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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000284-WC

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND — APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-13-01012

MORGAN CRAYNE; PIPER LOGGING;
HONORABLE STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE, AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: The Commonwealth of Kentucky, Uninsured Employers' Fund ("UEF") petitions for a review of the February 5, 2016 Opinion by the Workers' Compensation Board ("Board") affirming the Administrative Law

Judge's ("ALJ") July 20, 2015, Opinion, Order, and Award. The ALJ awarded Morgan Crayne temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. Because Piper Logging and its owner, Edward "Frankie" Piper, were uninsured, the ALJ ordered the UEF to pay the benefits.

The UEF disputes both that Crayne proved his injury was work-related, and also, that he gave adequate notice to his employer; and finally, argues that the ALJ improperly determined Crayne's average weekly wage ("AWW"). Therefore, the UEF proffers that the Board's opinion was erroneous. After careful consideration, we affirm.

BACKGROUND

Crayne worked as a logger for Piper Logging. He testified that he began working for them in late 2012. Piper Logging cuts and removes timber for landowners. The company was owned and operated by Piper. However, Piper Logging was not insured.

Crayne filed a Form 101 on July 1, 2013, and described the accident that occurred on April 17, 2013, when he injured his back. The injury occurred while he was trimming logs with a chainsaw and stepped on a copperhead snake. After he stepped on it, he jumped away and landed awkwardly. Upon landing, Crayne described feeling like he had pulled a muscle or twisted something in his lower back. He killed the snake and continued working.

Next, on that same day, Crayne delivered cut limber to Cadiz, Kentucky, which was about an hour away. As he was driving a truck down the hill, its seat lunged forward, which jarred him between the seat and the steering wheel. The pain in his lower back intensified. He realized that his injury was more than a mere back strain. He was able to resume working for a short period of time at Piper Logging but ultimately was in too much pain.

Regarding giving notice to his employer, Crayne maintains that after both occurrences, he immediately informed the owner. At that time, he was not instructed as to next steps. Additionally, Crayne declared that his wage at the time of the injury was $100.00 per day. He explained that he was paid weekly in both cash and also a check. At the final hearing, Crayne stated that he worked six days per week. The owner contradicted him and maintained that he only worked three days. The ALJ's findings were based on his working three to four days per week.

Crayne had to wait six weeks before he first saw a physician for the injury. He did not have health insurance and was not financially able to seek medical treatment any sooner. On June 3, 2013, he was seen at BaptistWorx, a work-injury clinic. He was informed that he had a ruptured disc in his lower back. After an x-ray, he was restricted to not lift anything heavier than ten pounds and was to take off work for three days. Crayne was also advised to follow up with his family physician who referred him to Dr. Ted Davies, a neurosurgeon. An MRI revealed a disc herniation, and Dr. Davies performed surgery in November 2013.

By this time, he had qualified for Kentucky Medicaid, which allowed him to receive treatment.

A Benefit Review Conference was held on May 14, 2015, and the final hearing took place on June 1, 2015. At the hearing, Crayne testified. Besides Crayne's testimony at the final hearing, his June 10, 2014 deposition was entered into the record. Further, the owner of Piper Logging was deposed on April 2, 2014, and his deposition was part of the record. Other depositions provided included depositions of Matthew McCaslin (Piper Logging employee), Charles "Bobby" Blackburn (Piper Logging employee), and William Lee (former logging employer of Crayne).

Medical testimony was as follows: Dr. Theodore Davies' October 21, 2013 medical report and August 12, 2014 medical report were offered at the hearing. In addition, Dr. Jeana L. Lee's report of an independent medical examination ("IME") and Dr. Michael Best's December 10, 2014 IME report were entered into the record. Dr. Best performed the IME at the request of the UEF. He diagnosed disc herniation related to the April 17, 2013 work injury, placed Crayne at maximum medical improvement, and expressed the opinion that further surgical/injective treatment would not be helpful.

The ALJ reviewed all the evidence and entered her opinion, order, and award on July 20, 2015. Piper Logging and the UEF filed a petition for reconsideration. The ALJ granted the petition for reconsideration in part and denied in part. Subsequently, the UEF appealed the July 20, 2015 opinion of the

ALJ and the order denying their petition for reconsideration. On February 8, 2016, the Board entered its opinion affirming the decision of the ALJ. UEF now appeals from this decision.

STANDARD OF REVIEW

Since Crayne successfully met his burden before the ALJ, the question on appeal for the Board was whether substantial evidence existed to support the ALJ's decision. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of "relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Company*, 474 S.W.2d 367, 369 (Ky. 1971). The only way to reverse the decision of the ALJ is to show that no substantial evidence of probative value supported the decision. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

On appeal, our standard of review of a Board decision "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." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687–88 (Ky. 1992).

With these standards in mind, we address the issues here.

ANALYSIS

A claimant bears the burden of proof and the risk of non-persuasion before the fact-finder with regard to every element of a workers' compensation

claim, including proving an "injury" as defined by the Workers' Compensation Act. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). For that burden to be sustained, no less than substantial evidence of each element of the claim must be introduced.

