

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000442-WC

BILLY DEWBERRY

APPELLANT

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-93734

v.

TRADEWINDS TRANSIT, INC.;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

STUMBO, JUDGE: Billy Dewberry appeals from an opinion of the Workers'

¹ Senior Judge Joseph E. 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.

Compensation Board (hereinafter “Board”) which affirmed an opinion of Administrative Law Judge (ALJ) Grant Roark dismissing his claim upon a finding that his psychological condition was not a direct result of a physical injury.

Dewberry was involved in a work-related motor vehicle accident in which he was not physically harmed. He argues however that the accident should be characterized as a physically traumatic event as a matter of law and that his workers’ compensation claim should be reinstated. He also argues that he did in fact sustain physical harm and that the ALJ used incorrect legal standards in his opinion denying his claim. We find no error in the opinions of the ALJ and Board and affirm.

Dewberry was working as a truck driver on February 11, 2008, when he went to sleep in the sleeper part of the cab. While asleep, his truck was struck from behind by another vehicle. The vehicle became lodged underneath Dewberry’s truck. Dewberry testified that he was awakened by the shaking of the truck. He also testified that he thought it was only a strong wind and went back to sleep. He was later awakened by a third-party who knocked on his door and advised him of the car trapped under his truck. Dewberry exited the vehicle, discovered the other vehicle, and called 911. The police and an ambulance responded. Dewberry was later transported to a hospital as a precaution and to be tested for drugs.

While Dewberry was not physically harmed from the accident, he has developed a post-traumatic stress disorder which is the basis of his claim. ALJ

Roark denied the claim because he determined the psychological disorder did not result from a physical injury, which is required to be compensable under the workers' compensation statute. The Board affirmed the ALJ's opinion. This appeal followed.

“[T]he function of the Court of Appeals in reviewing decisions of the Workers' Compensation Board is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Daniel v. Armco Steel Co., L.P.*, 913 S.W.2d 797, 797-798 (Ky. App. 1995).

A compensable injury under the workers' compensation statute is defined in KRS 342.0011(1) as follows:

“Injury” means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. “Injury” does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. “Injury” when used generally, unless the context indicates otherwise, shall include an occupational disease and damage to a prosthetic appliance, *but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.* . . . (Emphasis added).

Dewberry first argues that his psychological problems arose from the accident and that we should rule as a matter of law that he has a compensable claim. He cites us to the cases of *Lexington-Fayette Urban County Government v.*

West, 52 S.W.3d 564 (Ky. 2001), and *Richard E. Jacobs Group, Inc. v. White*, 202 S.W.3d 24 (Ky. 2006), both of which were considered by the ALJ and Board. He argues these cases stand for the proposition that a compensable psychological injury does not have to stem from actual physical harm, but from a physically traumatic event. He is correct in his interpretation.

[F]or the purposes of . . . KRS 342.0011(1), a “physical injury” is an event that involves physical trauma and proximately causes a harmful change in the human organism that is evidenced by objective medical findings. An event that involves physical trauma may be viewed as a “physical injury” without regard to whether the harmful change that directly and proximately results is physical, psychological, psychiatric, or stress-related. But in instances where the harmful change is psychological, psychiatric, or stress-related, it must directly result from the physically traumatic event.

West at 566-567. Case law has interpreted the phrase “physical injury” to mean a “physically traumatic event” and not “physical harm.”

Dewberry also compares his case to the *White* case. In *White*, a police officer shot a suspect and thereafter performed CPR and first aid on him. The officer then developed post-traumatic stress disorder and sought workers’ compensation. The ALJ denied the claim stating that the psychological disorder resulted from the “stress and mental impact of the life-threatening situation,” *White* at 26, and not a physically traumatic event. The Board affirmed.

White ultimately went to the Kentucky Supreme Court which held:

It is obvious that the incident . . . was life-threatening and emotionally traumatic to Officer White. The issue under KRS 342.0011(1) is whether it was physically traumatic

as well. There is no requirement that a physically traumatic event must cause physical harm as well as the mental harm for which compensation is sought. *West, supra*. It may involve a physical exertion rather than an impact from an outside force. *See Ryan's Family Steakhouse v. Thomasson*, [82 S.W.3d 889 (Ky. 2002)]. Performing CPR and first aid on an individual with multiple gunshot wounds clearly requires physical exertion. Therefore, it constitutes a physically traumatic event for the purpose of KRS 342.0011(1), and any mental harm that directly results is compensable.

Id. at 27.

Dewberry argues that because he felt a shake and was awakened and had to get out of his truck, this constituted physical exertion and the mental harm he suffered should be compensable. We disagree. If we use the physical exertion standard requested by Dewberry, the physical exertion would have to cause the mental harm or be directly related to it. Arguably, the only physical exertion in this case was Dewberry exiting his truck. This action was not a physically traumatic event for the purposes of the workers' compensation statute. It did not cause his mental problems nor were his psychological problems directly related to it.

We find Dewberry's case is more comparable to the case of *Kubajak v. Lexington-Fayette Urban County Government*, 180 S.W.3d 454 (Ky. 2005). In *Kubajak*, a police officer sought workers' compensation benefits after developing post-traumatic stress disorder and other mental problems. The ALJ and Board denied benefits stating that the psychological problems arose from the officer working gruesome crime scenes and after-the-fact exposure to the physical trauma

of third parties, but that the officer was not involved in any physically traumatic event. The Supreme Court adopted that reasoning and affirmed.

In the case *sub judice*, Dewberry could no longer work for fear of injuring other people with his truck. As the ALJ found, Dewberry's mental harm revolved around his learning that a vehicle struck his truck and became trapped underneath, not from any physically traumatic event. The ALJ and Board did not overlook or misconstrue prevailing law. We find no error.

Dewberry next argues that we should find he sustained actual physical harm as a matter of law. He argues that he was physically harmed when his sleep was interrupted by the shaking of the truck and his subsequent admission to the hospital. Dewberry wishes us to take judicial notice that the interruption of sleep is detrimental to health. This argument is without merit. Dewberry has never stated that he was actually harmed by his sleep being interrupted.

Dewberry makes other arguments, but they are moot because we have found that his psychological problems did not result from a physically traumatic event.

For the foregoing reasons, we affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
TRADEWINDS TRANSIT, INC.:

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