

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002309-WC

PALM BEACH COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-91-06109

NORMA TARTAR;
DR. BALLARD WRIGHT;
THE PAIN TREATMENT CENTER,
d/b/a STONE ROAD SURGERY CENTER;
HONORABLE EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND KELLER, JUDGES; LAMBERT,¹ SENIOR JUDGE.

¹ Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

DIXON, JUDGE: Palm Beach Company seeks review of a decision of the Workers' Compensation Board. The Board affirmed an ALJ's order sustaining a medical fee dispute in favor of Palm Beach's former employee, Norma Tartar. Finding no error, we affirm.

Tartar worked as an industrial seamstress for Palm Beach from 1968 until 2001. In July 1990, while pulling material through the sewing machine, Tartar developed a knot on her right shoulder with radiating numbness. Tartar reported the incident and sought medical treatment. Dr. Dennis Lane, an orthopedic surgeon, administered a shoulder injection and prescribed medication. Thereafter, Dr. Russell Travis, a neurosurgeon, diagnosed cervical radiculopathy and recommended physical therapy. In April 1991, Tartar was referred to another neurosurgeon, Dr. Amr El-Naggar, for her continuing cervical and arm pain. Dr. El-Naggar noted evidence of cervical radiculopathy and mild carpal tunnel syndrome. In November 1991, Tartar visited another orthopedic surgeon, Dr. Giacomo Sammarco. Following a course of conservative treatment, Dr. Sammarco performed bilateral carpal tunnel release surgery.

In April 1993, Tartar filed an application for workers' compensation benefits. The ALJ considered the medical evidence, along with Tartar's lay testimony, and concluded Tartar had suffered a repetitive-use injury due to the nature of operating an industrial sewing machine since 1968. The ALJ assigned a 10% permanent occupational disability for Tartar's resulting carpal tunnel syndrome. The ALJ noted,

Plaintiff has convinced the Administrative Law Judge through her own credible testimony and that of Dr. Sammarco, her treating orthopedic surgeon, that her bilateral carpal tunnel syndrome is the result of her repetitive work activities since 1968. While plaintiff may also have some cervical condition which was aroused by these repetitive activities at work, her occupational disability is due to bilateral carpal tunnel syndrome rather than to any cervical complaints.

The ALJ rendered the opinion and award in June 1994, and neither party appealed.

In September 2008, Palm Beach filed a motion to reopen/medical fee dispute to contest treatment by Dr. Ballard Wright of the Pain Treatment Center. Palm Beach alleged that Tartar's treatment, including prescription medication and proposed cervical injections, were unrelated to her carpal tunnel syndrome and non-compensable. The motion to reopen was granted and referred to an ALJ for adjudication.

Palm Beach submitted the utilization review report of Dr. Albert Olash, who recommended denial of the proposed cervical injections. Palm Beach also submitted the IME of Dr. Gregory Snider, who examined Tartar and reviewed her medical records. Dr. Snider noted that Tartar had been in pain management treatment for several years. His examination revealed "widespread tenderness" in Tartar's cervical area, and he diagnosed a chronic cervical strain. Dr. Snider disagreed with the efficacy of Tartar's on-going pain management treatment, specifically regarding her use of several prescription medications.

At the March 26, 2009, formal hearing, the contested issues were whether the treatment was work-related, reasonable, and necessary. Tartar testified

that she used a combination of prescription drugs to manage her daily symptoms, and she hoped the proposed injections would decrease her need for daily medication. Tartar also submitted the medical records relating to her pain management treatment.

In an opinion and order of May 21, 2009, the ALJ resolved the dispute in favor of Tartar. Relying on *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 318 (Ky. 2007), the ALJ concluded Tartar was entitled to medical benefits for her cervical condition even though the original ALJ had assigned permanent impairment only to the carpal tunnel syndrome. Following Palm Beach's petition for reconsideration, the ALJ rendered a supplemental opinion, which provided additional findings as to the reasonableness and necessity of the treatment.

Dissatisfied with the ALJ's conclusion, Palm Beach appealed the ALJ's order to the Board. Palm Beach argued that the original award conclusively determined that Tartar's occupational disability was due to carpal tunnel syndrome; consequently, Tartar's treatment for a cervical condition was not a compensable medical expense under the original award. On November 23, 2009, the Board rendered an opinion affirming the ALJ's decision. The Board's opinion states, in relevant part:

There is extensive evidence in the record in support of ALJ Hay's finding that Tartar's cervical condition is a part of the original injury and has caused ongoing impairment. ALJ Terry's June 15, 1994, opinion and order noted that Dr. Lane performed a shoulder injection and prescribed medication for Tartar's complaints of right arm and shoulder pain as early as

