

RENDERED: April 17, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-1530-WC

THE BUDD COMPANY

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
NO. WC-95-018026

KURT TOLES;
SPECIAL FUND;
HON. ROGER RIGGS,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: GUIDUGLI, KNOX and MILLER, Judges.

GUIDUGLI, JUDGE. The Budd Company (Budd) appeals from an opinion of the Workers' Compensation Board (the Board) entered May 30, 1997, which affirmed an opinion and award entered January 6, 1997, by the Administrative Law Judge (ALJ) finding appellee, Kurt Toles (Toles) to be 100% disabled. We affirm.

As the Board's opinion sets forth an excellent summary of the facts and evidence presented to the ALJ, we adopt the following portion of the Board's opinion as our own:

Petitioner, The Budd Company ("Budd"), appeals from an opinion and award rendered by the Hon. Roger D. Riggs, Administrative Law Judge ("ALJ"), on January 6, 1997 and from an order ruling on a petition for reconsideration dated February 3, 1997. The ALJ

awarded respondent, Kurt Toles ("Toles"), total occupational disability benefits apportioned 50/50 between Budd and the Special Fund as a result of an injury he sustained on April 24, 1995. Toles was 30 years of age at the time of the injury, had completed the tenth grade, and had also obtained a GED. He has specialized training in asbestos abatement. He served in the United States Navy from 1982 until 1987 and then had a varied work career that included being an auto body painter, a warehouse manager, an usher, a driver's helper for UPS, a sample custodian for various asbestos abatement companies, and his work with Budd. He began working for Budd in March of 1995, operating a forklift. On April 24 of that year, while operating a forklift on the floor of a tractor trailer, the floor of the trailer collapsed, with the forklift dropping to the ground. Toles hit his head and was knocked from his seat. He was taken to a treatment room at the plant and then transported to Shelbyville Hospital where he was x-rayed and released later that night, having been given some pain medicines. After his release, he was referred to the family physician center for physical therapy. He returned to work at Budd two days after his injury on restricted duty doing basically administrative work. He worked for about an hour and a half and then was released to go home as he could barely move. He went back to the doctor and by that point, he testified his back had started developing serious pains. He subsequently tried to return to work seven to ten different times. About a month after the accident, he began seeing Dr. Kraweic. By this time, he had also developed a condition in his chest known as lymphoma. While under Dr. Kraweic's treatment, he proceeded with physical therapy for a couple of weeks and then attempted to return to work on a two hour basis with the goal of working himself back to a full eight-hour day. By mid-October of 1995, Toles was back to working an eight-hour day at Budd, still on restricted light duty work. He subsequently on two separate occasions had to return to the emergency room because of incidents at work and by January of 1996, Dr. Kraweic indicated he would not be able to return to Budd. Toles had had a few problems with his back prior to going to work for Budd, missing a total of two to three days of work for back problems. He last worked for Budd on October 10, 1995 when his back seized up and subsequently received a letter from Budd on February 12, 1996 stating that Dr. Kraweic, after viewing a videotape of various jobs available at Budd, indicated he felt Toles was incapable physically of handling any of those jobs and that Budd, therefore, had little choice but to accept his voluntary termination of employment. A few months later, he began working part time for an environmental company doing sedentary work, viewing asbestos fibers through a microscope. At the administrative hearing, he testified he is no longer able to continue doing that job because of inability to bend over the microscope and that he had only worked a total of three hours during the month of October 1996. He has been unsuccessful in finding any other job.

The medical evidence in Toles' case consists of depositions from Drs. Kraweic, Charles Hargadon, and James Templin, together with a report from Dr. Templin. Toles first came under Dr. Kraweic's care on May 5, 1995 when Kraweic saw him for follow-up emergency room evaluation. That first evaluation concerned a nonwork-related abnormality of his mediastinum that had shown up on a chest x-ray performed when he visited the emergency room after the forklift incident. He referred Toles to another physician to address the abnormality and saw Toles again on May 16, 1995 to discuss his back pain. He subsequently ordered a CT scan of the back and saw Toles again on June 26, 1995. After examining him, he noted a tenderness of his left paraspinal muscular insertions with no neurological deficits nor abnormal deep tendon reflexes. At that point, Dr. Kraweic thought Toles mostly had a musculoigamentous injury and recommended physical therapy-initially. The CT scan which he ordered showed moderate posterior and central focal bulging and/or herniation of the L5-S1 disk. In his opinion, Toles' back condition resulted from his injury at Budd. A subsequent MRI showed narrowing of the spinal cord at L3 and L4 and degenerative changes at L5-S1. Dr. Kraweic also opined that Toles was suffering from depression due to his inability to perform work. Dr. Kraweic testified that he viewed a videotape showing a number of different jobs at Budd and, after reviewing it, did not feel Toles was able to return to work at Budd. He stated that Toles' depression stemmed from his injury and from the stress subsequent to an inability to perform work, together with monetary stresses. He prescribed Prozac for the depression and testified that in his opinion Toles continued to require treatment with Prozac.

