Filed 7/23/10 Krause v. WCAB (Wal-Mart Stores) CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CYNTHIA KRAUSE, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and WAL-MART STORES, INC., Respondents.	F058788 (WCAB No. ADJ2803173) **O P I N I O N**

THE COURT[*]

ORIGINAL PROCEEDINGS; petition for writ of review from a decision of the Workers' Compensation Appeals Board. James C. Cuneo, Ronnie G. Caplane, and Frank M. Brass, Commissioners. Alvin R. Webber, Workers' Compensation Administrative Law Judge.

William S. Morris, for Petitioner.

No appearance by Respondent Workers' Compensation Appeals Board.

Swanson & Frank, and Bradford A. Warren, for Respondent WalMart Associates, Inc., and American Home Assurance Company, adjusted by Avizent.

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[*]Before Wiseman, Acting, P.J., Cornell, J., and Dawson, J.

Cynthia Krause petitions for a writ of review from a decision of the Workers' Compensation Appeals Board (WCAB). (Lab. Code, [1] § 5950; Cal. Rules of Court, rule 8.495.) Krause contends the WCAB erred by adding an employer's workers' compensation insurer as a party defendant to a prior award and by failing to treat notification errors regarding a medical provider network (MPN) as a basis for the employee to treat outside the MPN. We will deny the petition.

DISCUSSION

Krause sustained an industrial injury nearly 10 years ago while working for Wal-Mart Stores, Inc. (Wal-Mart). Taking judicial notice of this court's August 10, 2006, decision arising out of the same industrial injury, this court recalls that "Krause slipped and fell on a wet floor while working as a janitor/maintenance employee for a Turlock Wal-Mart store on July 12, 2000. Wal-Mart admitted Krause injured her left lower extremity and provided her with appropriate medical benefits. She later alleged, and Wal-Mart disputed, that the slip and fall accident further resulted in a psychological injury." (*Krause v. Wal-Mart Stores, Inc.* (F049301) (*Krause I*).)

On September 8, 2005, a workers' compensation administrative law judge (WCJ) awarded Krause 53-percent permanent disability plus future medical treatment to her lower left extremity, notwithstanding the WCJ's findings that Krause was not credible and had presented disingenuous arguments in bad faith. (*Krause I*, at pp. 2-3.)

By way of a petition for writ of review, Krause contended the WCAB erred in finding she did not also sustain a psychological injury and by not authorizing a referral for a gastric bypass evaluation. This court denied the writ on August 10, 2006, concluding substantial evidence supported the absence of a compensable psychological injury and that there was "nothing to review" where there was no evidence Wal-Mart had

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1 Further statutory references are to the Labor Code unless otherwise stated.

denied Krause's request for gastric bypass evaluation because the WCAB never issued a final determination on the issue. (*Krause I*, at pp. 4-6.)

Wal-Mart continued to provide Krause with medical treatment from her primary treating physician, Dr. Amsden, who referred her to orthopedic surgeon, Dr. Robert Caton, for a total knee replacement. According to Wal-Mart, Krause last saw Dr. Amsden on June 25, 2007, and instead continued to treat with Dr. Caton on eight occasions following her knee surgery over the following year.

On September 12, 2008, a claims adjuster from Wal-Mart's workers' compensation servicing company, Avizent, sent Krause a letter in English only entitled "NOTICE TO INJURED WORKER TO SEEK ANOTHER MEDICAL PROVIDER" (Notice). The Notice explained Avizent "is the authorized representative for American Home Assurance Company," which had "implemented the Wal-Mart – First Health Primary MPN." Concluding Krause had been obtaining treatment from a non-network physician, the claims adjuster asked her to seek further care from an MPN provider and offered assistance in locating such a physician. Avizent's Notice acknowledged a process to object and noted treatment outside the MPN would be appropriate if her injury involved an acute medical condition, a serious chronic condition, a terminal illness, or recent surgery within 180 days of the MPN coverage date. (See § 4616.2, subd. (d)(3); Cal. Code Regs., tit. 8, § 9767.9.) According to Krause, Dr. Amsden is a member of Wal-Mart's MPN, but Dr. Caton is not.

