

RENDERED: APRIL 22, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001492-WC

KELLY TEMPORARY SERVICES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 01-70816

RICHARD MAGGARD; HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING

** ** * * *

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Kelly Temporary Services petitions us to review an opinion of the Workers' Compensation Board (Board) entered June 23, 2004. The Board's opinion reversed and remanded a decision of the Administrative Law Judge (ALJ) which denied as

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

compensable a proposed scar revision surgery to appellee's left hand. We reverse.

On October 19, 2001, appellee, Richard Maggard, suffered a work-related injury while employed as a welder for appellant. Appellee's left hand was crushed while he was running a fixture welder used to assemble frames for backseats in Toyota trucks. Appellee underwent two surgical procedures, including a skin graft, and received other medical treatment for the injury. Appellee was unhappy with the appearance of the scar on his left hand and sought additional surgery to reduce the appearance of scarring. In November 2002, Dr. William L. O'Neill scheduled skin graft revision surgery for December 17, 2002. Dr. O'Neill testified that he could improve the appearance of the scar. Appellant, however, denied payment for the surgery, and the surgery was never performed.

On April 25, 2003, appellant filed an application for resolution of claim with the Department of Workers' Claims. The primary dispute before the ALJ centered upon appellant's refusal to pay for the second scar revision surgery. In his opinion and order, the ALJ found:

As it appears that three of the four experts employed in this claim that plaintiff needed no further treatment, and that plaintiff's own treating physician felt that the surgery was cosmetic only, the Administrative Law Judge cannot conclude that the surgery is reasonable and necessary and therefore

cannot conclude that the proposed treatment is compensable.

Being unsatisfied with the ALJ's conclusion that the scar revision surgery was non-compensable, appellee sought review by the Board. In reversing the ALJ's decision, the Board framed the issue before it as "whether, under existing Kentucky law, a claimant is entitled to medical treatment to address disfigurement that has resulted from a work-related injury producing disability." The Board interpreted the ALJ's decision as denying benefits where the proposed medical treatment is cosmetic in nature. In determining whether the ALJ's decision was supported by evidence of record, the Board concluded:

Contrary to the ALJ's findings, neither Dr. Kasden nor Dr. Templin addressed the reasonableness or necessity of Dr. O'Neill's proposed scar revision surgery. While Dr. O'Neill qualified the surgery as cosmetic, he nevertheless urged its accomplishment, indicating his belief that it would be successful in reducing disfigurement. Only Dr. Bray stated that he did not believe "a skin graft revision is necessary at this time." Nowhere does he state the surgery would likely be unsuccessful and therefore unproductive. What is more, none of the physicians of record indicated that the proposed scar revision surgery is outside the type of treatment generally accepted by the medical profession as reasonable in circumstances such as Maggard's. Because the record does not establish either of the elements necessary to establish a lack of compensability under KRS 342.020(1), the evidence compels a finding that Kelly failed in its burden of proof as a matter of law. By not so finding, the ALJ committed

reversible error. This case is therefore remanded with instructions that an amended award finding Maggard's scar revision surgery to be compensable and holding Kelly liable for payment be entered.

This review follows.

Appellant contends the Board committed error by finding the second scar revision surgery to be compensable. Specifically, appellant claims the Board overstepped its role and improperly substituted its judgment regarding factual issues for that of the ALJ.

We first note there seems to be some confusion regarding the burden of proof in disputes concerning the compensation of medical expenses. The burden of proof is always with the employee to prove the work-relatedness of the injury, and the employer is under no obligation to pay for medical benefits until an injury award has been rendered. R.J. Corman R.R. Const. v. Haddix, 864 S.W.2d 915 (Ky. 1993). Where the compensability of a medical benefit is consolidated with a pending injury claim, the burden of proving the non-compensability of such medical benefit is clearly upon the employer. Square D. Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Under Kentucky Revised Statutes 342.020, the employer must pay for medical benefits that are reasonable and necessary for the cure and relief of an employee's work-related injury. National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky.App. 1991). A medical

procedure will not be considered reasonably necessary for the cure and treatment of an injury if it is unproductive or outside the type of treatment accepted by the medical profession as reasonable. Square D. Co., 862 S.W.2d 308. We agree with the Board that cosmetic medical treatment is not, per se, non-compensable; however, unlike the Board, we do not view this case as turning upon such issue.

In the instant case, Dr. O'Neill clearly stated that he believed the scar could be improved by a second scar revision surgery. By contrast, Dr. Gary Bray opined:

I do not think a skin graft revision is necessary at this time. Certainly, the function of the hand would not be changed and the appearance of this graft, by all standards, would have to be considered good to excellent. It is also my opinion that he would be unlikely to benefit from any treatment of the leakage of his triangular fibrocartilage, despite the arthrogram showing some leakage there.

As to Dr. Bray's testimony, the Board observed that "[n]owhere does he state the surgery would likely be unsuccessful and therefore unproductive." Although, Dr. Bray does not use the exact term "unproductive," we believe that a reasonable inference from his testimony could be that a second scar revision surgery would be unnecessary and, thus, unproductive. Considering Dr. Bray's testimony as a whole, we are of the opinion it was within the province of the ALJ to infer that Dr.

Bray believed the second scar revision surgery to be unproductive. See Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky.App. 1995). Unlike the Board, we view this case as presenting conflicting medical evidence upon whether the second scar revision surgery was reasonable and necessary for the treatment of appellee's hand injury. In such situation, we must conclude "the question of which evidence to believe is the exclusive province of the ALJ." Square D. Co., 862 S.W.2d at 309. For these reasons, we conclude the Board improperly reversed the ALJ's conclusion that the second scar revision surgery was non-compensable.

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

ALL CONCUR.

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