RENDERED: MARCH 11, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001572-WC

JEFF WALTERS APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-80957

ASHMARK , INC., d/b/a DONATO'S PIZZA;
DR. GLEN McCLUNG (REAL PARTY
IN INTEREST); HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS'COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

MOORE, JUDGE: Jeff Walters petitions for the review of an opinion of the Workers' Compensation Board affirming the decision of an Administrative Law Judge (ALJ) resolving a medical fee dispute in favor of his employer, Ashmark,

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[1] Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Inc., d/b/a Donato's Pizza. Walters contends that the ALJ's decision was erroneous because it relied upon the resolution of a matter not properly preserved or contested per 803 Kentucky Administrative Regulation (KAR) 25:010 § 13(14). Finding no error in the ALJ's decision or the Board's decision, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Walters is and has been an employee of Ashmark at all times relevant to this appeal. On June 20, 2006, Walters sustained a work-related injury to his shoulder when he attempted to swing a trash bag into a garbage container. Walters reported the incident to his supervisor. Based upon his report regarding the injury, Ashmark began paying Walters temporary total disability benefits and approved surgery for a torn rotator cuff in Walters' right shoulder.

On July 28, 2006, Dr. John R. Allen performed surgery on Walters' right shoulder, consisting of a rotator cuff repair, acromioplasty and distal clavicle resection. Dr. Allen submitted the bill for the surgery to Ashmark. After referring the matter to retrospective utilization review, Ashmark paid for Dr. Allen's procedure. Ashmark informed Walters that it would deny any further benefits and would not pay for any other medical expenses he incurred after August 10, 2006. Ashmark explained that Dr. Ronald Fadel, who performed the retrospective utilization review, believed that Walters' torn rotator cuff was not work-related because, in Dr. Fadel's opinion, the tear predated Walters' work injury.[2]

[2] When Dr. Fadel offered this opinion on August 3, 2006, it contradicted and superseded two other opinions he had previously offered on July 20 and August 2, 2006. Those previous opinions were to the effect that Walters' rotator cuff tear was work-related. Dr. Fadel's July 20 and August 2, 2006 opinions are not in the record on appeal, but Dr. Michael J. Moskal's subsequent note of March 28, 2007, cited below, references Dr. Fadel's earlier opinions. Dr. Fadel's August 3, 2006 opinion also references his earlier opinions. In relevant part, it states:

Walters sought further treatment and, on September 25, 2006, filed a request for benefits with the Department of Workers' Claims. Walters maintained his belief that the subject injury resulting from the June 20, 2006 incident was a torn rotator cuff in his right shoulder or a worsening of a pre-existing tear. He contended that the conditions caused by the tear were a rotator cuff defect; a partial subscapular defect; biceps tendon subluxation; and degenerative changes of the glenohumeral joint. Walters further contended that two additional conditions, deltoid atrophy and subacromial roughness, were also compensable because they resulted from the surgery Dr. Allen had performed to treat the conditions relating to his torn rotator cuff.

> I received additional medical documents in the above captioned case for which I wrote an addendum yesterday following an initial review in which I concluded the claimant's rotator cuff tear was work related.
>
> For reasons which are entirely unclear I did not received [sic] the most critical determinant document, the operative note, until today and am now asked to again offer an opinion regarding causation. Had this op note been available initially I would have been able to provide a better and conclusive opinion at that time.
>
> Based on this operative note dated July 28, 2006 it is now my conclusion that this tear clearly predated the work injury and the surgeon's failure to offer any intra-operative observation supporting acute additional tearing of the lesion. The hematoma mentioned in the MRI is not noted by the surgeon thus casting doubt on the imaging opinion. The irregular edge of the tear further supports chronicity in this case as does the noted chronic inflammation. The "large tear" is estimated to be approximately two inches. While acknowledging that this is a substantial tear[,] its impact on his day to day function remains unclear in this case.
>
> Contribution of the work injury to this pre-existing tear is quite unclear but based on the surgeon's observations it appears to have been minimal if any. This then now constitutes my final opinion in this most confusing case[.]

Ashmark, on the other hand, maintained its belief that the subject injury was unrelated to any of those conditions and responded by denying that Walters' torn rotator cuff was work-related. In support, Ashmark relied upon the opinion of Dr. Michael Moskal. In Dr. Moskal's March 28, 2007 memorandum of his independent medical evaluation of Walters, Dr. Moskal noted that aside from Walters' complaints of pain, the only evidence in the record supporting that Walters had sustained an injury on June 20, 2006, was Dr. Fadel's observation of a hematoma involving the infraspinatus muscle, and Dr. Fadel's belief, stated in two of Dr. Fadel's pre-August 3, 2006 opinions, that this hematoma indicated an acute rotator cuff tear. However, Dr. Moskal disagreed that a hematoma involving the infraspinatus muscle, even if it had existed, was indicative of a torn rotator cuff. As to how Walters had torn the rotator cuff in his right shoulder, Ashmark further relied upon Dr. Moskal's opinion that

> [t]here is no evidence on the basis of the medical records that a harmful change or injury has occurred to the shoulder. The interpretation of the MRI prior to surgery does not support a new tear of the rotator cuff tendons but rather supports a chronic long standing tear with loss of tendon and no new tendon tear. The tendon defects were not repairable and the atrophy of the supraspinatus and infraspinatus muscles was not new after surgery.
>
> Deltoid atrophy after surgical removal from the acromion is a documented iatrogenic source of atrophy of the deltoid.
>
> The irregular undersurface of the acromion is characteristic surgically induced irregularities.