Without responding as requested in the Notice, Krause instead served a September 19, 2008, deposition notice on the Avizent's claims adjuster. After Wal-Mart moved to quash the deposition for lack of notice of a dispute, Krause filed for an expedited hearing claiming Wal-Mart was interfering with her medical treatment and asking the WCAB to resolve the dispute and award sanctions and attorney fees.

The WCJ directed Krause to provide "a specific and detailed exposition of what benefit is allegedly being denied" and subsequently conducted an expedited hearing on December 16, 2008. In the hearing minutes, the WCJ summarized three grounds in which Krause contended should excuse her from treatment restricted within the MPN: 1) the Notice advising Krause to select an MPN treating physician was defective, despite having been corrected before the hearing; 2) at least three orthopedic doctors are not currently available within the MPN; and 3) Krause has a "serious chronic condition" statutorily exempted from MPN treatment. On January 14, 2009, the WCJ disagreed with Krause and found she had "not shown good cause to seek medical care outside Defendant's Medical Provider Network."

Krause petitioned the WCAB for reconsideration. Among her complaints, Krause objected to American Home Assurance Company's appearance as "an officious intermeddler in this matter" imposing its MPN on Krause and claimed Wal-Mart misrepresented itself and failed to follow the law by not disclosing that it was insured at the time of the medical award.[2] Krause also contended: the WCJ illegally shifted the burden of proof to her to demonstrate good cause to seek care outside the MPN; Wal-Mart should be held liable for its defective MPN Notice; allowing Wal-Mart to rehabilitate its defective notice renders the Labor Code and regulations a "nullity" and "frivolity;" the existence of the MPN is a fiction based on insufficient treating physicians available; the WCJ failed to address all of the issues raised at the expedited hearing; and that she was entitled to an exemption from the MPN for being treated for a "serious

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[2] Krause claims she raised the issue at the expedited hearing and in her pre-trial detailed exposition of her complaints, but that the issue "continuously gets blown off." Although Krause noted the WCAB previously found Wal-Mart to be self-insured and "appears now through representations made by counsel" to be insured, there is no indication in her pre-trial brief that she presented a legal argument contending the addition of Wal-Mart's insurer should bar the application of the MPN.

chronic condition." The WCJ subsequently vacated the prior decision to address the issues raised.

In June 2009, the WCJ ruled that any alleged defects in Wal-Mart's MPN process that may have existed in the past had, by the time of hearing, been corrected and Krause presented "no authority in support of her apparent 'there were errors that they cannot later fix' argument." The WCJ also found "no real issue here" regarding the identity of American Home Assurance Company, who presented overwhelming evidence as Wal-Mart's insurer at the time of injury, and concluded Krause failed to demonstrate she qualified for any exception to treatment under the MPN.

Krause again petitioned for reconsideration, complaining she was aggrieved by the WCJ's delay in the proceedings and by requiring her to file a "specific and detailed exposition" outlining her objections and explaining what benefits were allegedly denied.[3] Phrased in numerous ways, Krause again contended Wal-Mart's MPN did not have physicians that would accept workers' compensation patients, that the ability to correct a defective notice renders the legal requirements a frivolity, and that she was aggrieved by the WCJ's actions in allowing a change in the named insurer. In August 2009, the WCJ responded to the WCAB by remarking on the difficulty of adjudicating a claim without knowing the specific issues raised, that there was no evidence of a lack of available physicians within the MPN, and that "All of the evidence presented by either party demonstrate[d] that Applicant received every single workers' compensation benefit from Avizent and none from the employer in any 'self-insured' status." The WCJ also recommended the WCAB impose sanctions against Krause for improperly trying to

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3 This court was unmoved by a similar "delay" argument in *Krause I*: "While Krause contends the delay in ordering a consultation based on 'hypertechnical' grounds violates the mandate of California Constitution, article XIV, section 4 to provide 'substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character,' we note that it was not the WCAB that caused the delay, but Krause's counsel."

"'backdoor'" evidence refuting the existence of Wal-Mart's MPN that had not been submitted at trial.

