

RENDERED: FEBRUARY 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001556-WC

CENTENNIAL RESOURCES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-92095

GREGORY RUSSELL;
HONORABLE JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

DIXON, JUDGE: Centennial Resources petitions for our review of a decision of
the Workers' Compensation Board vacating and remanding an Administrative Law

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Judge's opinion on reopening, which sustained a medical fee dispute in favor of Centennial.

Gregory Russell sustained a back injury in March 1999, while working as a welder for Centennial. Russell underwent back surgery in May 1999; thereafter, Centennial terminated his employment. Centennial and Russell entered into a settlement in June 2000, for a lump sum payment of \$18,750, based on a 10% occupational disability. Following his termination, Russell was self-employed as a farmer and briefly worked as a heavy equipment operator for a coal company from May 2007 to July 2007.

In January 2007, Russell visited a nurse practitioner complaining of recurrent low back pain. Russell was referred to Dr. Sean McDonald, a neurologist, who ordered an MRI and prescribed physical therapy. In July 2007, Russell walked into the bathroom of his home to talk to his wife, and, upon turning to leave, he felt a sharp pain in his lower back that radiated down his leg.² As a result, Russell was bedridden for a few days and sought treatment from Dr. McDonald. On August 22, 2007, an MRI showed a disc compression at the site of the prior back surgery, level L5-S1. On October 3, 2007, Dr. McDonald performed a second hemilaminectomy and microdiscectomy at the site of Russell's 1999 surgery.

² In the days before this incident, Russell experienced discomfort on two separate occasions, stepping off a tractor and picking up a toolbox.

Centennial filed a motion to reopen/medical fee dispute on April 21, 2008, contesting the medical bills for Russell's treatment and surgery in 2007. The motion to reopen was sustained, and a hearing was held in October 2008. The ALJ heard testimony from Russell and his former wife, Melissa, who testified regarding the July 2007 incident at their home. The ALJ also reviewed the medical opinion of Dr. McDonald, who opined that the 1999 surgery was a substantial contributing factor in Russell's subsequent disc herniation. Centennial also submitted the records review/medical report and deposition of Dr. Russell Travis. Although Dr. Travis acknowledged Russell had a higher risk for re-injury following his 1999 surgery, he concluded that Russell's 2007 surgery was precipitated solely by the July 2007 injury at home. Centennial also filed an IME medical report and deposition of Dr. Timothy Kriss. Dr. Kriss concluded the 1999 surgery caused a lasting weakness in the disc and created a 15% chance of recurrent herniation. In an opinion and order of December 12, 2008, the ALJ resolved the dispute in favor of Centennial. The ALJ concluded:

While Dr. Kriss and Dr. Travis agreed that a person is more likely to have recurrent disc problems post-surgery, it is obvious to the undersigned that plaintiff had a new event on July 15, 2007 which was demonstrable on the MRI and which led to the subsequent surgery. Wherefore, the undersigned adopts the opinion of Dr. Travis and concludes that plaintiff's need for treatment after July 15, 2007 was not the result of the May 21, 1999 work-related injury, and is therefore not compensable by the defendant-employer and its insurer.

After an unsuccessful petition for reconsideration, Russell appealed the ALJ's order to the Board. Russell argued that the ALJ failed to address whether the original work injury was a substantial contributing factor with respect to his subsequent injury in 2007, pursuant to *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. App. 1997). In *Addington, supra*, this Court applied the "direct and natural consequence rule," which provides, "that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury."

Id. (citation and quotation marks omitted). The Court went on to note,

Thus, even though the subsequent injury was to a different part of the back and followed a non-work-related incident, the medical expenses arising therefrom are compensable since the work-related injury caused the part of the back that was subsequently injured to be more susceptible to injury.

Id.

In an opinion rendered July 22, 2009, the Board concluded:

Although the ALJ relied on the opinion of Dr. Travis in finding that a new event occurred on July 15, 2007[,] which led to the need for subsequent surgery, the ALJ's opinion fails to consider whether the need for treatment at the period of time in question was a direct and natural consequence of Russell's pre-existing condition. Of course, the ALJ, as fact finder, is free to reject even uncontroverted medical evidence if a sufficient basis for doing so is stated. For these reasons, we remand. See *Osborne v. Pepsi-Cola*, 816 S.W.2d 643 (Ky. 1991) and *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184 (Ky. App. 1981).

Accordingly, the opinion and order of December 12, 2008 is hereby VACATED and this matter is REMANDED to the ALJ for additional findings with instructions that he address whether the original disc rupture at L5-S1 played any substantial contributing role in the development of the recurrent disc rupture at the same level on the same side.

We now address Centennial's petition for review, wherein Centennial opines that the Board improperly substituted its opinion for that of the ALJ regarding the causation of Russell's subsequent disc herniation.

It is well settled that the ALJ "has the authority to determine the quality, character and substance of the evidence[.]" *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985), and he is free "to believe part of the evidence and disbelieve other parts of the evidence . . . [.]" *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). When this Court reviews a workers' compensation decision, our function is to correct the Board only where we believe "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." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). After careful review, we find no error in the Board's decision to vacate the ALJ's decision.

Although Centennial asserts that the Board exceeded its authority in reviewing the evidence, we conclude the Board properly relied upon *Addington Resources, supra*, in its analysis of the issues presented. We agree with the Board that the ALJ should make a specific finding pursuant to the "direct and natural

consequence rule” in light of the unanimous medical opinions that Russell was susceptible to re-injuring his back following the initial hemilaminectomy in 1999.

For the reasons stated herein, we affirm the decision of the Workers’ Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kamp T. Purdy
Scott M. B. Brown
Lexington, Kentucky

BRIEF FOR APPELLEE RUSSELL:

Craig Housman
Paducah, Kentucky