

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000904-WC

KENTUCKY TRANSPORTATION CABINET

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-82074

BOBBY G. TARTER;
HON. SHELIA C. LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: GUIDUGLI, JOHNSON AND HUDDLESTON, JUDGES.

GUIDUGLI, JUDGE. The Kentucky Transportation Cabinet (KTC) appeals from an opinion of the Workers' Compensation Board (the Board) entered March 28, 2001, which affirmed an opinion of the Chief Administrative Law Judge (the ALJ) which awarded benefits to Bobby Tarter (Tarter). We affirm.

Tarter was employed by KTC as a light equipment operator. According to Tarter's Form 101, he sustained injuries to his neck and right arm on October 15, 1997, when he was in an accident involving a KTC dump truck. Because of the issues

raised by KTC on appeal, a review of Tarter's prior medical history is required, as is a review of Tarter's dismissal from his employment with KTC.

PRIOR MEDICAL HISTORY

Tarter sought medical treatment for neck pain and headaches from Dr. Rodney Casada, a chiropractor, on January 7, 1997. According to Dr. Casada's records for that date, Tarter complained of neck pain and pain and tingling in his right arm. Between January and February 1997, Tarter saw Dr. Casada nineteen times. Tarter complained of right arm pain and/or tingling on three of those visits and of left-sided neck pain on five of those visits. Dr. Casada noted several times that Tarter's tenderness centered around the C-2 area. When Tarter's condition failed to improve following a course of conservative treatment, Dr. Casada referred him to Dr. Amr El-Naggar.

Dr. El-Naggar first saw Tarter on February 18, 1997, for evaluation of neck pain and bilateral occipital headaches. Tarter complained of neck pain and headaches but denied any symptoms involving his shoulders or arms. On exam, Tarter was found to be neurologically intact. Dr. El-Naggar noted tenderness at C1-2 and "significant" pain at C6-7 upon hyperflexion/extension of the neck. Dr. El-Naggar saw Tarter again on August 13, 1997. On that date, Tarter complained of neck pain and numbness in his left arm. Based on Tarter's complaints Dr. El-Naggar ordered a cervical MRI, which was never performed for reasons not apparent from the record. Dr. El-Naggar noted clinical evidence of bilateral occipital neuralgia,

prescribed medication, recommended nerve blocks and referred him to Dr. Douglas Kennedy for pain management.

Dr. Kennedy saw Tarter on February 24, 1997. Tarter complained of neck pain and headaches. Although he denied experiencing pain radiating into his arms, Tarter did report occasional shaking of his right arm and hand and one instance of his right arm becoming numb and cool. On exam, Dr. Kennedy noted that Tarter's pain was approximately at the C3-4 level. Tarter had no radicular symptoms, deep reflexes and sensation were intact, and full range of motion in his cervical spine and arms was noted. Dr. Kennedy diagnosed cervicogenic headache, which he equated to a "crick in the neck." He recommended facet injections at C3, 4 and 5 which Tarter refused.

POST-ACCIDENT MEDICAL HISTORY

According to testimony contained in the record, Tarter told police who responded to the accident that he was not hurt. He then returned to work.

Upon his return to work, Tarter filled out an accident report in which he indicated "Pulled muscle in total body." Tarter testified at the hearing that at the time he completed the accident report his entire body hurt. Later that night he sought treatment at the emergency room of the local hospital for pain in his neck and shoulder.

The parties stipulated that Tarter continued to work until February 9, 1998. He underwent a C5-6 discectomy and fusion which was performed by Dr. El-Naggar on April 23, 1998. Tarter returned to work on June 7, 1998, and continued to work

until September 15, 1998. Tarter testified that he has not worked since then as he feels he is unable to do so.

A. Dr. El-Naggar

Dr. Magdy El-Kalliny, Dr. El-Naggar's partner, saw Tarter on Dr. El-Naggar's behalf on January 14, 1998. Tarter reported that since the accident he had persistent neck pain radiating into his right arm along with numbness and tingling in his right hand. He denied any pain or numbness in his left arm. Neurologically Tarter was noted to be intact. Based on Tarter's complaints, Dr. El-Kalliny ordered an MRI "to rule out a C6-7 disc herniation." An MRI report dated January 22, 1998, showed a herniation at C5-6 which distorted the spinal cord.

