RENDERED: NOVEMBER 4, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002407-WC

APPELLANT

CHARLES JEKEL, JR.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
v. WC-02-94608

JAVIER STEEL CORPORATION;
WORKERS' COMPENSATION BOARD;
HON. MARCEL SMITH, Administrative
Law Judge; AND HON. DONALD G.
SMITH, Administrative Law Judge APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: The issues in this appeal from a decision of the Workers' Compensation Board center on the compensability of certain medical treatment; duration of

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

temporary total disability benefits; and the failure to award vocational rehabilitation benefits. Finding no error in the analysis of the facts and legal authority set out in the opinion of the Board, we affirm.

There is no dispute that appellant Charles Jekel sustained a work-related low back injury in the course of his employment with Javier Steel and that he cannot return to his former employment due to that injury. After initial conservative treatment for low back pain proved unsuccessful in relieving his pain, Jekel was referred to Dr. Steven Reiss, a neurosurgeon who did an L4-5 discectomy in May 2002. In August 2002, Dr. Reiss referred Jekel for a functional capacity evaluation which revealed that he could return to medium duty work. Although Dr. Reiss subsequently released Jekel to return to work with restrictions of no repetitive bending and no lifting over thirty pounds, Jekel did not return to work but sought treatment from Dr. David Rouben, an orthopedic surgeon who recommended a multi-level fusion.

The compensation carrier for Javier Steel submitted the matter of medical necessity of the surgery for utilization review. Dr. Alan Roth determined that the proposed surgery was not medically necessary and appropriate, with Dr. Russell Travis, a Lexington neurosurgeon, reaching the same conclusion on Jekel's motion for reconsideration. The original

Administrative Law Judge bifurcated the matter of medical necessity from the remainder of Jekel's compensation claim and rendered an October 21, 2003, opinion and order finding that proposed procedure was unnecessary based upon the opinions of Dr. Reiss, Dr. Travis, and Dr. Bart Goldman, who had at that time examined Jekel on two occasions at the request of Javier Steel. After conducting the first examinations, Dr. Goldman was of the opinion that a course of physical therapy followed by work hardening might allow Jekel to return to his previous employment. By the time of the second examination, Jekel had not followed the prescribed work-hardening treatment and Dr. Goldman again recommended that course of treatment.

In October 2003, Javier Steel reinstated temporary total disability benefits based upon Jekel's assurance that he would follow Dr. Goldman's recommendation concerning physical therapy and work-hardening. After Jekel failed to submit to that treatment, TTD benefits were terminated in February 2004, but were reinstated from March 2004, through the date of the final hearing after Jekel finally undertook the treatment.

After reviewing the voluminous medical and lay evidence in the record, the ALJ found Jekel had sustained a permanent partial disability as a result of the work-related back injury and applied the three multiplier set out in KRS 342.730(1)(c)1. The ALJ entered the following finding

concerning entitled to TTD benefits, vocational rehabilitation, and compensability of a pain management treatment program:

> I am persuaded by the opinion of Dr. Goldman that plaintiff had reached maximum medical improvement by November 25, 2002. Dr. Goldman is an examining rather than a treating physician. However, he examined plaintiff on three occasions and his opinions are well reasoned and supported by objective evidence. Dr. Goldman made his opinions clear when he testified. Therefore I find that plaintiff was entitled to temporary total disability benefits from February 10, 2002 to November 25, 2002. Dr. Eells did not assign any work restrictions for a psychological condition. Relying on this opinion, I find that plaintiff's psychological condition does not extend the period of entitlement to TTD.
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> * * *
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> Under KRS 342.720, an employee is entitled to vocational rehabilitation when, as a result of an injury, he is unable to perform work for which he has previous training or experience. Being persuaded by Dr. Goldman, Dr. Eells and Ralph Haas [a vocational expert], I find that plaintiff is precluded from iron work, but is capable of returning to some of the other jobs he has done in the past. Therefore, defendant is not liable for vocational rehabilitation.
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> * * *
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> KRS 342.020 requires defendant to pay for medical treatment which is reasonable and necessary. Dr. Peters has treated plaintiff for a period of time for pain management. This treatment includes narcotic medications. Dr. Reiss, who referred plaintiff to Dr. Peters, recommended that plaintiff discontinue use of narcotic pain medications long ago. Dr. Goldman recommended pain management in 2003, but only for a short term. I am persuaded

> by these statements. I find that continued pain management and narcotic medications are not reasonable and necessary. Defendant will not be held liable for this treatment.