August 10, 1990, and later assessed a 4% impairment rating for said cervical complaints. While ALJ Terry did not find Tartar's cervical condition to be impairment ratable, she did clearly state that Tartar 'may also have some cervical condition which was aroused by these repetitive activities at work.' This fits squarely within the *FEI Installation, supra*, guidelines

* * *

Indeed, this Board reviewed a voluminous number of records from PTC [Pain Treatment Center] which revealed Tartar's ongoing treatment for her cervical condition and resultant pain. The records of PTC established Tartar provided a history of cervical problems since the work injury. Further, while this Board did not have the benefit of reviewing medical records pre-dating 2004, this Board relied upon the summary of the evidence in ALJ Terry's June 15, 1994, opinion and order and Tartar's hearing testimony which revealed continuous and significant medical treatment of Tartar's shoulder and neck from the July, 1990, work incident forward.

In considering Palm Beach's petition for review, we first note the appropriate standard of review. Upon reopening, Palm Beach had the burden of proving the recommended treatment was unreasonable or unnecessary, *Mitee Enterprises v. Yates*, 865 S.W.2d 654, 655 (Ky. 1993), while Tartar bore the burden of proving a causal connection between her work injury and the subsequent need for treatment. *Jones v. Newberg*, 890 S.W.2d 284, 285 (Ky. 1994). Because Tartar was successful before the ALJ, the question before the Board on appeal was whether substantial evidence supported the ALJ's decision. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). When this Court reviews the Board's decision, our function is to correct the Board only where we believe it "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).

Palm Beach does not dispute the medical evidence produced by Tartar that correlates her cervical condition to the work injury. Instead, Palm Beach argues that, pursuant to the original award, only medical expenses relating to Tartar’s permanent disability, carpal tunnel syndrome, are compensable. To support its theory, Palm Beach asserts that the ALJ improperly engaged in a retrospective analysis of the evidence presented in the original claim and that the Board misconstrued the applicable law. We have considered Palm Beach’s arguments, and we conclude they are without merit.

First, we find no error in the ALJ’s review of the original decision. An ALJ has broad authority over a reopened claim, KRS 342.125(4), and he is free to compare the evidence from the original claim with the evidence presented at reopening. *W. E. Caldwell Co. v. Borders*, 301 Ky. 843, 193 S.W.2d 453, 455 (1946).

KRS 342.020(1), which addresses the employer’s obligation to pay medical expenses, states in part:

In addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury . . . as may reasonably be required at the time of the injury and thereafter during disability The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits.

In *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 317 (Ky. 2007), the Kentucky Supreme Court addressed whether an award of medical benefits is appropriate if an injured claimant does not have a permanent impairment rating. The Court concluded that, where a claimant suffers impairment – a harmful change in the human organism – due to a work-related injury, the employer is liable for medical benefits, even if the impairment does not rise to the level of permanent disability. *Id.* at 318-19.

Although Palm Beach’s appellate brief is somewhat hard to follow, it appears Palm Beach essentially argues that *FEI Installation* is an incorrect decision, and the Board erred by relying on it. However, we need not address the various theories of statutory interpretation offered by Palm Beach in its effort to contradict the holding of *FEI Installation*, as we are bound to follow precedent established by our Supreme Court. SCR 1.030(8).

In the case at bar, the ALJ and the Board found the reasoning of *FEI Installation* applicable to the fee dispute. The record shows that Tartar suffered a repetitive-use injury from pulling material through an industrial sewing machine for many years. After the July 1990 incident, she sought treatment for shoulder and bilateral arm pain. The original ALJ acknowledged Tartar’s cervical condition and attributed it to the repetitive-use injury, but chose not to assign any permanent impairment. Therefore, pursuant to *FEI Installation*, Palm Beach is responsible for the medical expenses relating to Tartar’s cervical condition since, like the carpal

tunnel syndrome, it resulted from the repetitive-use of her hands and arms while employed by Palm Beach. Accordingly, we find no error in the Board's decision.

Finally, although not addressed by Palm Beach, the Board also pointed out an alternative theory of relief, which we believe is well taken:

Finally, we point out KRS 342.020(1) mandates the employer pay for the cure and relief from the effects of an injury. ALJ Terry's findings and the records of PTC indicate that Tartar 'may also have some cervical condition which was aroused' by her work activities. Given this statement of ALJ Terry in her findings of fact regarding the arousal of a 'cervical condition' by the work injury and the medical records, we conclude the ALJ was certainly authorized to infer Tartar's cervical condition was a symptom/effect of the work injury if not a part of the original injury itself. Thus, the treatment of that symptom was fully compensable.

After careful review, we conclude the Board did not overlook or misconstrue the applicable law, and the decision in Tartar's favor was supported by substantial evidence.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Walter E. Harding
Louisville, Kentucky

BRIEF FOR APPELLEE NORMA
TARTER:

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