimant's work-related conditions caused her disability from the conditions to cease and, thus, her eligibility for future medical benefits to cease. No appeal was taken.

The ALJ did not err by dismissing the 2008 motion to the extent that it challenged all future medical treatment for the effects of the 1990 injury

¹ See *Colwell v. Dresser Instrument Division*, 217 S.W.3d 213, 216 (Ky. 2006); *Stambaugh v. Cedar Creek Mining Co.*, 488 S.W.2d 681 (Ky. 1972).

because the employer failed to show a substantial possibility of success on the merits. The final decision in the 2007 reopening barred the parties from re-litigating in a subsequent reopening whether all future treatment of the claimant's neck and low back conditions was non-compensable on the grounds that no further treatment for the effects of the injury was reasonable or necessary or that her present neck and low back conditions were non-work-related.

As stated in the Board's decision in the 2007 reopening, KRS 342.125(3) permitted the employer to contest specific future medical expenses at any time based on work-relatedness or reasonableness and necessity. The ALJ did not err by dismissing the 2008 motion with respect to the specific expenses at issue, however, because the employer failed to show a substantial possibility of success on the merits. The motion relied solely on the medical reports submitted in 2007, which indicated that the effects of the 1990 injury needed no further medical treatment and that the claimant's present neck and low back complaints, which were essentially the same as those being treated in 1993, were non-work-related. The employer failed to include any contemporaneous medical evidence that addressed the pre-authorization request for TENS unit supplies; the compensability of the October 31, 2008 visit to Dr. Twyman; or the compensability of the Rite Aid prescriptions.²

² The Board reversed with respect to statements for services provided on January 17, 2008 and May 30, 2008 and instructed the ALJ to reopen proof on the narrow issue of whether they were first submitted more than 45 days after the date the treatment was provided and, if so, whether there were reasonable grounds for the untimely submission. The Board also determined that KRS 342.125(3) and (8) barred any

Although Dr. Goldberg's report recommended against authorizing certain medications, the employer's pleadings included no expert opinion that showed any of the disputed Rite Aid prescriptions involved the same type of medication but under a different name.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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charges relating to ongoing treatment for depression and anxiety because the conditions were not included as part of the initial claim and the claimant did not allege a work-related disability from the conditions in a timely reopening. Those portions of the decision are not at issue.