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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002167-WC

RES-CARE, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-77685

MARANNA FRITZ; MINACT, INC.;
HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

GUIDUGLI, JUDGE: Res-Care, Inc., petitions for review of an opinion of the Workers' Compensation Board (hereinafter "Board") reversing and remanding an opinion of the Administrative Law Judge (hereinafter "ALJ"). The Board reversed the ALJ's determination that Res-Care and Minact, Inc., are jointly and severally liable for medical expenses related to Maranna Fritz's low back condition after February 16, 2001. The Board also reversed the ALJ's enhancement of permanent partial disability

benefits by the 1.5 multiplier. That issue has not been appealed, so the only issue before this Court is the apportionment of medical expenses relative to Fritz's low back condition. We have thoroughly reviewed the record and applicable law and finding no error, we affirm.

We adopt the following relevant portions of the Board's opinion as to the facts of the case.

> Fritz's injuries on May 29, 1997, and February 16, 2000, both occurred at the Earle C. Clements Job Corps Center in Union County, Kentucky. The center was operated by Minact at the time of the 1997 injury. At the time of the February 16, 2000[,] incident, the center was operated by Res-Care. The facts in this matter are not in dispute. Having carefully reviewed the record in this matter and finding the ALJ's summary of the evidence to be accurate and thorough, in the interest of administrative economy, we adopt relevant portions of the ALJ's summary as follows:
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> > On May 29, 1997, while employed by Minact, Ms. Fritz's office had been moved from one building to another. The movers just put all her office furniture in the middle of the room. She continued to see students and after three weeks, she repositioned her furniture. She did not lift anything, she just pushed it to where it should be in the room. In the process she hurt her neck and low back. Initially she thought she just had a muscle strain. The pain in her low back just kept getting worse. She had difficulty getting out of her car. Eventually the pain radiated into her right leg. The

radiating pain was not real noticeable until she had her second injury in February 2000.

Following her injury in 1997, she saw her primary care physician, Dr. White. She then saw an orthopedic surgeon, Dr. Davis who prescribed anti-inflammatories and muscle relaxers that did not help. She returned to Dr. White who put her on a TENS unit which did not help and then he prescribed pain medication. She was referred to Dr. Sloan who performed cervical lumbar epidurals. From 1997 until her second injury in 2000, Ms. Fritz describes her pain like an electrical current running through her neck. She had difficulty turning her head and putting her arm back. She was taking a Taebo class which she could no longer tolerate. As time went on, the pain in her neck improved considerably but the pain in her low back continued.

On February 16, 2000, Ms. Fritz had left work and she was going to her car. The parking lot was icy and there was a hole that had filled with water and was ice covered. She stepped in the hole. Her right foot twisted and it wrenched her lower back. The hole was about six inches around. She called Janice Johnson at Human Resources the next day to report the injury. She saw Dr. Hamilton on February 23, 2000.

She did not miss any work. Dr. Hamilton did ultrasound and physical therapy. She returned to Dr. Hamilton about three days per

week. Her symptoms continued to get worse and her pain level continued to rise, despite treatment. As her condition got worse, she returned to Dr. White on April 6, 2001, at which time he placed her on medical leave and referred her to Dr. Matthew Kern. Dr. Kern recommended surgery and carried that out on June 20, 2001. At the time of her deposition, Dr. Kern had her off work and referred her to physical therapy. Ms. Fritz was off work from May until July 1, 1999[,] and then was not off again until April 2001. In June 2001, Ms. Fritz's employment with Earl C. Clements Job Corps was terminated. She has kept in communication with Lisa Wedding in Human Resources and she has reapplied for her position.

. . . .

At the time of her deposition on April 16, 2003, Ms. Fritz's source of income was social security disability and workers' compensation. She receives $1,217.00 in social security disability per month and she receives about $1600 per month in workers' compensation benefits. Ms. Fritz has not worked anywhere since her prior deposition. She has not treated with Dr. Kern in two years. Dr. Kern referred her to Dr. Joseph Waling. Dr. Waling ordered another MRI and has done an epidural and several nerve blocks along with shock therapy. At the time of her deposition she was taking Endocet and Hydrocodone.

> On September 29, 2002, Ms. Fritz sustained a stroke. She was having back pain and she got up and went outside and sat on her deck. She then went back to bed and later got up to go to the bathroom and her whole right side collapsed.
>
> Ms. Fritz received long term disability benefits beginning in 2001 and they terminated in January 2003. She has been told she will have to repay some of the benefits. Ms. Fritz does not believe she could perform the full range of duties required as a social worker based on her back condition and her pain. Her back swells with exertion and she has to lie down during the day. She also has pain running down her leg. Sometimes her pain is so severe, it interrupts her sleep at night. She has difficulty reaching above her head and she has trouble washing windows. She cannot walk for more than five or ten minutes.

