

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002358-WC

OWENSBORO MUNICIPAL UTILITIES,
as insured by KACO

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 96-92937

RICHARD LYNN MOSELEY;
OWENSBORO MUNICIPAL UTILITIES,
as insured by MARYLAND CASUALTY
and GREAT AMERICAN INSURANCE;
SPECIAL FUND; HONORABLE SHEILA
LOWTHER, ADMINISTRATIVE LAW JUDGE
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

*** ** ** ** **

BEFORE: EMBERTON, GARDNER AND MILLER, JUDGES.

GARDNER, JUDGE: Owensboro Municipal Utilities (OMU) as insured by KACO (KACO) appeals from an opinion of the Workers' Compensation Board (the board) affirming an opinion of the Administrative Law Judge (ALJ) which found the employee in this case, Richard Moseley (Moseley), to be one hundred percent occupationally disabled and apportioned responsibility fifty percent to OMU as insured by KACO and fifty percent to the

Special Fund. After reviewing the arguments raised by KACO, the record below and the applicable law, this Court affirms in part, reverses in part and remands for proceedings consistent with this opinion.

Moseley began employment with OMU in 1972 and worked for OMU until July 1997. While employed with OMU, he served as a fuel system operator, mechanic and maintenance worker. Moseley has suffered from various back problems throughout the years, beginning in the 1970s. In March 1985, Moseley suffered a back strain while cutting a steel channel at work. He saw several physicians around that time and in the following years, but returned to work after the incident. In August 1992, Moseley injured his back at work when he fell and was struck by a cable. Moseley received medical treatment following this incident and was off work from August 1992 until January 1993. KACO, the insurer for OMU in August 1992, voluntarily paid Moseley temporary total disability benefits (TTD) from August 21, 1992, through January 4, 1993.

Moseley returned to work in January 1993. He worked from January 1993 until November 1993 as a maintenance supervisor which was less strenuous than his prior position. He returned to his previous position in November 1993 and worked there until March 8, 1996. On that date, he was pushing a 1,500 pound tool box, and his back went out. Following this event, his pain worsened and he saw Drs. Oexmann and Arendall. Arendall after having an MRI, myelogram and other tests conducted, determined that surgery was indicated. A lumbar laminectomy was performed

in October 1996. Surgery revealed that Moseley had a lateral recess decompression and a posterior foraminotomy which is a narrowing of the nerve canal resulting from calcium deposits, which decompresses the nerve. Moseley did not have a ruptured disc. Moseley reached maximum medical recovery in June 1997 but was never released by his physician to return to his previous work. His employment was terminated by OMU in 1997, because there were no positions available which matched the restrictions placed on Moseley. OMU as insured by Great American Insurance Company (Great American) voluntarily paid TTD benefits from March 8, 1996, through August 27, 1996. Voluntary benefits were also paid pursuant to the agreed order by KACO and Great American jointly from late 1996 until early 1997.

A claim for workers' compensation benefits was filed in 1992, and Moseley filed an application for adjustment of his claim following the 1996 work incident. The case proceeded, and in January 1998, the ALJ issued an opinion and award. The ALJ concluded that the 1985 work incident did not result in any occupational disability to Moseley. She thereby dismissed OMU's insurer in 1985, Maryland Casualty, from the action. After reviewing the medical evidence, the ALJ concluded that Moseley sustained a compensable work-related injury on August 20, 1992, and that this injury aroused into disabling reality a congenital abnormality in Moseley's spine, which became symptomatic. She concluded that Moseley's current problems are the end result of the 1992 injury and that the 1996 injury he suffered exacerbated his symptoms. She also concluded that the Special Fund was

responsible for one-half of all benefits award and that KACO, the 1992 insurance provider, was responsible for the other fifty percent. She found that Moseley's future medical expenses were the responsibility of KACO. Specifically, she awarded Moseley \$190 per week from KACO. This amount represented fifty percent occupational disability from and after August 29, 1992, for all periods of time during which Moseley was unable to work and continuing for as long as Moseley is disabled. She provided that during the periods that Moseley was able to work, no occupational disability benefits were payable. She awarded the same amounts to Moseley against the Special Fund. She dismissed Moseley's claims for benefits from the 1985 and 1996 injuries. The ALJ subsequently denied a petition for reconsideration of the opinion and award. KACO appealed to the board which affirmed the ALJ. KACO has now appealed to this Court.

