

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-001746-WC

HOUSECALL MEDICAL RESOURCES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-63759

DORIS ANDERSON BROWN; HON. BRUCE
COWDEN, JR., ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE. Housecall Medical Resources (Housecall) seeks review of an opinion of the Workers' Compensation Board (Board) affirming a decision of the Administrative Law Judge (ALJ) which, among other things, determined that an August 2001 diskectomy operation performed on Doris Anderson Brown was a compensable, reasonable, and necessary medical procedure. Because approximately 20 months prior to the operation an Arbitrator had determined that the procedure was not reasonable

and necessary, Housecall contends that the doctrine of res judicata precludes a determination that the August 2001 diskectomy is compensable. For the reasons stated below, we affirm.

In 1997, Brown was working as a home health aide for Housecall. On September 23, 1997, she suffered a lower back injury while lifting a patient into a bathtub. Brown was taken off work and sent to physical therapy. During one of her physical therapy sessions she injured her neck and began having neck pain. Brown returned to work on light duty and was assigned to work in the office. On January 29, 1998, while putting away files, Brown lunged to prevent a file from falling off the top of a filing cabinet and sustained a second work-related back injury. Brown did not return to work after January 29, 1998.

On August 13, 1998, Brown filed an Application for Resolution of Injury Claim with the Department of Workers Claims. Brown eventually began treatment with Dr. John Gilbert. As treatment, among other things, Dr. Gilbert advised Brown that she needed various surgeries, beginning with a cervical diskectomy. In an opinion and award rendered April 30, 1999, the ALJ awarded Brown benefits based upon a 5% impairment rating. With regard to the recommended surgeries, the ALJ stated, "Although the parties have not requested a finding on

the reasonableness and necessity of the various proposed surgical procedures by Dr. Gilbert, those proposals should be submitted to utilization review pursuant to 803 KAR¹ 25:190."

Thereafter, the back surgery proposed by Dr. Gilbert was submitted for utilization review. Pursuant to the utilization review, Dr. Sherill Nunnelley concluded that the proposed surgery was not necessary or appropriate based upon the opinions of Dr. Steven Kiefer and Dr. Henry Tutt that there were no objective findings to warrant surgery. Brown was timely notified of the results of the utilization review.

Housecall thereafter filed a motion to reopen the case to resolve the medical expense dispute concerning the proposed back surgery. The dispute was assigned to Arbitrator Bonnie Kittinger. On January 4, 2000, Arbitrator Kittinger issued an order determining that there had not been a showing of reasonableness or necessity of the surgeries proposed by Dr. Gilbert.

Approximately 20 months following the Arbitrator's decision, on August 28, 2001, Brown underwent cervical spine fusion surgery as proposed by Dr. Gilbert. The surgery was paid for by an alternate source. Following the surgery, Dr. Gilbert assessed a 27% impairment rating and concluded that Brown was unable to return to employment. On September 21, 2001, Brown

¹ Kentucky Administrative Regulations.

filed a Motion to Reopen due to a progressing work-related condition. As part of the reopening, Brown sought compensation for the August 2001 spinal surgery. On March 7, 2002, Brown filed a motion requesting a university evaluation pursuant to KRS² 342.315 to determine whether or not the August 2001 surgery was reasonable and necessary. Following responses by Housecall, on July 8, 2002, the ALJ entered an order determining that "the issue of the reasonableness of the cervical surgery has already been decided by a previous Opinion and Order and, therefore, *res judicata* prevents the Administrative Law Judge from revisiting this issue."

However, the ALJ allowed the reopening based on a worsening of Brown's condition. Evidence was presented concerning Brown's current condition as compared to her condition as of April 30, 1999, the date of the original award. On February 5, 2003, the ALJ entered his opinion, order, and award upon reopening. Among other things, the ALJ determined that the medical records submitted subsequent to Arbitrator Kittinger's January 4, 2000 order demonstrated that Brown's symptomatology had worsened during the intervening period of time so as to make the August 2001 surgery reasonable and necessary. The ALJ concluded that Brown now had a 25% impairment rating, and, reversing his July 8, 2002 order,

² Kentucky Revised Statutes.

determined that the August 2001 surgery performed by Dr. Gilbert was compensable and was not barred by res judicata.

On July 23, 2003, the Board entered an opinion affirming the ALJ's decision. This petition for review followed.

