

Commonwealth Of Kentucky

Court Of Appeals

No. 97-CA-2385-WC

EQUITABLE BAG

APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-96-7478

RUBY SILVEY;
SPECIAL FUND;
JAMES L. KERR: and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: GUIDUGLI, JOHNSON and SCHRODER, Judges.

GUIDUGLI, JUDGE: This matter is before the Court on a petition for review of an opinion of the Workers' Compensation Board (Board) reversing and remanding an opinion of an Administrative Law Judge (ALJ). The appellant employer, Equitable Bag Company (Equitable), contends that the Board substituted its judgment for that of the ALJ regarding the weight, character and substance of

evidence presented by the claimant. For the reasons stated hereafter, we affirm.

Ruby Silvey (Silvey) claims to have sustained a work-related low back and right foot injury on February 26, 1996, while employed at Equitable. However, prior to the filing of this workers' compensation claim (the second claim) on October 21, 1996, Silvey had already filed another workers' compensation claim (the first claim) in 1995 in which she alleged that she had sustained a similar work-related low back injury on May 11, 1994, while employed at Equitable. The first claim was disposed of by opinion of Thomas A. Nanney, ALJ, on August 29, 1996. In his opinion, the ALJ found that Silvey had failed to prove that her current condition related back to the original injury of May 11, 1994. Silvey filed her second claim while her appeal to the Board was pending. Eventually the board affirmed the dismissal of the first claim. It is the conflict and confusion between the medical testimony in the first and second claim which is the basis for this appeal.

On May 11, 1994, while employed as a bag catcher for Equitable, Silvey slipped on a bag in the floor, falling back on her buttocks. She claimed she sustained an injury to her back. Claimant continued to work thereafter and received temporary total disability payments from September 16, 1995 until November 29, 1995, totaling \$2,266.58. Equitable also paid medical expenses incurred by Silvey in the amount of \$6,507.88. Silvey filed her first workers' compensation claim in 1995. For this

first injury, Silvey was treated by doctors Robert Runge, Michael Kramer and Luis Pagani.

While still working for Equitable, but prior to the administrative hearing on the first claim, Silvey had another incident at work which eventually lead to the second claim. On February 26, 1996, while working as a bag catcher, Silvey bent down to lift a load of bags and when she straightened up, she had "an onset of increased pain in her back." She could not finish her work because the pain was so intense. She was crying due to the severe pain. Silvey left her job site, reported the situation to the employee nurse and went directly to Dr. Pagani's office.

At the hearing on the first claim before the ALJ, the following medical evidence was presented: Dr. Kramer, a neurosurgeon, saw Silvey in November 1995. He stated that the diagnostic testing performed on Silvey was all normal. He was unable to relate Silvey's clinical complaints to any physical findings. Dr. Runge, an orthopedic surgeon, began treating Silvey in January 1995. He last saw Silvey on August 1, 1995. He stated that at that time his clinical examination of claimant was essentially normal. Dr. Runge also reviewed an MRI performed on Silvey in September 1995 and reported that it did not reveal any L4 compression fracture. Dr. Runge felt that Silvey's L4 fracture was new. However, Dr. Pagani, who was now Silvey's treating neurologist (since November 1995), stated that the

compression fracture of the L4 vertebra and a stress fracture of the right foot were the result of the May 1994 injury.

ALJ Nanney stated that the central issue of the first claim to be "whether the plaintiff's [Silvey's] current problems which appear to be at least significantly related to a fracture of the L4 vertebra and a stress fracture of the foot are related to the May 11, 1994 injury, or, are the result of a subsequent injury which may have occurred in February, 1996." At that hearing Equitable maintained that Silvey had sustained a new injury on or about February 26, 1996 and that her injuries were not caused by the May 11, 1994 injury. Basing his decision on the medical testimony of Drs. Runge and Kramer, ALJ Nanney found that Silvey's lower back and foot injuries were not caused by the May 11, 1994 incident but rather that Silvey had sustained a recent injury. The ALJ specifically stated, "By this finding, I am not concluding that plaintiff's condition is specifically related to an injury in February, 1996. However, I am persuaded that it is not related to the original injury of May 1995 (sic) [May 1994] and may, upon proper proof, be shown to be related to incident (sic) in February 1996." From this ruling Silvey both appealed the ALJ's decision to the Board and filed the second claim alleging permanent injury resulting from the February 26, 1996 incident.

