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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002756-WC

WILLAMETTE INDUSTRIES, INC. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-96-01355

WILLIAM O. VOLGEMANN; SPECIAL FUND; SHEILA LOWTHER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GARDNER, MILLER AND SCHRODER, JUDGES.

GARDNER, JUDGE: Willamette Industries, Inc. (Willamette) appeals from an October 12, 1998 opinion of the Workers' Compensation Board (the Board) which affirmed in part, reversed in part, and remanded an opinion and award of the Administrative Law Judge (ALJ). The matter came to the ALJ on remand from a prior opinion of the Board rendered February 13, 1998, in which the Board concluded that the ALJ improperly failed to make a finding on the question of whether the prior active occupational disability of the claimant William O. Volgemann (Volgemann) was work-related.

The ALJ determined that Volgemann's prior injury was work-related, and Willamette now appeals on this issue. Willamette also contends that the Board erred as a matter of law in its October 12, 1998 opinion wherein it concluded that a subsequent injury fell within the exception to the "going and coming" rule and was therefore work-related.

The function of this Court's review of the Board's opinion is to correct the Board only where we find that 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). We have closely examined the record, the law, and the arguments of counsel, and cannot conclude that the Board has misconstrued the law, or that, in assessing the evidence, it committed an error so flagrant as to cause gross injustice. As we cannot improve upon the opinion of the Board, we adopt it as the opinion of this Court. The Board stated in relevant part as follows:

> This is the second time this matter has been before the Board and the facts in the case are still disputed. In an opinion and award rendered March 18, 1997, the ALJ found Volgemann to be totally occupationally disabled with 20% pre-existing active. After various petitions for reconsideration were filed, the ALJ awarded benefits based on an 80% occupational disability for 520 weeks. Under the 1994 amendments to the Workers' Compensation Act, she determined that Volgemann's pre-existing active disability could not be combined with the compensable portion to be enhanced to a lifetime payment. TTD at the total rate was awarded from January 4, 1996 to June 21, 1996.

Volgemann appealed to the Board, arguing that he was entitled to lifetime benefits rather than benefits for 520 weeks and at a higher rate. It was his position that his previous active disability was, in fact, work-related and pursuant to KRS 342.730(1)(a), he was entitled to lifetime benefits. The Board, in an opinion rendered February 13, 1998, reversed and remanded the decision of the ALJ. The Board recognized that Volgemann had two previous back surgeries, one in 1988 and another in 1989. In our opinion, we stated:

> In the original opinion and award in summarizing the evidence, the ALJ indicates that in July 1988 Volgemann underwent a laminectomy for a herniation at the L4-5 level and that this was not a work-related injury and that in March 1989, he underwent a second procedure for a herniation at the L3-4 and L4-5 levels.

(Board Opinion rendered February 13, 1998, p. 6).

We went on to state:

> We are unwilling to infer from either the original opinion and award or any of the subsequent orders on petitions for reconsideration that the ALJ has yet made a finding as to whether or not Volgemann's preexisting active disability was work related. In our opinion, the ALJ has still not adequately addressed the issue. In summarizing the evidence, as opposed to making findings, in the original opinion and award, the ALJ indicates that the 1988 injury was not work related when the only direct evidence on that issue is Volgemann's own testimony that it was work related and the only other evidence is provided in Dr. Nehil's letter report when he indicates that injury was attributed by Volgemann to 'a lot of walking on concrete surfaces.' The only evidence as to the precipitating event leading to the 1989 surgery

> is again Volgemann's own testimony that the accident leading to that surgery occurred when he was stopped on the highway while taking his 'release back to go to work from the first surgery.' That injury may or may not be work related. That requires a finding of fact by the ALJ.

(Board Opinion rendered February 13, 1998, pp. 7-8).

Therefore, we reversed and remanded this matter to the ALJ for a finding of whether the prior active occupational disability found by the ALJ was work-related or not work-related.

As previously reviewed in various opinions, Volgemann sustained an injury to his back on November 28, 1995 while performing pulling activities at Willamette. He acknowledged the previous back surgeries in 1988 and 1989. Volgemann was asked how he was injured in July of 1988. He testified: 'It (his back) just went out on me.' He was then asked whether he filed a workers' compensation claim and replied: 'No. I was just too dumb.' Concerning his back surgery in 1989, he was questioned on whether he had an injury before that happened. He replied that he had. He was taking his release to go back to work from his first surgery to Willamette when a state truck backed over him. As noted, Dr. Nehil's report from 1997 indicated that Volgemann gave a history of back pain in 1988 which he attributed to a lot of walking on concrete surfaces with specific trauma.

