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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: JUNE 21, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000465-WC

LOGAN'S ROADHOUSE, INC. AND
GALLAGHER GASSETT SERVICES, INC. APPELLANTS

ON APPEAL FROM COURT OF APPEALS
V. CASE NO. 2010-CA-001320-WC
WORKERS' COMPENSATION NO. 02-63505

MICHAEL SCOTT COOVERT;
HONORABLE JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

The Workers' Compensation Board found no abuse of discretion and affirmed the summary denial of the claimant's motion to reopen, noting among other things that he failed to support the motion with a *prima facie* showing of the alleged fraud. The employer appeals the Court of Appeals' decision to reverse and remand the claim to the Administrative Law Judge (ALJ) "to make essential findings of fact . . . as to the merits of Coovert's claim of fraud."

We reverse because nothing required the ALJ to make essential findings of fact concerning the merits of Coovert's claim of fraud. Not only did he fail to make an adequate *prima facie* showing of fraud to support reopening his claim,

he failed to request additional findings of fact following the order denying his motion to reopen.

The claimant sought benefits for work-related back injuries that occurred on November 8, 2002 and May 7, 2003. He returned to work after both injuries at the same or a greater wage. On October 28, 2004 an ALJ approved the parties' agreement to "[s]ettle his claim for TTD and PPD benefits for consideration of $20,000.00." The parties based the lump sum on the 13% permanent impairment rating that Dr. Fishbein assigned after the claimant recovered from lumbar surgery performed by Dr. McDonald. The agreement did not include a waiver of future medical benefits.

The claimant continued to be treated for low back problems after the settlement. He experienced severe back pain that radiated into his leg one morning as he sat up in bed. After an MRI performed in 2007 revealed a large recurrent disc herniation at L5-S1, which was new, he underwent a second lumbar surgery by Dr. McDonald on December 7, 2007 for which the employer paid voluntarily. The claimant did not move to reopen in order to seek an award of additional TTD or permanent income benefits after the surgery.

The employer filed a motion to reopen and medical dispute on December 10, 2008 in order to contest reasonableness, necessity, and causation with respect to prospective medical treatment and a motion to join Neurosurgical Associates as a party.[1] An independent medical evaluation performed in July

[1] Neurosurgical Associates includes Dr. McDonald; Dr. Rayes-Prince, the claimant's current pain management specialist; and Dr. Richardson, his previous pain management specialist.

2008 by Dr. Graham formed the basis for the motion. Dr. Graham opined that the new disc protrusion noted in 2007 did not result from the May 2003 injury; that no objective evidence supported the need for ongoing treatment; that no functional or neurological deficits supported the claimant's subjective pain complaints; that the chronic use of narcotics for subjective pain complaints was a cause for concern and that the claimant's current complaints were unrelated to the work-related injuries or their effects.

The claimant responded on January 26, 2009 with an affidavit stating that he underwent the second surgery after his back condition worsened considerably in 2007. He stated that his employer paid for the surgery and sent him one TTD check, but the adjuster told him he must return it because he was not entitled to any additional TTD benefits and later sent him to several medical evaluations. He stated that Dr. McDonald continued to treat him for low back pain that radiated into his left leg; referred him to pain management; ordered a myelogram, which had yet to be performed; and, depending on the results, planned to implant a nerve stimulator or perform a third surgery.

The motion was assigned to the Frankfort motion docket, after which the Acting Chief ALJ determined summarily in an order dated February 5, 2009 that the motion made a *prima facie* case for reopening and that the contested expenses were unreasonable and/or unnecessary for treatment of the work-related condition. A subsequent order granted the claimant's petition for

reconsideration; set aside the February 5, 2009 order; and referred the case for assignment to an ALJ for further proof-taking and a decision on the merits.[2]

In June 2009 the employer filed a supplemental medical fee dispute and utilization review opinion by Dr. Buck in order to contest reasonableness, necessity, and causation with respect to Dr. McDonald's request for pre-authorization to implant a spinal cord stimulator.

The claimant testified when deposed and at the hearing that the 2007 surgery helped his back condition but that he continued to have considerable back pain. He repeated his previous statements that the employer's carrier paid for the December 2007 surgery and sent him one TTD check, which the adjuster told him he must return because he was not entitled to any additional TTD benefits. He stated that he repaid the initial TTD check, which he had cashed, and destroyed the second check.

The memorandum of the benefit review conference (BRC) that was held after proof time closed indicates that the parties listed the contested issues as including the claimant's entitlement to TTD related to the December 5, 2007 surgery as well as reasonableness, necessity, and causation with respect to the narcotic medications, injections, and a spinal cord stimulator.

The employer argued that it contested ongoing treatment at the L5-S1 level "in connection with a re-herniation suffered in early September 2007 on the basis of causation/an intervening injury." Having attacked the claimant's credibility by pointing to contradictory evidence in the record, the employer

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[2] *See* 803 KAR 25:012, § 1(6)(c).

relied on testimony from Drs. Graham and Ballard to assert that the re-herniation in 2007 did not result from the effects of the work-related injuries but from some intervening cause. The employer concluded that the present symptoms resulted from the re-herniation, which was non-work-related, rather than from the work-related injuries.

The claimant argued that the surgery and his present symptoms and treatment resulted from his work-related injuries; that the insurance adjuster lied about his entitlement to TTD; and that he was entitled to TTD benefits from December 5, 2007 until September 16, 2008.

The ALJ rendered a decision in September 2009 that relieved the employer of responsibility for the contested narcotic pain medications and spinal cord stimulator but ordered the employer to pay for a weaning program from narcotics as well as for the contested epidural steroid injections. Denying the claimant's request for TTD benefits with respect to the 2007 surgery, the ALJ noted that the BRC memorandum listed it as being contested but that the record contained no pleadings that raised the issue.