Dr. Templin first saw Toles on March 22, 1996 and at that time recommended outpatient physical therapy with consideration for work hardening or a pain management program. At that time, he did not assess any permanent impairment based upon Toles' low back condition, but on July 20, 1996, prepared a Form 107 providing an impairment rating. In evaluating Toles' condition, he reviewed an MRI scan dated October 7, 1995 showing degenerative disk disease at three levels with no evidence of

nerve root entrapment, impingement, or spinal stenosis. Dr. Templin arrived at a diagnosis of chronic low back pain syndrome and degenerative lumbar disk disease, both of which were caused by or aroused by Toles' April 24, 1995 injury. Using the AMA guidelines, he would assign a 9 percent whole body impairment to Toles' condition but, in considering the nature of Toles' usual occupation, he felt the occupational implications were greater than that impairment rating, stating:

Unfortunately, Mr. Toles is unable to return to activities requiring frequent bending, stooping, kneeling, lifting from floor level or lifting items weighing greater than 20 pounds or carrying items weighing items greater than 25 pounds or repetitive lifting items greater than 30 pounds or carrying items weighing greater than 25 pounds for any extended distance or prolonged time.

Dr. Hargadon examined Toles on April 24, 1995 receiving a history of the work-related injury and subsequent medical treatment. Examination of Toles' lumbar spine demonstrated he had 40 degrees of flexion, 20 degrees of extension, and 40 degrees of lateral bending bilaterally. His neurological exam was negative. At the time of that initial examination, Dr. Hargadon did not feel Toles was at maximum medical improvement, and he suggested Toles start an outside walking program. He saw Toles again for reevaluation on July 24, 1996. Examination of the lumbar spine demonstrated 60 degrees of flexion, 30 degrees of extension, and 30 degrees of lateral bending bilaterally. Neurological exam was again negative, and lumbar x-rays were essentially within normal limits. There was no appreciable disk space narrowing or suggestion of compression fracture. Dr. Hargadon confirmed that Toles' flexion and extension were within normal limits and that the neurological exam indicated he did not have a herniated disk or any radiculopathy. Using the AMA guidelines, Dr. Hargadon would assess a 5 percent permanent partial impairment to the body as a whole in that Toles' back pain had exceeded one year of duration. When asked about Toles' taking Valium based upon a prescription from Dr.

Templin, Dr. Hargadon indicated that was a poor choice and that Valium was very addicting and a dependent drug which should only be used short term. When asked what physical restrictions he would recommend for Toles, he stated:

This man had what I feel is a significant injury, which is a vertical compression of the spine. Even though there were no major diagnostic findings other than the degenerative disc referred on the MRI, these people tend to be symptomatic for long periods of time period.

When I last saw him, he was working in quality control, and he was working anywhere from zero up to 20 hours per week, and quality control in most cases is a relatively easy job, and I would think he could work full time in that capacity.

When asked what weight restrictions he would recommend, Dr. Hargadon stated that he thought for the near term, at least, Toles should be on light duty status, which meant lifting 20 pounds occasionally, 10 pounds frequently but that may change with time. When asked about therapy, Dr. Hargadon testified that his experience with the Cardinal Hill Pain Center where Dr. Templin worked and where Toles as to receive therapy was very negative and that he had seen very few people improve. On cross-examination, Dr. Hargadon acknowledged that it was his impression that Toles could not do the types of jobs reviewed on a tape from Budd and that specifically he could not drive a forklift causing of the bending and turning in that forklift drivers spend a large portion of the day looking over their shoulder, which is something people with a chronic lumbar problem have a difficult time doing. When asked if he felt the occupational implications of Toles' injury exceeded the 5 percent impairment rating he assigned, Dr. Hargadon acknowledged that it did.

The contested issues listed in the prehearing order and memorandum dated October

11, 1996 consisted of extent and duration, continued medical treatment, vocational rehabilitation, and compensability of psychiatric treatment.

In finding Toles totally disabled, the ALJ stated:

Based upon the evidence from all of the physicians in this case, and also the very credible testimony of Mr. Toles, it is determined that as to October 11, 1995 the plaintiff became 100% occupationally disabled under the guidelines of Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). The restrictions placed upon Mr. Toles by all of the physicians, the opinion of Dr. Hargadon as to the severity of his injury and the sincere and unsuccessful effort on the part of Mr. Toles to return to gainful employment present a convincing picture of a man who is no longer able to return to any type of work for which he has training, skill or experience.

He then ordered Toles to be referred to the rehabilitation branch of the Department of Workers Claims for the provision of rehabilitation services pursuant to KRS 342.710, noting that Toles was unable to perform work for which he had previous training or experience. In finding the psychiatric treatment Toles was receiving compensable, the ALJ noted that his treating physician had recognized a state of depression on behalf of Toles "because of his financial problems and the resulting stress placed upon him," then noted that at that point in time, Toles had received no psychiatric treatment, nor had any been proposed. He, however, awarded whatever psychiatric treatment was reasonable and necessary to address the depression "which is resultant from the work-related injury." He also authorized Toles to recover from Budd medical expenses incurred for the cure and relief of the effects of his injury for so long as he remained disabled.

