RENDERED: September 10, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000870-WC

TT&M, INC.
As Insured by ITT HARTFORD — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. 96-007021 AND 94-051812

ELLERY HERRINGTON; GAP FORK FUELS;
ROBERT L. WHITTAKER, Director
of SPECIAL FUND;
MARK WEBSTER, Administrative
Law Judge; and
WORKER'S COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GARDNER, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: TT&M, Inc. petitions for review of a decision of the Workers' Compensation Board that affirmed an Administrative Law Judge's award of benefits to Ellery Herrington for a May 28, 1996, work-related injury. Upon reviewing TT&M's arguments, the record and applicable law, we affirm. Because the ALJ and the Board adequately addressed TT&M's arguments, we shall liberally quote from their opinions.

Herrington was born on May 6, 1994, and has an eighth grade education. Between 1982 and 1994, he worked for at least four underground coal mines as a roof bolter, scoop operator, shot firer and mobile drill operator. On November 23, 1994, Herrington suffered a back injury while lifting a pump during the course of his employment with Gap Fork Fuels. Herrington settled the claim arising from this injury on October 11, 1995, for $3,000.00 from Gap Fork and $750.00 from the Special Fund for an occupational disability of 3.1%. Drs. Ruben Singayao and Richard Mortara treated Herrington for the injury.

Herrington began working for TT&M in May 1996. Because the company knew about Herrington's back problems, it assigned him the job of mobile drill operator which is fairly easy. On May 29, 1996, Herrington began to experience a worsening of his back pain while tamping holes, and had to lie down and crawl out of the mine. Herrington immediately notified the company's supervisor of the pain. At the time of the second injury, Herrington was still being treated by Dr. Singayao for the first injury. Herrington sought treatment from Dr. Singayao on June 6, 1996. The physician prescribed medication, ordered an MRI, ordered Herrington to not return to any work, eventually ordered physical therapy, and referred him to Dr. Mortara. Dr. Singayao also referred Herrington to Dr. James Templin, who, in turn, referred him to Dr. Robert Lowe who performed surgery on Herrington on February 19, 1997.

Herrington moved to reopen the claim for his November 23, 1994, injury, and the motion was granted on October 22, 1996. On September 23, 1996, Herrington filed an application for adjustment

of claim for the May 29, 1996, injury. TT&M alleged that it first learned of Herrington's allegation that he had suffered an injury on September 23, 1996, when Herrington filed the claim. The ALJ consolidated both claims.

TT&M asserts that there is not substantial evidence to support the ALJ's finding that Herrington suffered a work-related injury on May 29, 1996. TT&M's assertion is based upon Herrington's "inconsistent" story concerning his May 29,1996, injury and excerpts from some of Herrington's medical records.[1]

The Board, in its opinion affirming the ALJ's decision, summarized the medical evidence presented to the ALJ on the issues of the May 29, 1996, injury and Herrington's condition following surgery:

> The medical evidence included testimony from Drs. James Templin, Matt Vuskovich, Robert Goodman, Singayao, Smith, and Lowe. Dr. Templin found evidence of a grade 1 spondylolisthesis, assigned a 15% functional impairment, 3% to the first injury and 12% to the second injury. He was of the opinion that Herrington's

[1] TT&M offered, among other excerpts, the following statement from Dr. Charles Smith, an osteopath, to support this assertion: "It is difficult to determine how much of this man's present problem is a result of his second injury and how much is a result of the first injury...it would appear that he has had a worsening of his original injury." This statement does not support TT&M's argument. As to the "inconsistencies" in Herrington's statements, the Board noted that Herrington "stated that while talking to representatives of the employer he acknowledged he wasn't sure what was going on and, in response to a question about whether it related to his old back injury, he answered in a way that could be considered affirmative."

occupational problems would be much greater than a 15% impairment indicated.

Dr. Vusovich found evidence of symptom magnification. He initially [examined] Herrington in July 1995 and found no evidence of impairment at that time. He examined Herrington on January 10 1997 and again found numerous nonorganic physical findings. He did not assign an impairment rating.

Dr. Goodman saw Herrington in January 1997 and found evidence of spondylolisthesis. He assigned an 8% impairment based upon the DRE models in the AMA guidelines. He was of the opinion that half was due to the injury at Gap Fork and half to the injury at TT&M. Half of each of these would be attributable to the arousal of a pre-existing condition. At the time he saw Herrington, which was prior to the fusion surgery, he would assign a 75 pound lifting limitation and recommend against repetitive bending, stooping, or twisting.

Dr. Singayao treated Herrington after the November 1994 [injury] and returned him to work in March 1995 without any work restrictions.

Dr. Smith was of the opinion Herrington was totally and permanently disabled after the surgery.