The Board's opinion then set forth an extensive summary of the medical reports included in the ALJ's opinion. After summarizing the evidence, the ALJ determined that each of the alleged injuries (on May 29, 1997, and February 16, 2000) resulted in a disability rating. Since Fritz did not retain the physical capacity to perform the same or similar work she had performed at the time of the second injury, the ALJ applied the 1.5 multiplier pursuant to KRS 342.730(1)(c). Benefits for the total disability were payable by Res-Care with a reduction for

the permanent partial disability benefits payable to Minact. The ALJ's award further provided that Minact and Res-Care would have joint and several liability for medical expenses related to the low back condition following February 16, 2000. The ALJ relied upon Phoenix Mfg. Co. v. Johnson, 69 S.W.3d 64 (Ky. 2001), in making this determination. As it relates to this appeal, on motion to reconsider, the ALJ upheld the apportionment of medical expenses stating "medical expenses relating to the lumbar spine were apportioned because of the finding that the two injuries were equally responsible for the resulting low back impairment and subsequent disability. This is a reason for apportionment."

Minact appealed to the Board. The Board reversed as to the application of the 1.5 enhancement of benefits for the permanent partial disability award. The Board held:

> To impose the 1.5 enhancement in this situation would amount to holding the first employer liable for additional occupational effects that result from a subsequent injury superimposed on the injury for which Minact was liable. That same logic was applied in Fleming v. Windchy, Ky., 953 S.W.2d 604 (1997) (Fleming 1), where the Court held that where two successive injuries, each of which itself would only be partially disabling, result in a total disability, the first injury is payable only as a partial disability. The 1.5 multiplier in KRS 342.730(1)(c)1 is a modification for an increase in occupational disability resulting from the lack of physical capacity to return to the employment in which the

> employee was engaged at the time of his injury. If the first injury would not produce a lack of physical capacity in and of itself, the second injury results in that lack of physical capacity. The first employer is not liable for the enhancement of benefits for lack of physical capacity, while the second employer would be. Thus, Minact is correct that when Fritz ceased working, the .5 reduction for earning the same or greater wage was removed and the 1.5 multiplier did not apply to the permanent partial disability award. Thus, the correct benefit payable by Minact after April 5, 2001, is $33.53, and Res-Care is entitled to a reduction in its TTD and permanent total disability liability for that amount.

The Board's reversal of the ALJ's opinion on this issue has not been appealed.

The Board also reversed the ALJ on the issue of apportionment of medical expenses. The Board acknowledged that the recent cases of Phoenix Mfg. Co. v. Johnson, supra, and Sears, Roebuck & Co. v. Dennis, 131 S.W.3d 351 (Ky.App. 2004), have held that under certain circumstances there may be an apportionment of medical benefits. But the Board found that apportionment was not appropriate in this case. After reviewing the Phoenix and the Sears, Roebuck cases, the Board specifically stated:

> The Court of Appeals stated that KRS 342.020(1) does not specifically provide for apportionment of medical expenses but does not prohibit dividing those expenses among different employers and/or insurance carriers when the circumstances so warrant. (Emphasis in original).

> In order for there to be an apportionment of medical expenses, there must be substantial evidence of record to support that apportionment. The ALJ may not arbitrarily assign an apportionment. Clearly, the ALJ may not impose joint and several liability for medical expenses. Here, our review of the record fails to produce any evidence to support any type of apportionment between the two injuries. Based upon the evidence of record, we believe the liability for medical expenses related to the low back condition following the February 16, 2000[,] injury must be the responsibility of Res-Care.
>
> The ALJ stated in his order ruling on the petition for reconsideration that his reason for apportionment was the equal apportionment of the functional impairment rating. We believe that apportionment of a functional impairment rating standing alone is an insufficient basis for apportioning medical benefits. Certainly there can be situations where a first injury produces a smaller impairment rating than the second injury yet causes the majority of the need for medical treatment. Likewise, a first injury may produce a greater impairment than the second and yet not necessitate a great deal of medical treatment.

On petition for review to this Court, Res-Care argues that the Board exceeded its scope of review in determining the ALJ's findings of fact were not based on substantial evidence and erred in failing to find Phoenix and Sears, Roebuck controlling on the issue of apportionment. In Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky.App. 1997), this Court, citing Western Baptist Hospital v. Kelly, 827 S.W.2d 685,

687-88 (Ky. 1992), set forth the proper standard of review of an ALJ's opinion when it held:

> The Board correctly limited its review of the ALJ's decision to determining whether the decision was supported by substantial evidence. Our further review "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."