Issuing its own decision on the petition for reconsideration, the WCAB concluded Krause did not establish she was entitled to continued treatment outside the MPN and that Wal-Mart was not liable for any medical treatment obtained outside the network. The WCAB remanded the matter, however, to further develop the record with regard to Krause's access to available physicians under the MPN. (§ 4616, subd. (a)(2); Cal. Code Regs., tit. 8, § 9767.5.) The WCAB also reopened the record to consider whether Krause had sought and been denied treatment after the initial defective Notice, potentially warranting a penalty award. (§ 5814.)

DISCUSSION

In reviewing an order, decision, or award of the WCAB, an appellate court must determine whether, in view of the entire record, substantial evidence supports the WCAB's determination. (§ 5952; *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164.) This court may not reweigh the evidence or decide disputed questions of fact. (§ 5953; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233.) Thus, if the WCAB's findings """are supported by inferences which may fairly be drawn from evidence even though the evidence is susceptible of opposing inferences, the reviewing court will not disturb the award."""" (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 664.)

Krause raises two substantive issues for this court's review. She claims American Home Assurance Company "should not be permitted to meddle" with her medical care because it was never a party to the original award for medical care and it is now too late

to set aside a prior stipulation or amend the record. She also claims the defective Notice forever bars her from the statutory framework requiring treatment under the MPN.[4]

Krause relies on the WCAB's en banc decision in *Coldiron v. Compuware Corp.* (2002) 67 Cal.Comp.Cases 289 (*Coldiron*), where the employer stipulated it was permissibly self-insured and waited six years to disclose to the WCAB that it was actually insured at the time of injury under a policy that provided coverage above the employer's primary liability. (*Id*. at pp. 290-291.) The WCAB sanctioned the employer's third-party administrator and noted the issue was relevant because the previously unnamed insurer was in liquidation and under the authority of the California Insurance Guarantee Association. (Ins. Code, § 1063 et seq.) The WCAB concluded "The responsible entity must be divulged at the earliest opportunity, and certainly no later than the commencement of the litigation process and formal proceedings." (*Coldiron, supra,* at p. 294.) The WCAB reasoned early disclosure "avoids unnecessary delays in the prompt delivery of benefits awarded." (*Ibid*.)

Unlike in *Coldiron,* American Home Assurance Company did appear early in the litigation process. According to the WCAB, "Our review of the record clearly reveals AHA has been identified as the insurer in this matter beginning in March of 2001, when it first entered its appearance through counsel. Subsequently, all captions in defendant's filings in this case have named AHA as a party defendant." Krause does not dispute the WCAB's findings. Moreover, the WCAB relied on a letter from the Workers' Compensation Insurance Ratings Bureau indicating American Home Assurance Company was Wal-Mart's insurer on Krause's date of injury. As the WCAB concluded, Krause "cannot claim to be aggrieved by the inclusion of AHA at this time."

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4 Wal-Mart does not dispute, and we agree, the issues raised are appropriate for appellate review from a final order as to the issues presented. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068.)

Krause presents no legal authority for the proposition that the defective Notice, once corrected, forever exempts her from Wal-Mart mandating treatment within the MPN. Krause relies on another en banc WCAB decision, *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (*Knight*), which held that an employer's failure to provide adequate notification rendered the employer liable for self-procured medical treatment outside the MPN. However, in *Knight*, the notice was more than technically deficient:

> "In none of the correspondence described above did [the insurer] explain where or how applicant was to obtain medical treatment. He was never notified that treatment had or had not been initiated in the MPN. He was never notified that an MPN physician had or had not been designated as primary treating physician. He was never notified of his right to change any designated primary treating physician and his right to select a new primary treating physician of his choice within the MPN. He was never notified of his right to obtain second and third medical opinions within the MPN or of his right to obtain review by an independent evaluator. Instead, [the insurer] wrote only that the medical treatment he sought was unauthorized, without tendering any information about how he was to obtain treatment for the admitted injury." (*Knight, supra,* 71 Cal.Comp.Cases at p. 1429.)

Here, the Notice was defective primarily in that it was not sent in Spanish, a language in which there is no indication would have aided Krause's understanding. Moreover, *Knight* did not declare that a defective notice could not be corrected. We find no merit to Krause's contention.

DISPOSITION

The petition for writ of review is denied. This opinion is final forthwith as to this court.