In sum, Ashmark asserted, based upon Dr. Moskal's opinion, that Walters' rotator cuff tear was a pre-existing injury attributable to a degenerative condition, rather than his work with Ashmark; that Walters' employment with Ashmark had not worsened that tear; and, thus, Walters' torn rotator cuff was a non-compensable injury. Ashmark further reasoned that the additional conditions of deltoid atrophy and subacromial roughness, which resulted from Dr. Allen's treatment of Walters' torn rotator cuff, were also non-compensable as a consequence.

However, Ashmark and Walters subsequently entered into a compromised settlement of this matter, which provided no waivers and was based upon a 5% impairment rating. The compromised settlement was approved by order of the ALJ on March 28, 2008.

On February 18, 2009, Ashmark filed a Form 112 medical fee dispute and moved to reopen the settlement award in response to another request for surgery by Walters for his torn rotator cuff. Ashmark's motion sought to reopen "on the limited issues of work-relatedness and reasonableness and necessity of contested medical treatment and/or bills." As an exhibit, Ashmark attached a copy of a February 2, 2009 letter it had sent to Walters' new treating physician, Dr. Glen McClung. This letter informed Dr. McClung that his request for preauthorization for Walters' surgery had been forwarded to Dr. Moskal for peer review and that "Dr. Moskal opines that the procedures you requested are not related to, or the direct result of Mr. Walters' 6/20/06 reported work related injury."

On May 21, 2009, the ALJ sustained Ashmark's motion to reopen. Also, Ashmark joined Dr. McClung as a third-party defendant because Dr. McClung had submitted medical bills to Ashmark for treating Walters' torn rotator cuff and Ashmark was contesting those bills.

At the October 7, 2009 benefit review conference, the parties agreed that Walters "had sustained work-related injury(ies) on 6/20/06." The contested issue, which the ALJ listed in the order it entered following the benefit review conference, was "Is the surgery proposed by Dr. McClung reasonably required for the cure and of the effects of the subject injury?" But, the order issued by the ALJ following the benefit review conference does not stipulate the nature of Walters' subject work-related injury.

On October 9, 2009, Walters and Ashmark deposed Dr. McClung. Prior to asking any questions of Dr. McClung, Walters prefaced by stating, "I'm here today to find out about why you believe the procedure that you recommended on November 10th for Mr. Jeff Walters is reasonable and necessary and related to the work-related injury before and then for you to comment on the report from Dr. Moskal concerning that, okay?" Thereafter, Walters asked, "All right. Is there any question as to whether or not [Walters'] conditions or his present pathology found in his shoulder is related to the event at work of lifting the garbage bag?" In response, Dr. McClung stated that the only information he had regarding the work-relatedness of Walters' torn rotator cuff came from what Walters had told him.

On November 12, 2009, Walters and Ashmark then deposed Dr. Moskal. Dr. Moskal testified consistently with his March 28, 2007 memorandum and reemphasized, at length, the reasons for why he believed that Walters' rotator cuff tear was not the result of, or related to, Walters' June 20, 2006 injury.

After the close of evidence, Walters and Ashmark submitted their respective arguments to the ALJ through written briefs. Walters' brief discussed only why the surgery proposed by Dr. McClung was reasonable and necessary for the cure and relief of Walters' torn rotator cuff. Ashmark's brief contested the issue of the reasonableness and necessity of the surgery proposed by Dr. McClung. However, Ashmark's brief further argued that Dr. McClung's proposed surgery was for Walters' rotator cuff tear and that Walters' rotator cuff tear was unrelated to the injury Walters sustained on June 20, 2006.

On January 8, 2007, the ALJ entered an order resolving the medical fee dispute in favor of Ashmark. After reciting the evidence and the respective opinions of Drs. McClung and Moskal, the ALJ concluded that although the surgery performed by Dr. Allen and the surgery proposed by Dr. McClung were both reasonable and necessary to treat Walters' condition, Walters' condition was not the result of the injury he sustained while working with Ashmark.

On January 20, 2010, Walters petitioned the ALJ to reconsider this decision, citing three reasons in support. First, Walters argued that the causal relationship between the condition of his shoulder, Dr. Allen's surgery, and the June 20, 2006 work incident had already been conclusively established in the

March 28, 2008 compromised settlement. Second, Walters argued that the causal relationship between the condition of his shoulder, Dr. Allen's surgery, and the June 20, 2006 work incident was not listed as a contested issue in the October 7, 2009, benefit review order. Finally, Walters generally argued that, in light of the above, his right to due process had been violated.

On February 16, 2010, the ALJ overruled Walters' petition. On appeal before the Board, Walters repeated his arguments.