Dr. El-Naggar saw Tarter on February 10, 1998. Tarter was still experiencing severe pain in his neck and tingling in his right arm as well as right-sided occipital headaches. Dr. El-Naggar reviewed the MRI and interpreted it as showing displacement of the right C-6 nerve root. Neurologically Tarter was unchanged. Dr. El-Naggar decided to treat him conservatively with medicine, physical therapy and exercise. When Dr. El-Naggar saw Tarter again on March 3, 1998, Tarter's condition was unchanged.

When Tarter saw Dr. El-Naggar on March 24, 1998, he told Dr. El-Naggar that "he was told by workman's [sic] compensation that his pain was not related to the work injury of October 1997, but rather due to his previous injuries since he was treating with me prior to the accident." In response, Dr. El-Naggar dictated the following into his office notes:

I reviewed the medical records and the patient did have neck pain which I treated him for in the past. He was having neck pain in addition to symptoms of tingling and numbness and pain in his left upper extremity which was intermittent. He was not having any symptoms in his right upper extremity, however. After the October 1997 accident he started having pain in the right shoulder and arm as well as significant worsening in his neck pain. He had the cervical MRI which showed the disc herniation at C5-6 on the right side which is compressing the right C6 nerve root. He did not have an MRI before the accident. Due to the fact that subsequent to the injury of October 1997 he started having increased neck pain and symptoms in the right upper extremity which he did not have before. [sic] I believe that his current symptoms and disc herniation at C5-6 are related to the accident of October 1997. Certainly the fact that he had neck pain in the past indicates a pre-existing dormant condition that was aroused with the injury.

Following surgery, Dr. El-Naggar continued to see Tarter on follow-up. On June 6, 1998, Tarter complained of residual neck stiffness, but Dr. El-Naggar released him to return to work with a temporary restriction on lifting more than twenty pounds. On July 13, 1998, Dr. El-Naggar gave a permanent restriction against lifting more than fifty pounds and released him.

Tarter returned to Dr. El-Naggar on September 23, 1998, with complaints of severe neck and shoulder blade pain. Dr. El-Naggar ordered cervical x-rays and took him off work. On a follow-up visit on September 30, 1998, Dr. El-Naggar noted that the x-rays were normal. On exam, Dr. El-Naggar reported tenderness at T-5, 6 and 7 and ordered a thoracic x-ray. The thoracic x-ray was also normal.

When Tarter returned on October 14, 1998, with continued neck and shoulder pain complaints, Dr. El-Naggar recommended cervical epidural injections which Tarter refused. Dr. El-Naggar released Tarter to return to work in two weeks and changed the permanent lifting restriction to thirty pounds.

On June 17, 2000, Tarter complained of neck and shoulder blade pain but denied any shoulder or arm pain. Tenderness was noted at the C2-3 level. Dr. El-Naggar ordered a cervical MRI. According to an MRI report dated May 31, 2001, the film was "unremarkable" aside from showing the prior fusion.

Tarter saw Dr. El-Naggar again on June 7, 2000. Dr. El-Naggar noted that the MRI of May 31 showed "a disc bulge at C4-5 which is the level above the fusion which was not significant and did not cause any nerve root compression." Dr. El-Naggar gave an impairment rating of 15% "secondary to having a disc herniation with cervical radiculopathy category III." Aside from the thirty pound lifting restriction, Dr. El-Naggar stated that Tarter "should alternate sitting, standing and walking every hour." No other restrictions were given.

On the same day, Dr. El-Naggar completed a Form 107 which gave an impairment rating of 15%. Dr. El-Naggar indicated that the accident was the cause of Tarter's complaints, that no part of his condition was due to the effects of the natural aging process, and that Tarter's work did not aggravate or accelerate the natural aging process. Dr. El-Naggar did find, however, that Tarter's condition was aggravated by arousal of a pre-existing dormant nondisabling condition which he identified as

"degenerative disc disease - neck and left arm pain." Dr. El-Naggar attributed half of Tarter's impairment rating to the arousal of the previously dormant condition. He also indicated that Tarter lacked the physical capacity to return to his previous employment.