KACO first argues that as a matter of law, the 1996 injury is compensable, and some percentage of occupational disability must be attributed to that injury. After reviewing the record below, this Court concludes that the ALJ's findings regarding the 1992 and 1996 injuries are contrary to the medical evidence presented and the applicable law, and thus we must reverse on this issue.

A claimant in a workers' compensation case bears the burden of proof and the risk of persuasion before the ALJ. REQ Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985), quoting Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). If the claimant succeeds, the question on appeal before

the reviewing tribunal is whether the decision of the ALJ is supported by substantial evidence. Id. If the claimant is unsuccessful and appeals, the question is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his or her favor. Id. See also Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992). The function of further review of the board's opinion in this Court is to correct the board only where this Court perceives the board 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 687-88. A reviewing court must determine whether an ALJ applied the correct rule of law to the facts he or she found. Starks v. Kentucky Health Facilities, Ky. App., 684 S.W.2d 5, 6 (1984).

In the instant case, the record reflects that substantive evidence was presented before the ALJ that compelled a finding that both the 1992 and 1996 injuries were of appreciable proportions. Dr. Arendall, upon whom the ALJ heavily relied, clearly testified that he would apportion 2.5 percent of Moseley's impairment to the 1992 injury and 2.5 percent to the 1996 injury. The record reflects that the 1996 incident was a distinct injury which occurred when Moseley was pushing a heavy tool box. The fact that the term "aggravation" was used by Arendall was of no appreciable consequence since he clearly testified that both the 1992 and 1996 injuries were instrumental in leading to Moseley's subsequent level of disability. The

finding that Moseley's prior existing condition was totally brought out by 1992 incident strains credibility.

We believe this case is fundamentally distinguishable from Calloway County Fiscal Court v. Winchester, Ky. App., 557 S.W.2d 216 (1977). In Winchester, the medical evidence indicated that the employee's subsequent injury was of no consequence and had little effect on his subsequent condition. The employee was only able to work a short time following the first injury. In the case at bar, the evidence shows that Moseley's second injury was of appreciable proportions, and that Moseley was able to work for at least three years following the 1992 injury.¹ As a result of the error committed by the ALJ, we must reverse and remand this case to the ALJ in order that the ALJ can properly apportion the resulting occupational disability benefits between the 1992 and 1996 injuries and the arousal of a pre-existing dormant condition which would be the responsibility of the Special Fund.² The court must also properly apportion the medical expenses.

¹We also note that the ALJ concluded that Moseley was one hundred percent occupationally disabled following the 1992 injury. This conclusion appears to be contrary to established law. The Kentucky Supreme Court in Yocum v. Spalding, Ky., 547 S.W.2d 442 (1977), stated that while an ALJ has broad leeway to translate functional impairment into occupational disability, that authority is not unlimited. It held that a worker who continues to be regularly employed cannot be totally disabled. Id., at 444. See also Winn Dixie, Louisville, Inc. v. Watson, Ky., 473 S.W.2d 148 (1971); Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968); R.C. Durr Co. v. Chapman, Ky. App., 563 S.W.2d 743 (1978).

²We have concluded that the ALJ's finding that the 1985 injury did not cause any disability and her subsequent dismissal of Moseley's claim based upon this incident is supported by substantial evidence. Hence, we affirm on this issue.

KACO next contends that any award of benefits to Moseley should be entirely the Special Fund's responsibility.³ As part of its argument, KACO contends that KRS 342.1202, which applies in this case, is unconstitutional and contradicts KRS 342.120(6).⁴ KACO's argument lacks merit.