As to Walters' first contention, *i.e.*, that it was improper for the ALJ to go back and find that the trauma that led to the surgery by Dr. Allen was not related to Walters' work-related condition, the Board reminded Walters that his award originated from a settlement approved by an ALJ, rather than an ALJ's judgment. Therefore, when Ashmark reopened Walters' award, *res judicata* did not preclude Ashmark from raising any issue which could have been previously considered upon Walters' original application for benefits. *See* KRS 342.125(7); *Newberg v. Davis*, 841 S.W.2d 164 (Ky. 1992); *Beale v. Faultless Hardware*, 837 S.W.2d 893 (Ky. 1992); *see also Whittaker v. Hurst*, 39 S.W.3d 819, 821 (Ky. 2001) (holding that upon reopening a settlement award an employer was permitted to contest the very existence of the disease upon which that award was based).

As to Walters' second contention, *i.e.*, that the relationship between his shoulder condition and his work-related injury was not properly before the ALJ per 803 KAR 25:010 § 13(14), the Board also disagreed. The Board noted that throughout the litigation of the original claim and the reopening, Ashmark had

maintained that Walters' shoulder condition was not related to his work injury. The Board noted that Ashmark had stated this in its February 18, 2009 Form 112 medical fee dispute as a ground for reopening. Finally, the Board noted that the questions Ashmark and Walters asked Drs. McClung and Moskal following their benefit review conference, Ashmark's extensive argument regarding this subject in its brief before the ALJ, and Walters' failure to object to Ashmark's brief prior to the ALJ's decision further demonstrated that both Ashmark and Walters understood the contested issue to include whether Walters' shoulder condition was related to his work-related injury.

The Board concluded that the issue of whether Walters' shoulder condition was related to his work-related injury had been properly raised and that substantial evidence supported the ALJ's conclusion that Walters' shoulder condition was not related to his work with Ashmark.

This appeal followed.

II. STANDARD OF REVIEW

The duty of this Court is to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-688 (Ky. 1992); *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). Once a reviewing court has determined that the agency's decision is supported by substantial evidence, the court must determine the correct rule of law was applied to those facts by the agency in making its

determination. If so, the final order of the agency must be upheld. *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994).

III. ANALYSIS

Based upon our review of the record, substantial evidence supports the ALJ's decision; indeed, Walters offers no argument to the contrary. Furthermore, Walters does not argue, as he did before the ALJ and Board, that Ashmark was prohibited from raising the issue of whether his shoulder condition was related to his work injury. Instead, Walters' appeal is limited to the issue of whether Ashmark actually did raise this issue before the ALJ. Walters directs our attention to 803 KAR 25:010 § 13(14), which provides that "Only contested issues shall be the subject of further proceedings." Walters emphasizes that the ALJ's October 7, 2009 benefit review order states that the contested issue in this matter is "Is the surgery proposed by Dr. McClung reasonably required for the cure and of the effects of the subject injury?" Walters contends that the ALJ's resolution of this matter ventured outside the scope of this issue and rested upon an entirely different one, *i.e.*, whether the subject injury was work-related. As such, Walters further contends that the ALJ's resolution of this matter violated 803 KAR 25:010 § 13(14) and was erroneous as a consequence.

However, we disagree that the ALJ resolved this matter outside the scope of the contested issue presented in the October 7, 2009 benefit review order.

As a prerequisite to resolving whether "the surgery proposed by Dr. McClung [was] reasonably required for the cure and of the effects of the subject injury," one must define 1) the surgery proposed by Dr. McClung; and 2) the subject injury. As to the latter, the parties agreed that Walters had sustained a work-related injury on June 20, 2006. But, the parties did not agree on what that injury was. For this reason, the ALJ's order is consistent with and effectively resolves the contested matter. It simply determined that "Although the surgery proposed to be performed by Dr. McClung is reasonably required for the treatment of Mr. Walters' condition," that condition was not "proximately caused by the subject injury." The Board's interpretation of the contested issue in this matter, within the context of 803 KAR 25:010 § 13(14), is consistent our own interpretation. We give great deference to an administrative agency's interpretation of its own regulations.[3] Thus, we find no error in the Board's conclusion that, to determine whether a proposed surgery is reasonably required for the cure and of the effects of an injury, one must necessarily determine what that injury is.

Moreover, while Walters does not specifically raise the issue on appeal, we agree with the Board that there was no violation of procedural due process in this case resulting from the ALJ's addressing and relying upon the origin of Walters' shoulder condition in its decision. The record reflects that both Ashmark and Walters understood, and should have understood, the contested issue

[3] *See J.B. Blanton Co. v. Lowe*, 415 S.W.2d 376 (Ky. 1967); *Sidney Coal Co., Inc./Clean Energy Mining Co. v. Huffman*, 233 S.W.3d 710, 713-14 (Ky. 2007).

to include whether Walters' shoulder condition was related to his work-related injury.

For these reasons, the decisions of the ALJ and Worker's Compensation Board are hereby AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

David R. Marshall
Lexington, Kentucky

BRIEF FOR APPELLEE:

Carl M. Brashear
Lexington, Kentucky