At his deposition, Dr. El-Naggar testified that the MRI of January 22, 1999, showed degenerative changes and agreed that these changes were part of the natural aging process. He also testified that he lowered Tarter's lifting restrictions to thirty pounds based solely on his subjective complaints of pain. Dr. El-Naggar agreed that Tarter had an active cervical condition in August 1997, but indicated that it was Tarter's neck pain and left arm numbness as opposed to the C5-C6 disc level.

Dr. El-Naggar also testified that the 15% impairment rating was related to the work injury. In his opinion, the fact that Tarter had neck pain prior to the accident "indicated a preexisting dormant condition, that was aroused with injury."

B. Dr. Timothy Wagner

Dr. Wagner performed an independent medical evaluation of Tarter on December 7, 1999. In a report of the same date, Dr. Wagner indicated that he reviewed medical records from Drs. Casada, Kennedy, El-Kalliny, and El-Naggar.

On the date of the evaluation, Tarter complained of pain in his neck and shoulders. On exam, Dr. Wagner noted full range of motion in Tarter's arms and cervical spine. No atrophy was present and Tarter had a strong grip in both hands. Deep tendon reflexes were equal in both arms. Dr. Wagner's diagnosis

was "Status post C5-6 discectomy with fusion." He noted that although Tarter related his condition to the accident there was treatment for neck pain prior to the accident and that "he probably has some on-going disc degeneration problem at C5-6 before the accident, which would make this a pre-existing active condition which would be partially due to the normal aging process." Dr. Wagner gave Tarter an impairment rating of 8% stemming from the discectomy and fusion and indicated that in his opinion the work-related accident was not the sole cause of the C5-6 disc problem.

At his deposition, Dr. Wagner testified that 50% of Tarter's impairment rating was due to a preexisting active condition and the natural aging process. According to Dr. Wagner, the natural aging process condition was loss of water content "at that level" which was symptomatic prior to the accident and worsened by the accident. In his opinion, Tarter could return to work and carry out his normal job duties with no restrictions.

LOSS OF CDL AND EMPLOYMENT

Tarter was convicted of DUI-first offense on March 26, 1998, and his license was suspended for ninety days. As a result of the conviction Tarter lost his Commercial Driver's License, which was a requirement of his employment. According to KTC policy, an employee whose license is suspended for a DUI-first offense has thirty days to obtain a hardship license and ninety days to obtain reinstatement of his CDL. Tarter received a

hardship license thirty days after his conviction. It is unclear whether his CDL was reinstated.

Tarter was convicted of DUI-second offense and DUI-third offense on April 15, 1999, and his license was suspended for one year. Subsequent convictions for driving on a suspended license resulted in the suspension being extended to November 2004. KTC policy requires automatic termination of any employee who is convicted of a second DUI.

KTC also presented evidence showing that Tarter was suspended for absenteeism on January 4, 1999, and was supposed to return to work on January 19, 1999. When Tarter failed to return to work, KTC informed him in writing on February 3, 1999, that pursuant to KTC policy he was considered to have resigned his position.

OPINIONS OF THE ALJ AND THE BOARD

In an opinion and award entered October 17, 2000, the ALJ awarded benefits to Tarter based on a 15% functional impairment. The ALJ further found that Tarter was entitled to application of the 1.5 multiplier pursuant to KRS 342.730(1)(c)1. because he was unable to return to his prior employment. In reaching this decision, the ALJ stated:

2. The next issue in dispute concern [sic] causation and work-relatedness. It is undisputed that Mr. Tarter experienced some symptoms involving his cervical spine prior to the subject injury. He was treated by a chiropractor for these symptoms in the [sic] early 1997. He was seen by Dr. El-Naggar himself in August, 1997 for symptoms involving his neck and numbness in his left arm. However, in a treatment note written in March, 1998, Dr. El-Naggar distinguished that complaint from the condition which

necessitated surgery. It was his opinion that the motor vehicle accident resulted in a herniated disc at C5-6. This resulted in radiation of pain into the right arm. Dr. El-Naggar indicated that the plaintiff had not experienced this type of radiculopathy before that motor vehicle accident. Based upon this testimony, the Administrative Law Judge is persuaded that Mr. Tarter has met his burden of proof on this issue.

