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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002344-WC

MUDCAT CONSTRUCTION, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-60741

REX DANIEL CUNDIFF;
LEE COUNTY ADJUSTMENT CENTER;
HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

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

BEFORE: BARBER, GUIDUGLI, AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, Mudcat Construction ("Mudcat"), the second of two employers in this workers' compensation claim, seeks review of the Board's opinion affirming the ALJ's determination that the claimant's second injury resulted in permanent total disability. Finding no error, we affirm.

Appellee, Rex Daniel Cundiff ("Cundiff"), filed a Form 101 on February 10, 1999, alleging: (1) that he injured his back on August 5, 1997, unloading wire from a truck while working for the Appellee, Lee County Adjustment Center ("LCAC") and (2) that

he injured his back on September 24, 1998, running a ditch witch while working for Mudcat. Cundiff's work history reflects that he worked for LCAC from October 4, 1990, until September 14, 1997; for Harper Diesel & Machine Service, as a laborer in a repair shop, from September 16, 1997, until March 20, 1998, and for Mudcat as a loader operator/laborer from September 21, 1998, until October 1, 1998.

The contested issues before the ALJ, as outlined on the October 22, 1999, prehearing order and memorandum, include: workrelatedness and notice on the 1998 injury; extent and duration; compensability of medicals; preexisting active; apportionment as to carriers and exclusion for natural aging.

On March 1, 2000, the ALJ rendered an opinion, order and award, "siding with" Cundiff on the issues of workrelatedness and notice for the 1998 injury (Mudcat's). The ALJ noted that both injuries occurred after the 1996 revision of the Act and that income benefits were controlled by the 1996 amended version of KRS 342.730. The ALJ found that Cundiff had a 20% functional impairment based upon Dr. Vaughn's opinion. The ALJ apportioned half or 10% to the first injury (LCAC), which translated to a 10% occupational disability, using the grid factor of 1 in the statute. The ALJ found that, following the 1997 injury, Cundiff had retained the capacity to return to the type of work he had previously performed. The ALJ determined that neither KRS 342.730(1)(c)(1), nor 342.730(1)(c)(2) factors came into play.

The ALJ concluded that Cundiff was permanently and totally disabled based upon the restrictions imposed by Dr. Vaughn after the second injury at Mudcat. The ALJ explained that Dr. Vaughn had restricted lifting to 10 pounds and did not believe Cundiff could return to gainful employment. The ALJ rejected the argument that any award should exclude the natural aging process relying upon the testimonies of Dr. Vaughn and of Dr. Goodman that Caudill's spondylolisthesis was not due to the natural aging process but was a congenital or developmental condition; further, the injuries, themselves, had aroused this condition into disabling reality. The ALJ agreed with LCAC's analysis that medical expenses should not be apportioned under Derr Construction Co. v. Bennett, Ky., 873 S.W.2d 824 (1994).

The ALJ directed the parties to submit a proposed award based upon applicable law commensurate with his findings. On April 5, 2000, the ALJ rendered an amended opinion, order and award. Based upon Fleming v. Windchy, Ky., 953 S.W.2d 604 (1997), the ALJ made the following award:

> 1997 injury against LCAC:
>
> $20.09 per week beginning August 5, 1997, and continuing for a period not to exceed 425 weeks, together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation and the said defendant shall take credit for payments of such compensation heretofore made.
>
> 1998 injury against Mudcat:
>
> $303.33 per week beginning September 24, 1998, and continuing for so long he is so disabled, together with interest at the rate

> of 12% per annum on all due and unpaid installments and the said defendant shall take credit for payments of such compensation heretofore made . . . . [T]o the extent that any permanent partial disability benefits paid . . . [on the 1997/LCAC injury] overlap the period of total disability, they will offset the liability of Mudcat . . . which would otherwise be due pursuant to the total disability award.

The ALJ determined that LCAC was liable for medical expenses from August 5, 1997 until September 24, 1998 (the date of the second injury, at Mudcat) and Mudcat was liable thereafter.

