RENDERED: November 21, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

96-CA-3248-WC

RUTH WHITT — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD WC- 89-9790

MARTIN COUNTY COAL CORPORATION; SPECIAL FUND; HONORABLE DENIS S. KLINE, Administrative Law Judge; and COMMONWEALTH OF KENTUCKY, WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

* *

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM and HUDDLESTON, Judges.

BUCKINGHAM, JUDGE. Ruth Whitt (Whitt) appeals from an opinion of the Workers' Compensation Board (Board) affirming a decision by an administrative law judge (ALJ) overruling her motion to reopen a previous claim for a work-related back injury. For the reasons set forth hereinafter, we affirm.

Whitt sustained a work-related back injury in 1988 while employed as a janitor at Martin County Coal Corporation (Martin). She was awarded benefits based on a 20 percent

occupational disability as a result of that injury. Whitt returned to work a few weeks after the injury and continued to work for several months before being laid off. She did not return to work after that time.

In June 1995, Dr. David L. Weinsweig, a neurosurgeon, performed a microdiscectomy on Whitt at the L4/L5 level. She thereafter sought a reopening of her claim, but the ALJ determined that her "current complaints are not related to her June, 1988 work injury" and that Martin should be "relieved of responsibility for payment of the medical expense of surgery." The Board affirmed the ALJ's decision, and Whitt filed this appeal.

Whitt's medical evidence on reopening consisted of the deposition of Dr. Weinsweig, and Martin submitted the depositions of Drs. Robert Goodman and Matthew Vuskovich. In addition, Whitt testified at the hearing before the ALJ.

Dr. Weinsweig testified that he performed the back surgery on Whitt due to her pain and an MRI which showed "bulging/early herniated disk L4-5." On the causation issue concerning Whitt's current difficulties in relation to her prior injury, the relevant portion of Dr. Weinsweig's deposition is as follows:

> Q. Doctor, was this surgery that you performed, was it a direct result of her injury of June of 1988?
>
> A. I never met her before 1993, but from the history that I gather, the pain began when she was injured at work in 1988.

TR Vol. II, p. 178.

Dr. Goodman testified that he had examined Whitt in 1989 for Martin concerning her 1988 injury and had again examined Whitt for Martin in 1996. He testified that he had assigned Whitt a three percent impairment rating, but now assessed her impairment rating at eight percent. However, Dr. Goodman stated that his increased impairment rating was based solely on Whitt's subjective complaints of pain and the fact that she had undergone back surgery, as his examination had actually shown that Whitt's condition had improved in some ways. His report states twice that he "cannot demonstrate any objective change" in Whitt's condition.

Dr. Vuskovich testified that he also had examined Whitt in 1989 and again in 1996. According to his 1996 report, the surgery performed on Whitt was "worthless." Dr. Vuskovich, who assigned a zero impairment rating to Whitt in 1989, testified that he could see no association between the 1988 injury and her current problems and surgery.

The ALJ found that Whitt had not met her burden of proof in showing that her 1995 surgery was related to her 1988 injury, stating that "[m]y conclusions are based on common sense and, to a lesser degree, the testimony of Drs. Vuskovich and Goodman." Whitt appealed that ruling to the Board, along with the ALJ's ruling to relieve Martin of the duty to pay for the 1995 surgery. The Board affirmed the ALJ, noting that the ALJ's usage of the term "common sense" was "merely a statement that he

is drawing a reasonable inference from the evidence before him." The Board also affirmed the ALJ's ruling on the payment for the surgery, deeming Dr. Vuskovich's testimony to be sufficient to support a conclusion that the surgery was not work-related. Both rulings are the subject of this appeal by Whitt.

A claimant seeking an increase in compensation in a reopening proceeding "must prove by competent evidence that a significant change in occupational disability in fact exists, and that the disability is the result of the injury or disease which was the subject of the original award." Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33, 36 (1991). Whitt argues that the ALJ substituted his own medical opinions instead of relying on the medical evidence in the record when he stated that his conclusion that Whitt's surgery was unrelated to her 1988 injury was based upon "common sense and, to a lesser degree, the testimony of Drs. Vuskovich and Goodman."

Given the fact that the ALJ has the exclusive authority to determine the "quality, character, and substance of the evidence," as well as the exclusive authority to determine which conflicting medical evidence to believe, we find no error in the ALJ's decision to accept Dr. Vuskovich's testimony and to give little weight to Dr. Weinsweig's testimony. Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993). The ALJ was not obligated to give more weight to Dr. Weinsweig's testimony simply because he was Whitt's attending physician. Wells v. Morris, Ky. App., 698 S.W.2d 321, 322 (1985). Furthermore, the fact that

Dr. Vuskovich's testimony was not given weight by a different ALJ in Whitt's original proceeding does not bind the ALJ in this reopening proceeding.

The finder of fact (ALJ) may draw reasonable inferences from the evidence. Jackson v. General Refractories Co., Ky., 581 S.W.2d 10, 11 (1979). We deem the ALJ's use of the term "common sense" to be, at worst, a poor choice of words. In short, pursuant to Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992), the ALJ's decision that the 1988 work-related injury and the 1995 surgery were unrelated should be affirmed.

Whitt also claims that the ALJ's ruling that Martin did not have to pay for Whitt's surgery was erroneous and contrary to a letter written by Martin's underwriter prior to the surgery. That letter states in relevant part that "our office will provide payment for the scheduled surgery . . . ."[1] The letter, which was written before the surgery and before any medical testimony had been taken, cannot serve to substantiate the fact that the 1995 surgery was related to the 1988 injury. The branch manager who wrote the letter was likely not qualified to express an opinion on whether the surgery was medically related to the 1988 injury sufficient to cause Martin to be bound to pay for the surgery. Workers' compensation awards "must be made upon the basis of relevant medical testimony . . . ." Royal Crown

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[1] The letter further states that the payments would be made only "for any reasonable and necessary services relating to the injury of 6-01-88." TR Vol. II, p. 217.

Bottling Co. v. Bedwell, Ky., 449 S.W.2d 767, 769 (1970). The Board's decision on this issue should not be reversed as it is not so "flagrant[ly] [erroneous] as to cause gross injustice." Western Baptist Hosp., supra, at 688.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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