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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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 24, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000834-WC

C & T OF HAZARD — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-001669-WC
WORKERS' COMPENSATION NO. 99-93979

CHANTELLA STOLLINGS;
DR. KATHERINE BALLARD,
THE PAIN TREATMENT CENTER;
HONORABLE R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, C & T of Hazard, appeals from a decision of the Court of Appeals which affirmed the denial of a motion to reopen an award to resolve a medical fee dispute. C & T argues that the Court of Appeals and the Workers' Compensation Board erred by concluding that the Administrative Law Judge's ("ALJ") misapplication of the burden of proof in this matter was harmless error. For the reasons set forth below, we affirm the Court of Appeals, albeit it on different grounds.

Appellee, Chantella Stollings, suffered a work-related back injury in 1999 while working for C & T. As a result she was awarded permanent partial

disability benefits and future medical benefits. In 2008, Stollings began treatment with Dr. Katherine Ballard for pain management. Dr. Ballard prescribed the daily use of the opioid analgesics Oxycontin, Baclofen, and Neurontin.

Dr. Henry Tutt performed an independent medical examination of Stollings on October 19, 2009. He concluded that Dr. Ballard's pain management treatment of Stollings was neither work-related nor reasonably necessary. Based on Dr. Tutt's findings, C & T filed a motion to reopen Stollings's award.

In an opinion and order entered on February 4, 2011, the ALJ found that C & T failed to carry its burden of proving that Stollings's medical treatment was unreasonable and unrelated to the work-related injury. Specifically the ALJ stated:

> The issues for determination on reopening are the reasonableness, necessity, and relatedness of [Stolling's] ongoing medical treatment with Dr. Ballard. This issue encompasses the reasonableness, necessity, and relatedness of the prescription medications Actiq, OxyContin, and Topamax, [sic] as well and whether or not [Stollings] is receiving treatment for her work-related back injury or for the degenerative joint disease not casually related to her accident.
>
> [C & T] has the burden of proving that the contested medical spaces [sic] and/or proposed medical treatment is unreasonable, unnecessary or unrelated to the February 10, 1999 work-related back injury. *Mitee Enters v. Yates*, 865 S.W.2d 654 (Ky. 1993); *Phillip Morris Inc. v. Poynter*, 786 S.W.2d 124 (Ky. App. 1990).
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> . . .
>
> [T]he [ALJ] found [Stollings's] testimony about the relief she receives from the treatment to be highly persuasive and found the testimony of Dr. Ballard to be very persuasive. The [ALJ] did not find Dr. Tutt's opinions to be persuasive, and in fact, found his testimony that [Stollings] is in need of fusion surgery, but not in

> sufficient pain to warrant pain medications to be disingenuous and illogical, and therefore non-persuasive.
>
> Therefore, [C & T] shall be ordered to pay all medical expenses previously challenged by them pursuant to the Kentucky Worker's [sic] Compensation Medical Fee Schedule and further finds the medical treatment [Stollings] is receiving from Dr. Katherine Ballard to be reasonable, necessary, and related to her February 10, 1999, work-related low back injury.

A petition for reconsideration filed by C & T was denied by the ALJ.

C & T appealed to the Workers' Compensation Board. In a two to one decision, the Board affirmed the ALJ's order. However, all three of the Board Members were in agreement that the ALJ "erred in his opinion and order and in his order on reconsideration when he found the burden rests with [C & T] to demonstrate the challenged medical expenses were unrelated to the effects of the work injury in a post-award medical fee dispute setting." Instead the Board believed that the burden of proof to show the treatment is related to the work-related injury was upon Stollings. The majority believed that despite the error, there was sufficient evidence to support the ALJ's ultimate conclusion that the medical treatment was related to Stollings's work-related injury. The dissent believed that the appropriate remedy was to remand the matter to the ALJ for him to find facts and make a decision using the proper burden of proof. The Court of Appeals affirmed the Board's decision.

C & T now appeals arguing that if an ALJ places the burden of proof on the wrong party it is a reversible error. However, we need not address that particular argument because the ALJ did not err in placing the burden of proof on C & T.

"The party responsible for paying post-award medical expenses has the burden of contesting a particular expense by filing a timely motion to reopen and proving it to be non-compensable." *Crawford & Co. v. Wright*, 284 S.W.3d 136, 140 (Ky. 2009) (citing *Mitee Enterprises v. Yates*, 865 S.W.2d 654 (Ky.1993) (holding that the burden of contesting a post-award medical expense in a timely manner and proving that it is non-compensable is on the employer)). As stated in *Larson's Workers' Compensation Law,* §131.03[3][c], "the burden of proof of showing a change in condition is normally on the party, whether claimant or employer, asserting the change...". The burden is placed on the party moving to reopen because it is that party who is attempting to overturn a final award of workers' compensation and thus must present facts and reasons to support that party's position. It is not the responsibility of the party who is defending the original award to make the case for the party attacking it. Instead, the party who is defending the original award must only present evidence to rebut the other party's arguments.

The Board in finding that Stollings had the burden to prove that the medical expenses were work-related cited to *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. App. 1997). However, the only reference to the burden of proof in *Perkins* was the following sentence: "Since the fact-finder found in favor of Perkins who had the burden of proof, the standard of review on appeal is whether there was substantial evidence to support such a finding. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984)." We believe that this sentence did not indicate the claimant had the burden to

prove that his treatment is work-related on a motion to reopen but instead was a recitation of the well-established standard of review as set forth in *Wolf Creek Collieries*. C & T also presents several unpublished opinions which indicate that the burden of proof is upon the claimant to show the medical expenses were work-related. However, we decline to consider those cases as persuasive. CR 76.28(4)(c). Thus, C & T had the burden of proof to show that Stolling's treatment was unreasonable and not work-related.

In this matter the ALJ clearly found that Stolling's treating physician, Dr. Ballard was credible, and that Dr. Tutt's opinion, which supported C & T's position was "disingenuous and illogical, and therefore non-persuasive." It is clear that C & T did not satisfy its burden of proof to reopen Stollings's award. A review of the record indicates that the ALJ's opinion is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998)(defining substantial evidence as "evidence of substance and consequence when taken alone or in light of all the evidence that is sufficient to induce conviction in the minds of reasonable men"); *see also Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993)(holding that the ALJ has sole authority to determine the quality, character, and substance of the evidence).

Thus, for the above stated reasons, we affirm the decision of the Court of Appeals.

All sitting. All concur.

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