Concerning the issue of TTD, in the original opinion, the ALJ found Volgemann temporarily totally disabled from January 4, 1996 until June 21, 1996. As stated, Volgemann's injury occurred on November 28, 1996. He took two weeks off to undergo physical therapy in mid December 1995 and returned to work on January 3, 1996. His back hurt and he had to stop. Dr. Eggers performed surgery on March 6, 1996 and Volgemann attempted to return to work on June 21, 1996 at his regular job but was unable to do so.

The ALJ, in her Opinion and Award on Remand, found the only evidence contained in the record concerning Volgemann's previous back injury and subsequent surgeries in 1988 and 1989 was his own testimony. She found that the uncontradicted testimony which was inadvertently overlooked in the original proceeding was that he injured his back in the course of his employment. Therefore, pursuant to KRS 342.730(1)(a), the ALJ found Volgemann entitled to an award of benefits for so long as he remained disabled. In the order portion, she found him entitled to 80% occupational disability benefits from January 4, 1996 continuing on. Both Volgemann and Willamette filed petitions for reconsideration on the issues of TTD and active disability which were overruled by the ALJ in an order rendered July 7, 1998 and the second appeal before this Board ensued.

On appeal, Volgemann argues that pursuant to 'the law of the case,' the ALJ was prohibited from revisiting the previous award of TTD benefits on remand. We agree. No argument was made in the original appeal on this matter and the ALJ erred in granting TTD benefits to Volgemann. Under the 'law of the case' doctrine, the ALJ's original opinion giving TTD benefits is not subject to further judicial review as stated in Sowders v. Coleman, Ky., 4 S.W.2d 731 (1928):

> The doctrine of 'law of the case' is founded upon the policy that there should be an end to litigation, and cases may not be presented by piecemeal. It is a sound policy and well defined and understood in this jurisdiction. The doctrine, as defined by the decisions, is that one adjudication settles all errors relied upon for a reversal, whether mentioned in the opinion of the court or not, and all errors lurking in the record on the first appeal which might have been, but were not expressly relied upon as error.

Furthermore, as argued by Volgemann, the award of permanent total occupational disability benefits with a portion carved out as active does not preclude the award of TTD at the full rate under the 'whole man'

> theory. See, Ingersoll-Rand Co. v. Rule, Ky. App., 867 S.W.2d 205 (1993). We believe Rule is on point and Volgemann is entitled to TTD benefits as previously awarded.
>
> Willamette, in its appeal, argues that the ALJ erred in finding Volgemann's pre-existing active disability to be work-related. It first argues that contrary to this Board's previous opinion, the ALJ did make a specific finding in her original opinion that Volgemann's pre-existing active disability was not work-related. We acknowledged that finding of the ALJ, however, as quoted above from our previous opinion, we believe the ALJ did not adequately address the issue, citing Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985); Whitaker v. Peabody Coal Co., Ky., 788 S.W.2d 269 (1990). Clearly, the ALJ's determination that the 1988 injury is work-related is supported by Volgemann's testimony as cited above. As concerns the 1989 injury, Volgemann testified he was taking his release to go back to work when he was rear-ended, thus injuring his back necessitating a second surgery performed by Dr. Eggers in 1989. We believe the activity engaged in by Volgemann when injured in 1989 falls within the exception to the 'going and coming rule.' Volgemann was delivering the release as a necessary requirement of his employer to return to work. Thus, it was a work-related activity. See, Farris v. Huston Barger Masonary [sic], Inc., Ky., 780 S.W.2d 611 (1989). Therefore, the ALJ's conclusion of work-relatedness is supported by substantial evidence and she correctly concluded Volgemann was entitled to lifetime benefits pursuant to KRS 342.730(1)(a).

The Board affirmed in part, reversed in part, and remanded the matter to the ALJ. We find no error in the Board's consideration of the issues presented, and accordingly affirm the opinion of the Board.

ALL CONCUR.

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