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IN THE
COURT OF APPEALS OF INDIANA

CLEAR CHANNEL OUTDOOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 93A02-0705-EX-444
	)	
DUANE McCORKLE,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
The Honorable Linda Hamilton, Chairman
Application No. C-166144

December 17, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Duane McCorkle ("McCorkle") was injured in the course of his employment with Clear Channel Outdoor ("Clear Channel"). McCorkle filed an application for adjustment of claim with the Worker's Compensation Board ("the Board") seeking permanent and total disability benefits. A single hearing member of the Board found that McCorkle is permanently and totally disabled and awarded permanent and total disability benefits. Clear Channel appealed the decision to the Board. The Board affirmed the single hearing member's award. Clear Channel appeals and argues that the Board's finding that McCorkle is permanently and totally disabled as a result of the injury he suffered in the course of his employment with Clear Channel is not supported by the evidence. We affirm.

Facts and Procedural History

In the late 1980s, McCorkle suffered a closed head injury and underwent three back surgeries. After he recovered from those injuries, McCorkle was able to perform hard labor until September 26, 2001. On that date, McCorkle was erecting a billboard when it collapsed on him crushing the right side of his face and causing a traumatic brain injury. He was diagnosed with post-concussive syndrome, blurred vision, and short-term memory loss.

McCorkle sought treatment from Dr. Daniel Cooper who evaluated McCorkle for severe headaches, short-term memory loss, severe blurred vision, fatigue, nausea, depression, ringing ears, confusion, and low back pain. Dr. Cooper diagnosed McCorkle with significant depression and a cerebral contusion. Neurologist Sherry Reid stated that McCorkle was suffering from a "traumatic brain injury with post-concussive syndrome,

headaches, vertigo, short term memory loss, and blurred vision." Appellant's App. p. 17. Dr. Reid opined that McCorkle's "current symptoms are not due to his head injury that he received 13 years ago." Id. at 20. McCorkle was also evaluated by Dr. Karl Manders, who concluded that McCorkle was suffering from post-concussive syndrome and opined that McCorkle is not "able to return to work with any specific limitations in his present state." Id. at 53. Concerning McCorkle's level of impairment, neuropsychologist Dr. Donald Layton concluded "[t]here has likely been an accumulative effect from the patient's two closed head injuries." Id. at 37. Dr. Layton also opined that McCorkle's "severe cognitive dysfunction" is "highly unusual from a recovering head injury patient," and it was possible that it might be a "case of malingering." Id. at 28.

On June 28, 2002, Dr. John McLimore, another treating physician, determined that McCorkle had reached maximum medical improvement and assigned to him a three-percent permanent partial impairment rating. Id. at 30. He placed McCorkle on the following permanent restrictions: 1) "no lifting/carrying greater than 1 pound in a standing position (on an occasional basis)"; 2) "no lifting greater than or equal to 6 pounds (occasionally) when in a sitting position"; 3) able to do sedentary work; 4) cannot climb ladders, scaffolding or platforms; 5) cannot use stairs; and 6) no driving. Id. On February 4, 2004, Dr. Edward Berla, a vocational analyst, evaluated McCorkle and determined that he is occupationally disabled. Id. at 59. The Social Security Administration also reached the same conclusion. Id. at 73.

On June 24, 2003, McCorkle filed his application for adjustment of claim in which he alleged that he is permanently and totally disabled as a result of his September 26,

2001 injury. Clear Channel argued that McCorkle "is not permanently and totally disabled as a result of [the] work-related injury that he sustained on September 26, 2001, but that [he] suffered from pre-existing conditions or non-work related conditions that led to his disability." Id. at 14.

A hearing was held before a single hearing member on February 2, 2005. The hearing member concluded that McCorkle "is permanently and totally disabled as a result of the work-related accident that occurred on September 26, 2001", and that he "is entitled to permanent and total disability benefits under the Indiana Worker's Compensation Act." Id. at 9. Clear Channel appealed the award to the Board, and the Board affirmed the award. Clear Channel now appeals. Additional facts will be provided as necessary.

Standard of Review

Clear Channel faces a highly deferential standard of review. "When we review a judgment issued by the Board, we are bound by the Board's findings of fact and will not disturb its judgment unless the evidence is undisputed and leads undeniably to a contrary conclusion." Van-Scyoc v. Mid-State Paving, 787 N.E.2d 499, 505 (Ind. Ct. App. 2003). See also Hill v. Worldmark Corp./Mid Am. Extrusions Corp., 651 N.E.2d 785, 787 (Ind. 1995) ("Unless the evidence is 'undisputed and leads inescapably' to a result contrary to the Board's finding, it will be affirmed."). We will not reweigh the evidence nor judge the credibility of the witnesses. Van-Scyoc, 787 N.E.2d at 505. "'Rather, we examine the record only to determine whether there is any substantial evidence and reasonable inferences which can be drawn therefrom to support the Board's findings and

conclusions. Only if the evidence is of a character that reasonable [people] would be compelled to reach a conclusion contrary to the decision of the Board will it be overturned.'" Id. (quoting Perez v. U.S. Steel Corp., 428 N.E.2d 212, 216 (Ind. 1981)).

Discussion and Decision

The Indiana Worker's Compensation Act requires employers to provide their employees with "compensation for personal injury or death by accident arising out of and in the course of the employment." Ind. Code § 22-3-2-2 (2005 & Supp. 2007).

> An accident occurs in the course of employment when it happens at a place where the employee may reasonably be, within the period of employment, and while the employee is fulfilling the duties of employment. An injury arises out of employment when there is a causal relationship between the employment and the injury. As the party seeking benefits, Van-Scyoc bears the burden to prove that his injury arose out of and in the course of employment. Ultimately, the issue of whether an employee's injury arose out of and in the course of his employment is a question of fact to be determined by the Board.