Res-Care contends evidence in the record supports the ALJ's opinion to apportion the medical expenses. Res-Care points to the following evidence: (1) Fritz was still actively receiving ongoing medical treatment for the effects of the 1997 injury when she fell in February 2000; (2) Dr. Baker stated that the MRI after the February 2000 accident "did not show any significant anatomical change as a result of the February 2000 accident," and went on to add "I would apportion one-half of her lumbar 10-percent impairment to the 1997 incident and one-half to the 2000 incident;" (3) Dr. Wood opined that the February 2000 incident as not an injury, but a mere temporary aggravation of a pre-existing active medical condition; and (4) Dr. Waling's report indicates that Fritz had "reached maximum medical improvement for her injury sustained in May 1997," but then added "if anything, her symptoms may progress to the point that

she will be even more limited with bending, stooping, standing, sitting, driving, etc."

Minact responds by pointing to evidence in the record contrary to that relied on by Res-Care. For example, Dr. Hamilton's records indicate that Fritz had reached maximum medical improvement on January 26, 2000, prior to the second incident. Next, Minact points out that Dr. Baker did not address what medical treatment for the back should be the responsibility of which employer. Rather, Dr. Baker merely stated that the two injuries were aggravations of a mildly symptomatic back condition that pre-existed both incidents. Finally, Minact argues that the ALJ's finding that Fritz suffered two separate injuries as a result of two separate incidents shows the ALJ did not rely upon either Dr. Wood's or Dr. Waling's opinion.

The basis for the ALJ's apportioning the medical expenses between the two employers was (as stated in the ALJ's order denying reconsideration) "medical expenses relating to the lumbar spine were apportioned because of the finding that the two injuries were equally responsible for the resulting low back impairment and subsequent disability." The Board found that this is not a legal basis for apportionment. We agree. Despite the two recent cases of Phoenix, supra and Sears, Roebuck,

supra, we believe Derr Const. Co. v. Bennett, 873 S.W.2d 824 (Ky. 1994) controls. In Derr, the Kentucky Supreme Court held:

> KRS 342.020, which governs liability for medical expenses, requires an employer to pay for the cure and relief from the effects of an injury, including medical, surgical, and hospital treatment that may reasonably be required at the time of the injury and thereafter during disability. It contains no provision authorizing the apportionment of liability for medical expenses between the employer and the Special Fund. In fact, we are aware of no provision in Chapter 342 which would authorize requiring the Special Fund to pay any portion of a worker's award of medical benefits. KRS 342.120 relates only to the apportionment of liability between the employer and the Special Fund for income benefits to compensate an injured worker for occupational disability which results from the injury. The question that remains, however, is whether, where the injured worker has ongoing medical expenses due to a pre-existing, work-related degenerative condition, the employer who is liable for medical expenses due to the subsequent work-related worsening of the condition is entitled to a determination that some portion of the medical expenses is not compensable, just as the prior, active portion of occupational disability is not compensable.
>
> KR 342.120(4) [now KRS 342.110(6)] specifically exempts the employer from paying income benefits for prior, active disability or for disability resulting from the arousal of a previously dormant condition. However, KRS 342.020 contains no such exemption regarding medical benefits. Liability for medical expenses requires only that an injury was caused by work and that medical treatment was necessitated by the injury. Regardless of whether an injured

worker's disability actually was caused by the arousal of a previously dormant condition rather than by the work-related injury, itself, the employer has been held liable for the payment of medical benefits relative to the injury. (Emphasis added).

. . .

In the instant case the ALJ determined that claimant had sustained a work-related cumulative trauma injury while working for his employer, a determination that was supported by substantial evidence. The ALJ also determined that claimant's arthritic condition, to which the last employment contributed, was caused by the cumulative trauma of his many years of iron work. Regardless of whether future knee implant surgery had been recognized as an eventuality before the incident of October, 1989, there was testimony that the incident had hastened the date on which the surgery would be required. Therefore, although it might seem harsh on the facts of this case to impose liability for future medical expenses necessitated by claimant's arthritic condition on this employer, it has been determined that work done for the employer contributed, at least to some degree, both to the condition and to claimant's resulting disability. Under such circumstances, where work has caused the disabling condition, the resulting medical expenses ought to be borne by the workers' compensation system. See Larson, Workmen's Compensation Law, § 96.70. This theory is embodied in the language of KRS 342.020. Because KRS 342.020 does not exempt an employer from liability for any portion of a worker's medical expenses in those instances where the work-related injury constitutes a progression or worsening of a prior, active work-related condition, we hold that the employer is responsible for the medical expenses necessary for the cure and relief

> of the arthritic condition in claimant's knees.

Id. at 827-28.

While it is clear that the Phoenix and Sears, Roebuck cases set out exceptions to the general rule put forth in Derr, we find them to be factually distinguishable from this case. While the result may seem harsh as stated in Derr, that is the law and the legislature has not seen a reason to address this situation since Derr was rendered. We are bound by Derr and fail to see any basis for reversing the Board. The Board's opinion did not overlook or misconstrue controlling statutes or precedent nor did it commit an error in assessing the evidence so flagrant as to cause gross injustice. Western Baptist Hospital, 827 S.W.2d at 687-88.

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

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