Dr. Lowe first saw Herrington in December 1996 believing that he had significant problems. He performed a spinal fusion on February 19, 1997. By May of 1997, he indicated the fusion had produced a "reasonably good

result." He did assign a 20% impairment rating apportioned equally between the two injuries. Continued follow-up revealed that stiffness continued as did radiculopathy. He opined that the fusion apparently was causing more difficulty than would have been anticipated. He assigned a 25% impairment rating at the time of his August examination, 15% of which he attributed to the initial injury. He did not believe Herrington would have the capability of returning to any of his prior coal mining work.

Several issues were raised before the ALJ in the combination new injury and reopening. Most of those issues related to the "second" injury which occurred at TT&M. The AlJ did evaluate Herrington's condition as it related to a reopening and reached the conclusion that while Herrington settled for a 3.1% occupational disability, his actual disability at that time was 20%. He further concluded Herrington had sustained an increase in his occupational disability to the level of 50%. Neither of these determinations are at issue on appeal.

The ALJ went on to conclude that there was a work-related injury in May 1996 and that it constituted a new work-related harmful change in the organism as that is defined in [Ky. Rev. Stat.] KRS 342.0011 (1). He noted that each of the doctors who offered an opinion on the issue attributed a portion of Herrington's ultimate disability to each of the two injuries. He further

believed Herrington's testimony of the onset of severe low back pain while tamping the hole.

The function of further review in the Court of Appeals is to correct the board only where the 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, Ky., 827 S.W.2d 685, 687 (1992).

The medical evidence causally related Herrington's condition to the May 1996 work-related injury. Since substantial evidence was presented supporting the finding that Herrington suffered an injury, as defined under the Workers' Compensation Act, this Court may not rule otherwise. Smyzer v. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). That Herrington suffered a work-related injury on May 29, 1996, is a reasonable inference to be drawn from the evidence which is the sole province of the fact finder. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d (1985). It is not enough for TT&M to show that the record contains some evidence which would support a reversal of the Board's opinion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). Inasmuch as the Board's decision, affirming that of the ALJ's, is supported by substantial evidence, the remaining evidence does not compel a different result. Special Fund v. Francis, Ky,. 708 S.W.2d 641 (1986).

TT&M asserts that even if Herrington suffered a work-related injury on May 29, 1996, the finding that he gave due and

timely notice is not supported by substantial evidence. The Board addressed this issue, as follows:

> The ALJ further concluded that due and timely notice had been given under the circumstances . . . . The ALJ acknowledged, and we agree, that the information relayed to the employer immediately after the May 29, 1996 injury was somewhat indefinite. However, the ALJ further concluded that at the very latest the employer knew Herrington was claiming a work-related injury for notice purposes at the time of the filing of the application for adjustment of claim. Due to the complex circumstances surrounding Herrington's low back injury, it was not unreasonable for the ALJ to conclude pursuant to KRS 342.200 that there existed a reasonable excuse for the delay. The ALJ upon petition for reconsideration by TT&M addressed this situation in some detail. Herrington was candid in his testimony and very credibly testified that at the time of the onset of the severe low back pain in May of 1996 he was unsure whether a new injury had occurred or whether the pain was a mere continuation of his original problem. We believe this is just such a circumstance in which KRS 342.200 should be applied. It was not until some time in July of 1996 when he was advised by a physician that there had [been] a "new" injury that he became fully aware that appropriate notification must be given. The ALJ concluded that by the filing of his application the requirements of the

> statute had been met. This, of course, is a mixed question of law and fact but we do not believe that it is appropriate under these circumstances for us to conclude that as a matter of law due and timely notice had not been given. It is, in our opinion, a reasonable inference to be drawn from the record that Herrington himself was unsure as the cause of his condition and whether it constituted a "new" injury until so apprised by a physician.

KRS 342.185 provides that "no proceeding under this chapter for compensation for an injury . . . shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable . . . ." Whether notice of accident or injury is given to the employer "as soon as practicable" depends upon the facts and circumstances of each case. Marc Blackburn Brick Co. v. Yates, Ky., 424 S.W.2d 814 (1968). Further, the notice provision of this section "should be construed liberally in favor of the employee in order to effectuate the beneficent purposes of the workers' compensation law." Lewallen v. Peabody Coal Co., Ky., 306 S.W.2d 262 (1957) (the Court stated that the "three months' interim between knowledge of the claimant and his notice to the Company was reasonable notice and 'as soon as practicable' within the spirit of the [Workers'] Compensation Act"). Thus, under the circumstances, we perceive no error on the Board's part in finding that Herrington gave timely and due notice.