Mudcat appealed to the Board contending: (1) that the ALJ erred in failing to find LCAC the responsible employer; (2) that Cundiff's injury at Mudcat was not work-related; (3) that Cundiff did not give due and timely notice of the injury at Mudcat and (4) that Cundiff is not totally and permanently disabled. On September 6, 2000, the Board rendered a unanimous 24-page opinion affirming from which we quote in pertinent part:

> Mudcat first argues that Cundiff's injury at LCAC was a preexising active disability . . . at most, any work incident at Mudcat in September 1998 was the aggravation of a pre-existing active condition. It points to the evidence in the record that Cundiff had persistent pain and ongoing treatment following the LCAC injury and therefore that employer should bear the responsibility for the payment of benefits.
>
> Apparently, Mudcat is arguing that Cundiff sustained the full extent of his disability with LCAC and the injury with Mudcat merely aggravated a pre-existing condition . . . . We believe that contrary to Mudcat's arguments, that the ALJ undertook the correct analysis of this successive injury claim.

. . . .

As previously noted, because of the amendments [in 1996] to KRS 342.730, LCAC could be found liable for no more than 10% of the award once the ALJ chose to rely on Dr. Vaughn's 20% impairment rating (10% apportioned to LCAC and 10% apportioned to Mudcat). The ALJ correctly applied KRS 342.730 in calculating LCAC's liability. The ALJ also correct determined that since the later injury culminated in total disability, Mudcat was entitled only to a credit for the overlapping period . . . from the prior permanent partial disability award . . . .

We further find that the ALJ's determination that Cundiff was partially disabled by the first injury and rendered totally disabled by the second injury is supported by substantial evidence in the record. Though he testified he suffered continuous pain and sought medical treatment following the injury with LCAC, he nonetheless continued to work, performing what was described as strenuous labor with Harper Diesel. It was not until his injury with Mudcat that he could no longer work and his symptoms became more severe. Indeed, if the 1997 injury was taken alone, the ALJ's award of 10% disability would have been, in all likelihood, the correct result. In essence, the ALJ did find a portion of Cundiff's disability to be active at the time of his injury at Mudcat.

. . . .

Mudcat next argues the ALJ erred in finding that Cundiff sustained his burden of proving causation . . . .

Cundiff bore the burden of proof to establish causation . . . . Snawder v. Stice, Ky.App. 576 S.W.2d 276 (1979). Since Cundiff was successful . . . before the ALJ . . . the question is whether the ALJ's decision was supported by substantial evidence. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984).

The ALJ chose to rely on Cundiff's testimony as how his injuries occurred . . . . Inasmuch as the ALJ's decision is supported by substantial evidence, we are without authority to find otherwise. [Citation omitted.]

Mudcat next argues that Cundiff did not provide due and timely notice . . . . The ALJ relied on Cundiff's testimony that he informed his supervisor on Friday, the day he first saw a physician for his work injury at Mudcat. He also relied on the testimony of Donald Best that the claimant informed him that he had hurt his back . . . . [T]he ALJ's decision is supported by substantial evidence and may not be reversed on appeal. [Citation omitted.]

Lastly, Mudcat argues the ALJ erred in concluding that Cundiff was totally occupationally disabled and further contends the ALJ erred by failing to apportion any liability to the natural aging process and erred in his apportionment of medical expenses.

. . . .

[The] . . . provisions [of KRS 342.0011(11)(c), defining permanent total disability and KRS 342.0011(34) defining work] mandate two specific findings by an . . . [ALJ] in assessing a total disability award. First he ALJ must find the evidence establishes a "permanent disability rating." Here . . . Drs. Vaughn and Goodman assessed 20% and 15% impairment ratings, respectively.

The second aspect of the analysis requires the ALJ to determine whether there . . .[is] a complete and permanent inability to perform any type of work as a result of the injury. This portion of the definition of permanent total disability provides discretion to the Administrative Law Judges who interpret evidence in light of the definition of "work." Thus, in order to qualify for permanent total disability benefits, a claimant must demonstrate not that he is completely unable to perform any sort of work

activities, but rather, that he cannot do any work activities that he may be capable of performing on a regular and sustained competitive basis . . . . Inasmuch as the ALJ's opinion is supported by evidence of substance, we must affirm. [Citation omitted.]