Housecall contends that based upon Arbitrator Kittinger's decision on January 4, 2000, that the surgeries recommended by Dr. Gilbert were not reasonable or necessary; the issue was res judicata that Brown's August 2001 surgery was noncompensable. We disagree.

The doctrine of res judicata (also known as the doctrine of the finality of judgments) is basic to our legal system and stands for the principle that once the rights of the parties have been finally determined, litigation should end. Slone v. R & S Mining, Inc., Ky., 74 S.W.3d 259, 261 (2002). Thus, where there is an identity of parties and an identity of causes of action, the doctrine precludes further litigation of issues that were decided on the merits in a final judgment. Id. The application of these principles to final workers' compensation decisions is grounded in the fact that because there is an extensive procedure for taking appeals, a final decision should not be disturbed absent fraud, mistake, or other very persuasive reason that would warrant reopening. Id. On the other hand, the doctrine does not act as a bar in a

subsequent proceeding if the issues or questions of law are different. Whittaker v. Cecil, Ky., 69 S.W.3d 69, 72 (2002); see also Yeoman v. Commonwealth, Health Policy Bd., Ky., 983 S.W.2d 459, 464 - 465 (1998).

Housecall contends that the evidence proves that the facts were static, and that no new facts were developed following Arbitrator Kittinger's original ruling. Housecall argues that the evidence clearly proves that Brown's condition remained unchanged from December 1998 through the time the surgery was performed in August 2001. In his February 5, 2003 opinion, order and award upon reopening, the ALJ addressed this issue as follows:

10. As noted above, one of the preliminary issues which the Administrative Law Judge must decide is whether or not the previous finding made by Arbitrator Kittinger involving the unreasonableness of the cervical surgery as recommended by Dr. Gilbert is a res judicata finding at the present time. The Administrative Law Judge notes for the record that this finding was made in an Order dated January 4, 2000 upon filing of a motion to reopen/medical fee dispute by the Defendant/Employer on or about September 1999. Although the undersigned Administrative Law Judge had previously ruled in a previous Order that res judicata would apply so as to deny the Plaintiff's attempt to revisit this issue, the Administrative Law Judge now is of the opinion that medical records submitted by Gilbert subsequent to this initial finding made by Arbitrator Kittinger demonstrate that the Plaintiff's symptomatology had

worsened during this period of time so as to make the surgery reasonable and necessary. In particular, the Administrative Law Judge cites to the following to substantiate this finding:

a. Dr. Gilbert in a February 28, 2000 medical entry reflected that the Plaintiff has failed everything. In a July 17, 2000 medical entry, Dr. Gilbert noted that the Plaintiff's neck was miserable and that her pain was progressively worsening. In a July 16, 2001 medical entry, the Plaintiff reported that her right arm was getting weaker with numbness and tingling and that epidural injections in the past did not relieve her symptoms. From these records it appears that all measures of conservative treatment had failed;

b. The Administrative Law Judge also cites to the deposition of Dr. Gilbert wherein surgical findings confirmed existence of the ruptured disc that was in fact compressing the spinal cord and that Dr. Gilbert observed some stenosis during the procedure; and

c. The Administrative Law Judge also cites to the Plaintiff's own testimony elicited at the formal hearing where she acknowledged that her neck pain was getting worse and that her arm had started to tingle and become numb and that the pain progressed over time prior to the surgery. She furthermore noted that the surgery improved her symptoms in her neck and that her arms and hands post-surgery did not hurt and did not tingle and burn like they had previously, and that she does not have the headaches that she once had.

11. From the above, the Administrative Law Judge finds that substantial evidence exists from the record that the Plaintiff's condition worsened since the original determination of unreasonableness to the

point that it became reasonable for the Plaintiff to undergo surgery. The Administrative Law Judge takes judicial notice of the fact that over a year and a half had lapsed from the initial determination that the surgery was deemed unreasonable to that point where the Plaintiff elected to have surgery performed. For the foregoing reasons, the Administrative Law Judge finds that the Defendant/Employer has now failed in its determination of establishing that the surgery, which was performed August 2001 was unreasonable and/or unnecessary. See KRS 342.735(3). See also, National Pizza Company vs. Curry, Ky. App., 802 S.W.2d 949 (1991). Compare also, Transport Associates v. Butler, Ky., 892 S.W.2d 296 (1995). To the same extent, the Administrative Law Judge finds that res judicata does not attach at this point so as to negate this finding.