3. There are several issues concerning the degree to which Mr. Tarter retains a functional impairment, and whether it is entirely compensable. The Administrative Law Judge is persuaded that Dr. El-Naggar is in the best position to address these issues. This physician saw Mr. Tarter prior to the work-related accident. He also treated Mr. Tarter for an extended period of time following that accident. Dr. El-Naggar's treatment notes, as well as his testimony, persuade the Administrative Law Judge that the motor vehicle accident resulted in a herniated disc, which in turn produced a 15% functional impairment. It is the finding of the Administrative Law Judge, based on Dr. El-Naggar's testimony, that no portion of this impairment is attributable to a pre-existing condition or to the natural aging process. Consequently, Mr. Tarter is entitled to benefits pursuant to KRS 342.730 based upon this impairment rating Finally, it is the finding of the Administrative Law Judge that the plaintiff is entitled to the 1.5 multiplier set forth in KRS 342.730(1)(c)1.

The Board affirmed the ALJ's opinion and award and this appeal followed.

KTC contends that "the degenerative effects of the natural aging process in Tarter's cervical spine, i.e., his preexisting degenerative cervical condition, should be carved out of his 15% functional impairment and his disability benefits reduced 50% pursuant to [KRS] 342.730 (1)(e)." In support of its argument, KTC points to the fact that Dr. El-Naggar apportioned

half of Tarter's impairment rating "to . . . degenerative changes due to the effect of the natural aging process." We disagree.

As the Board noted, the Kentucky Supreme Court rejected this argument in McNutt Construction/First Generation Services v. Scott, Ky., 40 S.W.3d 854 (2001). In that case, like this case, one of the claimant's physicians testified that half of the claimant's impairment rating was attributable to a preexisting degenerative condition and that the preexisting condition stemmed from the natural aging process. The claimant's employer argued that any "disability which results from the arousal of the prior, dormant degenerative condition should not be considered because the condition is due to the natural aging process and, therefore, is not an "injury" for the purposes of Chapter 342." McNutt, 40 S.W.3d at 859. In rejecting the employer's argument, the Court held:

As we construe the definition of "injury," the critical question is one of causation. Although KRS 342.0011(1) clearly indicates that the effects of the natural aging process are not considered to be an "injury," it also clearly indicates that work-related trauma "which is the proximate cause producing a harmful change in the human organism" is an "injury," [Emphasis in original.] When the two provisions are considered in concert, it appears that their purpose is to emphasize that only those harmful changes which are proximately caused by work-related trauma are compensable pursuant to Chapter 342. Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury. [Footnote omitted.] We are 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.

. . . [D]isability which results from the arousal of a prior, dormant condition by a work-related injury remains compensable under the 1996 Act[.]

Id. Based on the reasoning in McNutt, the ALJ's ruling on this issue was not erroneous. Because her findings were supported by substantial evidence, affirmation of her decision is required. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984). The fact that there may be evidence in the record which would support a decision contrary to that of the ALJ does not require reversal. Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999).

KTC also argues that the ALJ's application of the 1.5 multiplier is erroneous because Tarter retains the physical capacity to return to work but cannot because he has been terminated for job abandonment and/or his second DUI conviction. KTC maintains that evidence from Drs. Wagner and El-Naggar support its contention that Tarter is physically able to return to the type of work he was performing at the time of the injury. We disagree and adopt the following portion of the Board's opinion as our own:

The plain language of KRS 342.730(1)(c)1. establishes that if the [ALJ] concludes that an individual is physically incapable of returning to the same work performed at the time of the injury, then the 1.5 multiplier should be used. Whether an individual does or does not return to work for reasons other than his physical condition is not the determining factor. The [ALJ], in her opinion, recited the testimony in the record concerning Tarter's job duties as a light

equipment operator and Dr. El-Naggar's testimony concerning Tarter's complaints of residual pain and a 30-pound lifting restriction. This, in our opinion, qualifies as substantial evidence in the record upon which the [ALJ] could base a conclusion that the 1.5 multiplier should be applied. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. David Shearer, Jr.
Louisville, KY

BRIEF FOR APPELLEE, TARTER:

Mark D. Knight
Somerset, KY