Jekel's subsequent appeal of the ALJ's determinations on these issues, as well as the previous ALJ's ruling concerning non-compensability of further surgery, produced an opinion affirming both ALJs on all issues. Jekel now advances the same arguments concerning the propriety of the ALJs' conclusions in this appeal.

First, as to the compensability of the surgery recommended by Dr. Rouben, Jekel cites Square D. Company v. Tipton[2] for the proposition that Javier Steel could be relieved of the obligation to pay for that surgery only upon proof that the treatment would be unproductive or is outside the type of treatment generally accepted as reasonable by the medical profession and that the employer bears the burden of proof in that regard. Like the Board, we find that regardless of which party had the burden of proof, substantial evidence supported the ALJ's conclusion that the fusion surgery was not reasonable or necessary. Similar to the situation in Square D., the ALJ relied upon evidence from the physician who had performed Jekel's initial surgery that due to the location of his pain, fusion surgery was not likely to be successful. The ALJ cited

[2] 862 S.W.2d 308 (Ky. 1993).

the opinions of two other neurosurgeons who recommended against the surgery. Having the substantial support of evidence of record, we are without authority to disturb the decision of the factfinder.[3]

Jekel next complains that the ALJ erred in terminating his TTD benefits as of November 25, 2002, because he had not reached maximum medical improvement and was restricted from work following that date. The flaw in Jekel's argument is that the ALJ was free to accept the opinion of Dr. Goldman that as of the date of his November 25, 2002, examination, Jekel was at maximum medical improvement and could return to medium duty work. In Magellan Behavioral Health v. Helms,[4] this Court recently examined the requirements for entitlement for TTD benefits set out in KRS 342.0011(11)(a) and emphasized that each of the two components of that statute must be met: 1) the claimant must not have reached MMI; **and** 2) the claimant must not have improved enough to return to work. Thus, the testimony of Dr. Goldman provides ample support for the termination of TTDs on November 25, 2002, despite his recommendation for further treatments which might provide palliative relief or even allow return to his former work activities.

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[3] Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

[4] 140 S.W.3d 579 (Ky.App. 2004).

The third allegation of error focuses upon the denial of compensability of continued pain management treatment with narcotic pain medication. Again, there is ample evidence in the record to support the conclusion that continuation of such treatment was neither reasonable nor necessary and in fact the ALJ cited the opinions of two physicians who specifically recommended against the continuance of the narcotic medications.

Finally, Jekel argues that the denial of vocational rehabilitation benefits was erroneous because the evidence is uncontradicted that he cannot return to his former employment as an iron worker. KRS 342.710 provides for the payment of vocational rehabilitation benefits reasonably necessary to restore a claimant to suitable employment when, due to his work-related injury, he is unable to perform work for which he has previous training or experience. Jekel's request for such benefits was denied on the basis of evidence that there were jobs he had done in the past to which he was capable of returning. Thus the factual determination required by the statute[5] has been entered and review of the record confirms the existence of substantial evidentiary support for the finding.

[5] See Edwards v. Bluegrass Containers Division of Dura Containers, Inc., 594 S.W.2d 900 (Ky.App. 1980).

In sum, we note that the scope of our review as set out in Western Baptist Hospital v. Kelly[6] is to correct the Board only when it appears that it has "overlooked or misconstrued controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause gross injustice." Our review of the record discloses that neither factor precludes affirmance of the Board's opinion in this case.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Christopher P. Evensen Louisville, Kentucky	Judson F. Devlin Louisville, Kentucky

[6] 837 S.W.2d 865, 867-8 (Ky. 1992).