TT&M asserts that it is not liable for more than 25 percent of Herrington's disability award because Herrington had a

pre-existing disability which should be excluded from any award granted; the ALJ's finding that unreasonable and unnecessary surgery totally disabled Herrington; and there is no evidence of substance to support the Board's application of Campbell v. Sextet Mining Co., Ky., 912 S.W.2d 25 (1990). The ALJ determined Herrington to be totally disabled. TT&M explains that it should be responsible for the percentage of disability which would have resulted from the latter injury or occupational disease had there been no pre-existing disability, pursuant to KRS 342.120. Pursuant to the ALJ's finding that Herrington was rendered totally disabled as a direct consequence of the surgery Dr. Lowe performed on February 19, 1997, he apportioned the award as follows:

> Pursuant to my finding concerning the existence of a 1996 injury and the apportionment based on Dr. Lowe, I find that of the 100% total disability 50% is for the 1994 injury and 50% is for the 1996 injury. As indicated above, there was already 20% occupational disability for the first injury. This means there has been an increase of 30%. The 30% award against Gap Fork creates a dilemma of should the award then be limited to the number of weeks remaining [for] the 425 week period in the earlier settlement or should this be a lifetime award since Herrington is now totally disabled and Gap Fork Fuels is responsible for half of his occupational disability. But for the latter injury this would not a total [disability] and it seems unfair to enhance the disability for the prior award by the disability from the latter award.

Nevertheless, as I understand Campbell v. Sextet Mining Co., Ky., 912 S.W.2d 25 (1995), a model of judicial clarity, I cannot take away the lifetime aspect of Herrington's award although I can carve out that part of the award which would have been [Gap Fork's] responsibility.

I therefore find that Herrington has proved an increase of occupational disability from 20% (not the bad deal for 3.1%) to 50%. As of the date of the second injury Herrington is totally disabled. I will make a permanent partial award against Gap Fork and a lifetime award against TT&M.

The Board, in affirming the ALJ's award and in response to TT&M's petition for reconsideration on this issue, stated that:

The final issue is whether the ALJ should have reduced TT&M's liability based upon a pre-existing 50% active disability. The ALJ in attempting to apply Campbell v. Sextet Mining Co., Ky., 912 S.W.2d 25 (1996) reduced TT&M's liability on a monetary basis rather than a percentage basis. When questioned about this by petition for reconsideration, the ALJ further clarified his opinion. Therein he stated that Herrington's total occupational disability ultimately resulted from the surgery performed by Dr. Lowe which naturally flowed from the second injury. He therefore concluded that the second injury by itself, even without regard to the first injury, was totally occupationally disabling.

International Harvester v. Poff, Ky., 331 S.W.2d 712 (1959); and Schneider v. Putnam, Ky., 579 S.W.2d 370 (1970. Therefore, in applying the whole man doctrine, the ALJ concluded it was inappropriate to reduce the amount of Herrington's ultimate occupational disability by a percentage.

The [Kentucky] Supreme Court has now modified its holding in Campbell v. Sextet Mining Co. in the claim of Fleming v. Windchy, Ky., 953 S.W.2d 604 (1997). In modifying Campbell, however, the court concluded that in claims such as the one before us, the employee should receive the totality of his occupational disability. When Fleming is considered in light of the ALJ's conclusion that the latter injury totally disabled Herrington by itself, we are of the opinion that the ALJ appropriately gave only a monetary credit to the obligation to pay by TT&M rather than a percentage of disability offset.

We agree with the Board's construction of the case law relevant to this issue.

TT&M argues in conclusion that the ALJ and the Board misconstrued the holding of Derr Construction Co. v. Bennett, Ky., 873 S.W.2d 824 (1994), in imposing liability for medical expenses on TT&M. Again, we adopt the Board's response to that argument:

Finally, contrary to TT&M's urging, we believe that Derr Construction Co. v. Bennett, Ky., 873 S.W.2d 824 (1994), supports the ALJ's determination that all medical

> bills after the May 1996 incident, which he deemed compensable, were the obligation of TT&M. Although Derr was a claim involving repetitive trauma, its principal [sic] is far more reaching. If the subsequent injury, as here, is sufficient to create a total occupational disability, then it certainly is sufficient to be considered a superseding and intervening cause giving rise to the necessity to pay all subsequent medical bills. The ALJ, in our opinion, based upon what would be considered substantive and probative evidence, concluded that the second injury which led to Herrington undergoing a fusion was the causative element for his ongoing medical treatment. Those circumstances create the liability for the payment of medical expenses pursuant to KRS 342.020 and place that liability upon TT&M.

The principle that medical treatment naturally flowing from a work-related injury is compensable under the Workers' Compensation Act is followed in Kentucky. In Elizabethtown Sportswear v. Stice, Ky. App., 720 S.W.2d 732 (1986), this Court held that a claim for workers' compensation benefits can be brought by the employee to recover for additional disability resulting from treatment which aggravates a work-related injury.

The Board's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kimberly Van Der Heiden
CLARK, WARD & CAVE
Lexington, Kentucky

BRIEF FOR APPELLEE:
ELLERY HERRINGTON:

Robert G. Miller, Jr.
PERRY, PRESTON AND MILLER
Paintsville, Kentucky

BRIEF FOR APPELLEE
GAP FORK FUELS:

Jeffrey D. Damron
RILEY, WALTERS & DAMRON, P.S.C.
Prestonsburg, Kentucky