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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001083-WC

STURGEON, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-63371

ERNIE MORRIS;
STURGEON MINING COMPANY, INC.;
J. LANDON OVERFIELD, ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD APPELLEES

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

BEFORE: EMBERTON, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE: Sturgeon, Inc. asks us to review a decision of the Workers' Compensation Board (Board) rendered March 31, 2000. Kentucky Revised Statutes (KRS) 342.290. We affirm.

In 1996, Morris simultaneously worked for Sturgeon Mining Company, Inc. (Sturgeon Mining) and Sturgeon, Inc. Sturgeon Mining was in the business of coal mining, and Morris worked as a coal truck driver. Sturgeon, Inc. was in the business of commercial construction, and Morris worked as a "low-boy" truck driver. The companies share a board of directors and

officers. When Morris worked for Sturgeon Mining, he was paid per load of coal transported. When he worked for Sturgeon, Inc., he was paid hourly.

In October 1997, while working for Sturgeon, Inc., Morris fell from the low-boy truck and sustained an injury to his lower back. On December 21, 1998, he filed a claim against both Sturgeon, Inc. and Sturgeon Mining as a result of this injury. An arbitrator determined Morris' employer at the time of the accident to be Sturgeon, Inc. The case was then transferred to an Administrative Law Judge (ALJ). A hearing was held on July 7, 2000. At the hearing, Patricia Cable, secretary and office manager for Sturgeon, Inc. and Sturgeon Mining, testified that Morris was working for Sturgeon Mining at the time of his injury. A letter from Everett Currier, corporate secretary for both Sturgeon, Inc. and Sturgeon Mining, was submitted by agreement of the parties. Currier's letter stated Morris was involved in a mining-related activity when he fell from the low-boy. The ALJ affirmed that Morris' employer was Sturgeon, Inc.

As to Morris' injuries, the ALJ considered evidence from doctors who treated Morris. Dr. Vicky Young, Morris' primary physician, assigned a ten percent impairment rating and imposed several physical restrictions. Dr. Leon Ravvin, who performed surgery on Morris, likewise imposed several restrictions. Dr. Ravvin attributed half of Morris' impairment to the natural aging process. Dr. Craig Cartia, a pain specialist, assigned a ten percent impairment rating, and like Dr. Ravvin, attributed half of Morris' impairment to aging.

Morris also suffered depression as a result of his physical injuries and was seen by Dr. Stuart Cooke. Dr. Cooke assigned a fifteen percent impairment rating as a work-related injury. From the evidence, the ALJ concluded Morris was totally disabled. A Petition for Reconsideration by Sturgeon, Inc. was overruled. An appeal to the Board followed. The Board affirmed the ALJ by opinion rendered March 31, 2000, thus precipitating our review.

Sturgeon, Inc. asserts the Board erred by determining that statements made by a Sturgeon Mining employee and a Sturgeon Mining officer were not judicial admissions. Determining the statements to be judicial admissions would have meant Morris was working for Sturgeon Mining when he fell from the low-boy. A judicial admission is:

> [A] *formal act* of a party (committed during the course of a judicial proceeding) that has the effect of removing a fact or issue from the field of dispute . . . .

R. Lawson, The Kentucky Evidence Law Handbook, § 8.15 (3d ed. 1993); see also Sutherland v. Davis, 286 Ky. 743, 151 S.W.2d 1021 (1941).

> [U]nless all such circumstances and conditions give rise to the **probability of error** in the party's own testimony, he should not be permitted to avert the consequences of his testimony by the introduction of, or reliance on, other evidence in the case. (Emphasis added.)

Id at 1024. The rule of judicial admissions must be applied with caution. See Bell v. Harmon, Ky., 284 S.W.2d 812 (1955).

The Board noted that since Cable and Currier worked for both Sturgeon Mining and Sturgeon, Inc., a conflict of interest existed. As such, the Board held that there was a sufficient

enough "probability of error" to prevent use of the statements as judicial admissions. We do not believe the Board erred in rejecting the admissions that would have placed liability upon Sturgeon Mining in lieu of Sturgeon, Inc.

Next, Sturgeon, Inc. asserts that the ALJ erred in finding Morris totally disabled without proof of complete and permanent inability to perform any type of work. Specifically, Sturgeon, Inc. asserts that the Board improperly affirmed the ALJ under the factors for finding disability set out in Osborne v. Johnson, Ky., 432 S.W.2d 800, 803 (1968), which reads:

> (1) What kind of work normally available on the local labor market was the man capable, by qualifications and training, of performing prior to injury; (2) what were the normal wages in such employment; (3) what kind of work normally available on the local labor market is the man capable of performing since his injury; and (4) what are the normal wages in such employment?

Sturgeon, Inc. claims the 1996 revision of the workers' compensation law overruled Osborne and limits the ALJ to the definition in KRS 342.0011(11)(c), which reads:

> "Permanent total disability" means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. . . .

This issue was addressed by the recent Kentucky Supreme Court case, McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854, 859 (2001), from which we quote:

> Pursuant to the 1996 amendments, awards for permanent, partial disability are a function of the worker's AMA impairment rating, the statutory multiplier for that rating, and whether the worker can return to the pre-

> injury employment; thus, it is clear that the ALJ has very limited discretion when determining the extent of a worker's permanent, partial disability. *See*, KRS 342.730(1)(b) and (c). However, determining whether a particular worker has sustained a partial or total occupational disability as defined by KRS 342.0011(11) clearly requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy. For that reason, we conclude that some of the principles set forth in *Osborne v. Johnson, supra,* remain viable when determining whether a worker's occupational disability is partial or total. (Citations omitted.)

In the case *sub judice*, the medical evidence in the record clearly indicates Morris suffers severe physical and psychological limitations. Additionally, Morris' own testimony sets out his various difficulties. As such, we perceive no error on the part of the Board in affirming the ALJ under Osborne.

Sturgeon, Inc.'s final assignment of error is that the Board erred in affirming the ALJ's refusal to exclude from compensation benefits that portion of Morris' condition attributed to the natural aging process. We view McNutt, 40 S.W.3d 854, as directly on point. In McNutt, medical evidence indicated one-half of the claimant's impairment was caused by a dormant degenerative condition, which was part of the natural aging process. The Court held that disability resulting from arousal of a prior dormant condition by a work-related injury is compensable within the definition of "injury" in KRS 342.0011(1), even when it is caused by the natural aging process. In the instant case, the record indicates one-half of Morris' impairment was attributable to the natural aging process. The medical

evidence revealed, however, that the condition had been dormant. Both treating doctors testified they would have assigned a pre-injury functional impairment rating of zero. Thus, we believe McNutt to be dispositive. We are of the opinion the ALJ did not err in awarding workers' compensation benefits to Morris. Upon the whole, we perceive no error on the part of the Board in affirming the ALJ.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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