Mudcat also argues that the ALJ erred in failing to apportion any of Cundiff's disability as due to the natural aging process. The ALJ relied on the testimony of Dr. Vaughn, as acknowledged by Dr. Goodman . . . . We particularly note the AMA Guides' instruction that the natural aging process, as well as other common developmental findings in the back, such as spondylolisis, spondylolisthesis, and herniated disc without radiculopathy are excluded within the AMA Guides impairment ratings and categories in the calculation of functional impairment ratings.

We further note the Court of Appeals, in the unpublished opinion of Commonwealth of Kentucky, Transportation Cabinet v. Frank Guffey, et al. 1999-CA-00753-WC (rendered December 10, 1999)[1], affirmed the Board's interpretation of KRS 342.0011(1) . . . that, "that which is a dormant, nondisabling condition has not now become 'natural aging process.' The Court conceded [sic] that it is the effect of the injury being compensated, and not the effect of natural aging.

We believe the ALJ correctly refused to exclude any of the award as due to the natural aging process. Clearly the physicians testified that spondylolisthesis is not due to the natural aging process.

. . . .

Lastly, Mudcat argues the ALJ erred in his apportionment of medical expenses. We

[1] That decision was appealed to the Supreme Court, which rendered Commonwealth v. Guffey, Ky., 42 S.W.3d 618 (2001), on April 26, 2001, affirming the Court of Appeals' decision with respect to the natural aging process.

> disagree and find the ALJ correctly apportioned medical expenses pursuant to . . . Derr Construction Co. v. Bennett, 873 S.W.2d 824 (1994). The Court [in Derr] held that the employer was liable for all medical expenses, noting that unlike the other sections in the Act, KRS 342.020 contains no exclusion for prior active disability . . . .
>
> In this case, following Cundiff's injury with LCAC he was able to return to work doing the same type of job without difficulty and without the need for surgical intervention or significant medical treatment. It was not until the second injury with Mudcat that surgery was necessitated. Therefore, based upon the law in Derr Construction Co. v. Bennett, supra, we believe the ALJ reached the same result.

Mudcat again appeals. Mudcat maintains that the Board and ALJ erred in concluding: (1) that LCAC was not the responsible employer because Cundiff's disability was pre-existing and active before the injury at Mudcat; (2) that Cundiff met his burden of proof on causation; (3) that Cundiff met his burden of proof on notice and (4) that Cundiff was totally disabled. Mudcat also maintains that it was error not to apportion liability for medical expenses.

Mudcat acknowledges the fact that it is not our function, as a reviewing court, to reweigh the evidence; nevertheless, that is exactly what Mudcat asks us to do. Mudcat states that it "believes the law in this case has been misapplied" but proceeds to continue to argue the evidence rather than identify any error of law. The Board thoroughly addressed each of the issues raised by Mudcat. We concur in their analysis.

We also draw the parties' attention to McNutt Constr. v. Scott, Ky., 40 S.W.3d 854 (2001). There, the Supreme Court was not "persuaded that the legislature's decision to abolish Special Fund apportionment with regard to traumatic injury claims had any effect on the longstanding principle that a harmful change to a worker's body which is caused by work is an "injury" for the purposes of Chapter 342." Id. at 859. The Court held that disability which results from the arousal of a prior, dormant condition by a work-related injury remains compensable under the 1996 Act.

McNutt rejected the argument that the 1996 amendments to KRS 342.0011(11) legislatively overruled the definition of occupational disability in Osborne v. Johnson, Ky., 432 S.W.2d 800(1968) codified in the pre-December 12, 1996, version of KRS 342.0011(1). The Court explained that pursuant to the 1996 amendments awards for permanent, partial disability are a function of the AMA impairment rating, the statutory multiplier for that rating, and whether or not the worker can return to pre-injury employment. The ALJ has very limited discretion when determining the *extent* of a worker's permanent, *partial disability*. KRS 342.730(1)(b) and (c). However, determining *whether* a particular worker is partially or totally disabled as defined in 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. The Court explained that some of the principles in Osborne v. Johnson, supra, remain viable when determining whether occupational disability is partial or total. Despite the extensive revision of the Act in 1996, the ALJ remains the fact-finder whose functions include translating lay and medical evidence into a finding of occupational disability. KRS 342.285(1).

Accordingly, we affirm the September 6, 2000, opinion of the Workers' Compensation Board.

ALL CONCUR.

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