The fact-finder, the ALJ, rather than the reviewing court, has the sole discretion to determine the weight, credibility, quality, character, and substance of evidence and the inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). The ALJ has the discretion to choose whom and what to believe. Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 422 (1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). Although a party may note evidence which

would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974); Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002).

The burden of proof on this issue was on Brown. See KRS 342.735(3) (The employee has the burden of proof to show the medical expenses are related to the injury and are reasonable and necessary prior to an application of benefits being filed and before an award or order of benefits). Where the party with the burden of proof is successful before the ALJ, the issue on appeal is whether substantial evidence supports the ALJ's conclusion. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Substantial evidence is evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971).

The ALJ's findings of fact and conclusions concerning the reasonableness and necessity of Brown's August 28, 2001 surgery are supported by substantial evidence. Dr. Gilbert's February 28, 2000, July 17, 2000, and July 16, 2001, medical entries; Dr. Gilbert's surgical findings; and Brown's own testimony support the ALJ's findings and conclusions.

Further, the ALJ properly applied the doctrine of res judicata to his findings. Simply put, the question of whether the August 2001 surgery was reasonable and necessary, was a different question than the question decided by Arbitrator Kittinger in her January 4, 2000 decision.

The medical expense dispute considered by Arbitrator Kittinger addressed whether the surgery was reasonable and necessary based upon the medical facts as they existed in late 1999. Housecall and its insurance carrier filed a Notice of Utilization Review Denial dated September 16, 1999. The notice stated "[b]ased on the available clinical information . . . the patient's surgery would not be necessary or appropriate at this time." (Emphasis added). The issue under consideration by the Arbitrator was whether the proposed surgery was reasonable and necessary at that time (in 1999).

The surgery was performed in August 2001. The issue in the reopening was whether the surgery was reasonable and necessary at that time (in 2001). The issue decided by Arbitrator Kittinger and the issue decided upon reopening, though both were concerned with whether spinal surgery was reasonable and necessary, were concerned with different points in time and different medical facts. Brown's surgery was performed approximately 20 months subsequent to the Arbitrator's decision, and the ALJ's finding that Brown's spinal condition

had worsened during this time was supported by Dr. Gilbert's medical reports and Brown's testimony. We agree with the analysis of the Board:

It is true that an order denying compensability in a medical fee dispute would be res judicata as to a second proceeding based on the same facts. See Hysteam Coal Corp. v. Ingram, 283 Ky. 411, 141 S.W.2d 570 (1940); Happy Coal Co. v. Hartbarger, 251 Ky. 779, 65 S.W.2d 977 (1933). In this case, however, we believe ALJ Cowden's determination of the compensability of Dr. Gilbert's surgery was based upon different facts than were in existence at the time of Arbitrator Kittinger's ruling. The notice of utilization review denial dated September 15 1999 clearly states: "[b]ased on the available clinical information the following opinion is suggested. I feel that the patient's surgery would not be necessary or appropriate at this time." [Emphasis added by Board]. Further, as specifically set out by the ALJ in his opinion, there is evidence from Dr. Gilbert's records which indicates Brown's condition continued to worsen. While Housecall points to evidence in the record that demonstrates Dr. Gilbert's findings were much the same prior to the filing of the medical fee dispute, it is also true that Brown continued to treat with Dr. Gilbert and he chronicled her continued problems. Further, Brown herself testified that her neck pain and radiculopathy continued to progress. Inasmuch as the facts continued to be developed and were not static since the time of the original ruling on compensability of Dr. Gilbert's surgery, we believe the ALJ was not barred by res judicata in revisiting the issue.

The function of this Court in reviewing the Board "is to correct the Board only where the . . . Court perceives the

Board has overlooked or misconstrued controlling statute or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). This did not occur in the present case.

Housecall also argues that the ALJ's July 8, 2002 order in which he initially held that the Arbitrator's order was res judicata on the necessity of the surgery was itself a res judicata determination which would prevent the ALJ from changing his ruling in his February 5, 2003 order. However, the July 8, 2002 order was an interlocutory order, not a final judgment. Only final judgments, and not interlocutory orders, have the effect of res judicata. Cartmell v. Urban Renewal and Community Development Agency of City of Maysville, Ky., 419 S.W.2d 719, 721 (1967).

For the foregoing reasons the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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