KRS 342.1202 provided,

An award for income benefits for permanent total or permanent partial disability under this chapter based, in whole or in part, on a pre-existing disease or pre-existing condition of the back, or of the heart shall be apportioned, by the administrative law judge, fifty percent (50%) to the employer and fifty percent (50%) to the special fund. Apportionment required by this section shall not be a cause of appeal.

KRS 342.120(6) and (7) stated,

(6) If it is found that the employee is a person mentioned in paragraphs (a) or (b) of subsection (2) of this section and a subsequent compensable injury or occupational disease has resulted in additional permanent disability so that the degree of disability caused by the combined disabilities is greater than that which would have resulted from the subsequent injury or occupational disease alone, and the employee is entitled to receive compensation on the basis of the combined disabilities, the employer shall be liable for the payment of all income benefits awarded by the administrative law judge which is equal to the percentage of disability which would have resulted from the latter injury or occupational disease had there been no pre-existing disability or dormant, but aroused disease or condition.

(7) The remaining compensation for which such resulting condition would entitle

³Great American also contends that the Special Fund should bear the entire responsibility of the award.

⁴KRS 342.1202 was repealed in December 1996, when the General Assembly overhauled the workers' compensation statutes.

the employee, including any compensation for disability resulting from a dormant disease or condition aroused into disabling reality by the injury or occupational disease, but excluding all compensation which the provisions of this chapter would have afforded on account of prior disabling disease or injury had it been compensated thereunder, shall be paid out of the special fund provided for in KRS 342.122. Such remaining compensation shall be paid directly to the employee under such regulations as the secretary of finance and administration may provide for such purpose.

The purpose and viability of KRS 342.1202 has been discussed and approved by Kentucky's highest court. In Commonwealth of Kentucky, Central State Hospital v. Gray, Ky., 880 S.W.2d 557 (1994), the court noted that the General Assembly in 1987 attempted to deal with the escalating and unfunded liability of the Special Fund. The court observed that KRS 342.1202 was enacted in response to judicial decisions which shifted liability from the employer to the Special Fund. Id., at 558. The court noted that this Court had earlier encouraged the legislature to review the issue of apportionment in cases involving heart attacks in Stovall v. Dal-Camp, Inc., Ky. App., 669 S.W.2d 531 (1984). Id., at 557. The statute assured that employers would be liable for no less than fifty percent of the workers' compensation awards in heart attack and back cases and assured that the employers would be encouraged to make the workplace as safe as possible. Id., at 559. See also Heartland Health Care Center v. Maupin, Ky., 887 S.W.2d 553 (1994). KACO's reliance on Accuride Corp. v. Donahoo, Ky., 865 S.W.2d 652 (1993), is misplaced. The Supreme Court in that case specifically acknowledged that any unfairness inherent in the

application of KRS 342.120 to pre-existing heart or back conditions had been remedied by the enactment of KRS 342.1202. KACO has failed to cite any authority which supports its contention that KRS 342.1202 was unconstitutional or that the ALJ should have apportioned all of the responsibility to the Special Fund. The ALJ correctly applied KRS 342.1202 to the facts of this case.

KACO also maintains that the majority of Moseley's current level of disability existed prior to the alleged 1992 event. We decline to disturb the ALJ's finding on this issue. Dr. Arendall testified that based upon the information he received from Moseley and the medical records, he did not believe that Moseley had any prior active disability as of August 19, 1992, the day before the August 20, 1992 injury. Thus, there is substantial evidence to support the ALJ's finding on this issue. This Court finds it unnecessary to address the other arguments raised by KACO.

For the foregoing reasons, this Court affirms the ALJ and the Workers' Compensation Board regarding the findings of a pre-existing dormant condition prior to the 1992 injury and the applicability of KRS 342.1202, but must reverse the ALJ's findings concerning the effect of the 1992 and 1996 injuries upon Moseley's occupational disability and remand for proceedings consistent with this opinion.

ALL CONCUR.

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