Van-Scyoc, 787 N.E.2d at 505-06 (citations omitted).

Clear Channel argues that the Board's finding that McCorkle is permanently and totally disabled as a result of the September 26, 2001 injury is unsupported by the evidence. Specifically, it asserts that McCorkle's current condition was caused by his prior injuries, "the exaggeration of [his] symptoms as demonstrated in the multiple tests he underwent after the September, 2001 accident", and "the fact that McCorkle did not recover as was expected with the type of injury he sustained[.]" Br. of Appellant at 10.

Initially, we note the general principle that an "'employer takes an employee as he finds him.'" U.S. Steel Corp. v. Spencer, 655 N.E.2d 1243, 1247 (Ind. Ct. App. 1995), trans. denied, (quoting Goodman v. Olin Matheison Chem. Corp., 174 Ind. App. 396,

405, 367 N.E.2d 1140, 1146 (1977)). "An injury otherwise compensable under the Workmen's Compensation Act entitles an employee to benefits commensurate with the total disability sustained, including the aggravation or triggering of latent pre-existing conditions." Hansen v. Von Duprin, Inc., 507 N.E.2d 573, 577 (Ind. 1987).

However, pursuant to the Apportionment Statute, if an employee has a pre-existing impairment or disability which combines with a subsequent compensable work-related injury resulting in further impairment or disability, the employer is not liable for that portion of the injury not directly related to its employment. Ind. Code § 22-3-3-12 (2005); U.S. Steel, 655 N.E.2d at 1247. Yet, the Apportionment Statute "does not apply to the exacerbation or aggravation of a pre-existing but nonimpairing and nondisabling condition of the body." U.S. Steel, 655 N.E.2d at 1247.

> The statute describes three scenarios regarding pre-existing and work-injury impairments: 1) work-injury impairments that merely combine with pre-existing conditions to result in disability; 2) work-injury impairments that are merely aggravations of pre-existing conditions; and 3) work-injury impairments which occur, perhaps to physically imperfect employees, solely from events at the current employer's workplace. The first two scenarios result in application of the apportionment statute while the third does not.

Pillsbury Co. v. Osborne, 794 N.E.2d 474, 483-84 (Ind. Ct. App. 2003), trans. denied (citing U.S. Steel, 655 N.E.2d at 1248).

McCorkle asserts that Clear Channel has waived its apportionment argument because the issue was not raised with the Board.[1] McCorkle and Clear Channel submitted a stipulation of facts, contentions, and issues to the single hearing member, and

[1] In its reply brief, Clear Channel claims that it "outlined the pre-existing condition argument in its Proposed Findings of Fact and Conclusions of Law submitted to the Single Hearing Member after the hearing." Reply Br. at 1. Clear Channel failed to include its proposed findings of fact in its appendix; therefore, its claim is not supported by the record on appeal.

included the following issue: "[Clear Channel] contends that [McCorkle] is not permanently and totally disabled as a result of [McCorkle's] work-related injury that he sustained on September 26, 2001, but that [McCorkle] suffered from pre-existing conditions or non-work related conditions that led to his disability." Appellant's App. p. 14. Clear Channel did therefore raise the issue of McCorkle's pre-existing injuries to the Board, but appeared to argue that those preexisting injuries were the sole cause of his disability, as opposed to a contributing cause, which would require apportionment of the worker's compensation award.

Regardless, we observe that McCorkle's previous head and back injuries occurred in the late 1980s. He was able to perform hard labor for over ten years after recovering from those injuries and he had a valid commercial driver's license on September 26, 2001. While McCorkle may have been more susceptible to head and back injuries, his previous head and back injuries did not cause any significant impairment as evidenced by his ability to perform hard labor for many years after those injuries. Accordingly, it was reasonable for the Board to conclude that McCorkle's disability was solely caused by his September 26, 2001 injury. See Pillsbury Co., 794 N.E.2d at 484 (Although Osborne had three prior neck surgeries, she was able to work without restriction before her October 1997 neck injury; therefore, her pre-existing conditions were not significant impairments, and the Board was not required to apportion the award.); U.S. Steel, 655 N.E.2d at 1248 (The Board's conclusion that it was not a preexisting impairment, but Spencer's current injury that rendered him disabled was supported by evidence that Spencer was able to perform hard labor for ten years following his previous injury.).

Moreover, the Board's conclusion that McCorkle was rendered permanently and totally disabled as a result of the September 26, 2001 injury is supported by the following evidence. The billboard McCorkle was erecting fell on his head crushing the right side of his face. As a result, he suffered a "traumatic brain injury" and was diagnosed with "post-concussive syndrome, headaches, vertigo, short term memory loss, and blurred vision." Appellant's App. p. 17. Dr. Karl Manders, the Board Appointed Independent Medical Examiner, concluded that McCorkle was suffering from post-concussive syndrome and opined that McCorkle is not "able to return to work with any specific limitations in his present state." Id. at 53. Dr. John McLimore placed McCorkle on several permanent restrictions including that McCorkle may not lift or carry anything greater than one pound, cannot climb ladders or scaffolding, cannot drive, and cannot use stairs. Id. at 30. Vocational analyst Dr. Edward Berla concluded that McCorkle is one hundred percent occupationally disabled meaning that he is "not physically or mentally capable of working in any job in the local, state, or national economy due to all of the physical and mental limitations that he has." Appellant's App. p. 110.

Under these facts and circumstances, we conclude that the Board's finding that McCorkle is permanently and totally disabled as a result of the September 26, 2001 injury is supported by the evidence.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.