As the fact-finder, the ALJ has the sole authority to determine the weight, credibility, and inferences to be drawn from the evidence. *Toyota Motor Manufacturing, Kentucky, Inc. v. Tudor,* 491 S.W.3d 496, 505 (Ky. 2016) (citation omitted). Moreover, the ALJ is given broad discretion to weigh the quality and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). Furthermore, the ALJ may reject testimony and believe or disbelieve various parts of the evidence. *Magic Coal v. Fox,* 19 S.W.3d 88 (Ky. 2000).

Turning to the three specific contested issues presented by the UEF, we first address whether the ALJ had substantial evidence when she determined that Crayne's injury was work-related. The UEF maintains that substantial evidence was not provided to support that Crayne experienced a work-related injury. In contrast, the ALJ found substantial evidence confirmed that Crayne had injured his lower back in the course and scope of his employment. After review of the depositions and evidence in the record, the ALJ determined that the alleged injury occurred. The ALJ bolstered this finding with the medical testimony, which supported that a work injury caused Crayne's lower back problems. The Board agreed that substantial evidence supported the ALJ's determination, and we agree.

Next, we consider the UEF's argument that the ALJ used mere speculation to calculate the AWW. As noted by the ALJ, KRS 342.140(1)(d) sets forth the method for determining a worker's AWW if the claimant's wages are fixed by the day. It is not disputed that Crayne's wages were set in this manner, and he was paid $100.00 per day. Furthermore, given that the employer did not provide the required paperwork, the ALJ only had the testimony of the owner, Crayne, and another employee, McCaslin, plus copies of Crayne's checks. Based on this information, the ALJ opined that Crayne worked an average three to four days per week in the thirteen-week quarter preceding the work accident, and he earned $350.00 per week. Substantial evidence supports that this calculation is reasonable. The Board concurred with the ALJ's calculation of the AWW, and we agree.

Finally, we address the issue of notice. The UEF maintains that the only evidence demonstrating notice was speculative. Notice is governed in workers' compensation cases by KRS 342.185(1), which states in part:

> Except as provided in subsection (2) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof . . .

This requirement is clarified by KRS 342.200, which reads:

> The notice shall not be invalid or insufficient because of any inaccuracy in complying with KRS 342.190 unless it is shown that the employer was in fact misled to his injury thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this chapter if it is

> shown that the employer, his agent or representative had knowledge of the injury or that the delay or failure to give notice was occasioned by mistake or other reasonable cause.

Regarding notice, medical records show that Crayne reported having an accident on April 17, 2013. He has consistently reported this date and the accident as having occurred on that date. A fellow employee, McCaslin, acknowledged the accident and another employee, Blackburn, stated that he heard them discuss it. And the owner was present at the site on the day of the accident. The ALJ evaluated the evidence and determined that the owner was aware of the incident and of Crayne's accident. Crayne testified that he told Piper that day and did not return to the work site for a few weeks. Relying on the testimony, the ALJ decided that notice was properly given.

Notwithstanding Piper's denial of receiving notice on the date of the injury, interestingly, our review of the record provided a copy of an UEF investigative report of the Kentucky Department of Workers' Claims from the Division of Security and Compliance Enforcement Branch. Apparently, the agency received the report of an uninsured employer on July 19, 2013, and completed the investigation on July 23, 2013. In the report, the investigator reported that he spoke with Piper and that Piper said he was aware of the injury **on the date it occurred** and offered to take the injured party to the hospital if he would take a drug test.

In the case at bar, the Board reviewed the UEF's argument about notice and found it had no merit. It observed that the ALJ has discretion in determining whether notice was given "as soon as practicable" based on the specific circumstances of the case. *Newberg v. Slone*, 846 S.W.2d 694 (Ky. 1992). The ALJ weighed the testimony and decided that due and timely notice were made on April 17, 2013. Crayne was adamant that he told Piper; he did not work for a few weeks; and, he claimed that Piper visited him at his home during this time. The Board held, based on the ALJ's discretion to evaluate the evidence, notice was provided in a proper manner. We concur.

In sum, Crayne was successful in convincing the ALJ, the fact-finder, that substantial evidence supported his assertions that the injury was work-related, that he gave adequate notice, and that the information regarding his wages was credible for determining the AWW. Keeping in mind that the ALJ has the sole authority to make findings of fact, we note that the Board affirmed the decision. In our appellate role, to correct the Board if it has improperly interpreted the law or committed a flagrant error in assessing the evidence, we hold that the Board properly affirmed the ALJ.

CONCLUSION

Our review of the record convinces us that the ALJ had substantial evidence to determine that Crayne's injury was work-related, that he gave adequate notice, and that the ALJ appropriately determined the AWW. Moreover, the Board

properly affirmed the decision and did not misconstrue the law or inadequately assess the evidence.

Indeed, we note that the purpose of the UEF is to provide payment of compensation when an employer has failed to secure payment of compensation. KRS 342.760. That is the case here. We affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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