The Board affirmed the ALJ's opinion and award, and this appeal followed.

Budd contends that the trial court erred in finding Toles to be 100% occupationally disabled. Budd argues that the record contains no evidence that Toles is unable to perform any type of work or that work which he is able to perform is not available in the local area pursuant to Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). Budd points to the fact that Toles never testified that he was unable to perform any work and the fact that each doctor testified that Toles was able to perform sedentary work in support of its argument. Budd also contends that pursuant to Commonwealth of Kentucky v. Workers' Compensation Board, Ky. App., 627 S.W.2d 540 (1985), the ALJ is not permitted to ignore uncontroverted testimony that Toles is able to perform sedentary work.

When a claimant successfully bears his burden of proof and risk of persuasion before the trier of fact, the question before the reviewing body is whether the decision is supported by substantial evidence. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984). The ALJ is solely responsible for determining weight and credibility of the evidence presented. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, ___ (1977). As the finder of fact the ALJ is vested with the power to decide which evidence to believe and may believe or disbelieve evidence from the same witness. Codell Construction Co. v. Dixon, Ky., 478 S.W.2d 703 (1972). The fact that the evidence

may also support a different conclusion than the one reached by the ALJ does not entitle an appellant to a reversal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). In determining an occupational disability rating, the ALJ is permitted to consider the claimant's testimony as to his ability to work. Hush v. Abrams, Ky., 584 S.W.2d 48 ____ (1979).

We believe the decision of the ALJ is supported by substantial evidence. All the doctors agree that there are no jobs at Budd which Toles would be able to perform. Dr. Hargadon testified that "with regard to what activities he could tolerate, it would have to be something that is at bench height and a job that does not require any work above shoulder level or repetitive lifting below knee level or any repetitious pivoting from side to side." While Dr. Hargadon did indicate that Toles should be able to work full time at his position with QAS, he further indicated that Toles should be restricted to light duty status. Dr. Hargadon agreed that the occupational limitations stemming from his back problems exceed the 5% impairment rating he assigned. Dr. Templin indicated in his Form 107 that Toles' occupational limitation was greater than the 9% impairment rating he assigned because "unfortunately Mr. Toles is unable to return to activities requiring frequent bending, stooping, kneeling, lifting from floor level or lifting items weighing greater than 20 pounds or carrying items weighing greater than 25 pounds or repetitively lifting items weighing greater than 30 pounds or carrying items weighing greater than 25 pounds for any extended

distance or prolonged time." Dr. Kraweic testified that Toles is limited as to what he can do even though he has not yet placed any limitations on what he can do.

Toles testified that while he did return to part-time work at QAS as a slide reader, he had difficulty bending over the microscope. He agree that his work at QAS was sedentary, but testified that he was unable to lean over the microscope. Toles stated at the hearing that he was still employed at QAS, but had only worked a total of three hours in the month preceding the hearing. He also stated that he had contacted several environmental firms in the Lexington area and filled out numerous applications in grocery stores and gas stations but had no luck in obtaining employment within his restrictions. Thus, although the doctors feel Toles may be able to perform sedentary work, his experiences with sedentary work at Budd and QAS show otherwise. Because Toles cannot perform sedentary work and because he had been unable to find a job within his restrictions, the ALJ did not err in finding Toles to be 100% occupationally disabled. In the event Toles' condition improves to the point that sedentary work is possible or he is able to find a job which accommodates his restrictions, Budd can file for reopening on the issue of Toles' occupational disability.

Budd also argues that the ALJ erred in finding Toles' treatment for depression to be compensable under the Act. Budd maintains that Toles must show that his depression has resulted in some amount occupational disability in order to be

compensable. We disagree. An employer is liable for all "injurious consequences flowing from the original injury, and not attributable to an independent, intervening cause." Beech Creek Coal Co. v. Cox, Ky., 237 S.W.2d 56 (1995), citing 58 Am.Jur., Workmen's Compensation, § 198, page 706. Dr. Kraweic testified that Toles' depression stems from his injury, inability to work, and financial problems. Thus, the ALJ did not err in finding Toles' depression to be compensable under the act.

Finally, Budd argues that the ALJ erred in holding that medical expenses incurred for treatment by Dr. Templin and at Cardinal Hill were compensable. We agree with the Board that Budd failed to properly preserve this issue for review. As the Board stated, "The compensability of Dr. Templin's medical services was not listed in the prehearing order as a contested issue." We agree with the Board that listing "continued medical treatment" under contested issues in the prehearing order does not preserve any issues regarding the compensability of treatment rendered by a specific medical provider or facility.

Having considered the parties' arguments on appeal, the opinion of the Board is affirmed.

ALL CONCUR.

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