The claimant filed a petition for reconsideration in which he complained that the ALJ failed to decide his entitlement to TTD benefits. Denying the petition, the ALJ explained that the claimant should have raised the matter and requested payment by filing a motion to reopen rather than raising it for the first time at the BRC, which was held after the proof was closed. The ALJ noted that although the claimant placed his entitlement to TTD with respect to

the 2007 surgery on the BRC memorandum, it was not a contested issue in the medical fee dispute.

The claimant did not appeal. Instead, he filed a motion to reopen in which he alleged fraud.[3] He attached to the motion a copy of the parties' settlement agreement as well as an affidavit in which he stated that Kimberly Russell, an adjuster from Gallagher Bassett Services, Inc., contacted him and informed him falsely that he was not entitled to receive TTD benefits while recuperating from the 2007 surgery; that he returned a check for TTD benefits to Gallagher Bassett; that he did not contact an attorney because he assumed Kimberly Russell was telling the truth; that he would have filed a motion to reopen had he known the truth; and that he learned subsequently that he was entitled to TTD.

Objecting to the motion, the employer argued that the claimant's attempt to raise the issue in the medical fee dispute rendered it barred by the doctrine of *res judicata* or, in the alternative, that his failure to plead the issue during the medical dispute rendered the issue barred by the principle of claim preclusion. The employer denied that any TTD was paid or sent to the claimant with respect to the 2007 surgery; asserted that the settlement extinguished his right to future TTD;[4] and argued that his allegation of fraud

[3] KRS 342.125(1)(a).

[4] The employer explained when responding to the claimant's subsequent petition for review in the Court of Appeals that the adjuster did not make a false statement because the $20,000.00 lump sum included adequate consideration inasmuch as the present value of a 13% permanent partial disability was $10, 357.35, which left $9,642.65 as consideration for any future income benefits.

was no more than an attempt to circumvent the limitations periods for reopening or filing a claim.

The ALJ denied the motion summarily, after which the claimant appealed without filing a petition for reconsideration or requesting any specific findings. He argued on appeal that his motion alleged sufficient grounds to justify a reopening based on fraud and requested an order remanding the case to the Department of Workers' Claims to be assigned to an ALJ for the taking of further proof and a decision on the merits.

The Board found no abuse of the ALJ's discretion and affirmed, having determined that the claimant failed to make an adequate *prima facie* showing of fraud. The Board also determined that the employer's motion and medical dispute failed to place the issue of TTD before the ALJ.[5] Moreover, the doctrine of finality precluded the claimant's present motion to reopen based on fraud inasmuch as the alleged fraud was known to him during the pendency of the medical dispute; the cause of the December 2007 surgery was an issue in the dispute; yet he failed to file a motion to reopen at that time.

The claimant raised only one argument in his petition for review – whether his motion made an adequate *prima facie* showing of fraud. The Court of Appeals failed to address the argument, however, and reversed on the

[5] *See Bartee v. University Medical Center*, 244 S.W.3d 91 (Ky. 2008).

ground that the ALJ erred by failing "to make essential findings of fact . . . as to the merits of [the] claim of fraud."[6]

Appealing, the employer argues that the Court of Appeals erred by reversing and remanding to the ALJ for additional findings because the claimant failed to petition for reconsideration or request any findings. The employer bases the argument on *Eaton Axle Corporation v. Nally* in which the court determined that a party's failure to request the fact-finder to make any essential findings of fact precludes reversal on appeal.[7] We agree with the employer's argument. We also conclude that the ALJ did not abuse his discretion by denying the claimant's motion to reopen and, thus, did not err by failing to make findings of fact concerning the fraud allegation.

Stambaugh v. Cedar Creek Mining Co.[8] determined that reopening under KRS 342.125 is a two-step process in which the movant must first file a motion to reopen that makes a reasonable *prima facie* showing of the existence of a substantial possibility of being able to prove one of the grounds for reopening. Only if the motion is granted will the opponent be required to incur the expense of further litigation. A decision to grant or deny a motion to reopen is reviewed for an abuse of discretion,[9] in other words, for a determination of whether the

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[6] *White v. Great Clips*, 259 S.W.3d 501, 504 (Ky. App. 2008) (citing *Shields v. Pittsburgh and Midway Coal Mining Co.*, 634 S.W.2d 440, 444 (Ky. App. 1982)).

[7] 688 S.W.2d 334 (Ky. 1985).

[8] 488 S.W.2d 681 (Ky. 1972).

[9] *Hodges v. Sager Corp.*, 182 S.W.3d 497, 500 (Ky. 2005).

decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[10]

We agree with the Board that the ALJ did not abuse his discretion by denying the claimant's motion to reopen and conclude, as a consequence, that nothing required the ALJ to make essential findings of fact concerning the merits of the claim of fraud. Having alleged fraud, the claimant had the initial burden to make a *prima facie* showing that the claims adjuster made a false representation knowingly or recklessly in order to induce him to take some action; that he acted in reliance on that representation; and that he suffered injury as a consequence.[11] He failed to make the requisite showing because although his motion alleged that the claims adjuster told him falsely that he was not entitled to TTD, it included nothing to show that he would be able to prove she was not acting in good faith.

The decision of the Court of Appeals is reversed.

All sitting. All concur.

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[10] *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999).

[11] *Yeager v. McLellan*, 177 S.W.3d 807, 809-10 (Ky. 2005); *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357, 359 (Ky. App. 1978).

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