The only medical evidence presented to the ALJ in the second claim were the three (3) depositions of Dr. Pagani. In his first two (2) depositions (March 12, 1996 and May 7, 1996),

Dr. Pagani stated that within reasonable medical certainty that the cause of Silvey's injuries was the May 11, 1994 fall. However, in the third and final deposition given on December 17, 1996, Dr. Pagani stated the "injury of February 26, 1996 becomes now the most likely cause of the patient's [Silvey's] problems." Further questioning of Dr. Pagani revealed that he had been unaware that Silvey had sustained additional trauma to her body after the May 11, 1994 incident. Although Dr. Pagani had treated Silvey on February 26, 1996 and thereafter, his notes and reports did not indicate any history of a new injury or any other traumatic event which could be the cause of her injuries. Once the doctor had been advised that Silvey had been bending and lifting heavy stacks of bags and pulling and pushing carts loaded to maximum capacity with bags on February 26, 1996, (and that the May 11, 1994 workers' compensation claim had been denied) then Dr. Pagani testified that the February 26, 1996 incident is the most likely cause of Silvey's injury. Dr. Pagani assessed a five percent (5%) permanent partial functional impairment according to the AMA guidelines.

By opinion and order entered May 14, 1997, ALJ James Kerr dismissed Silvey's second claim. Based upon the conflicting depositions submitted by Dr. Pagani and Silvey's own testimony, ALJ Kerr concluded that claimant had failed to present adequate medical proof that she had suffered a work-related injury on February 26, 1996 nor that her medical condition as caused by her alleged injury of that date. ALJ Kerr stated that:

The Administrative Law Judge finds Dr. Pagani's testimony on December 17, 1996 to be wholly unbelievable. As he is the only physician presenting evidence of medical causation herein, the Administrative Law Judge cannot conclude that plaintiff's condition was caused by her alleged February 26, 1996 injury. In fact, the undersigned cannot conclude that plaintiff suffered a work related injury on February 26, 1996. Plaintiff herself testified that she incurred no traumatic incident in February, 1996 and her back pain was simply the result of the cumulation of her work activities.

On appeal to the Board, Silvey argued that she had presented uncontradicted medical evidence and the ALJ's opinion was clearly erroneous. The Board agreed and reversed and remanded the matter to the ALJ to determine "whether or not Silvey's condition was caused by an injury she sustained at Equitable." The Board recognized its limitations of review under KRS 342.285 but stated that, "[w]hile an ALJ is entitled to determine the weight and credibility of the evidence and to draw reasonable inferences from the evidence, a party is entitled to have her claim decided upon a correct understanding of the evidence presented. Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985), and Whitaker v. Peabody Coal Co., Ky., 788 S.W.2d 269 (1990)." (Emphasis added.)

The Board placed great emphasis on the fact that Equitable had resisted the initial claim on the basis that Silvey's condition was attributable to a more recent incident, specifically the February 26, 1996 incident. Once it was successful in defending against the first claim, Equitable then

argued that the injury was the same as in her first claim and thus, she could not be successful under any circumstances. The Board also indicated that ALJ Nanney's opinion in the first claim rendered August 29, 1996 concluded that the medical evidence showed that Silvey's condition was not caused by the May 1994 fall but was more indicative of a recent injury. ALJ Nanney found that "...the evidence in his [Dr. Runge's] mind was conclusive that she had sustained a recent injury." These specific circumstances, combined with Dr. Pagani's testimony, led the Board to conclude that Dr. Pagani's testimony was, in fact, credible and that "he was not merely changing his opinion to meet the circumstances."

Having found that the ALJ had erroneously interpreted the evidence presented, the Board held that:

In our opinion, the only reasonable inference to be drawn from that testimony is that Dr. Pagani is of the opinion that either the May 1994 incident or the February 1996 incident were the triggering causes of Silvey's symptoms and that the ALJ, having ruled out the former, it must be the latter. Again, we acknowledge that if the result of that either/or type testimony were to place liability on a subsequent employer, rather than an initial employer, the testimony would be problematic. However, in this claim, that dilemma is not before us.

Therefore, on remand, the ALJ shall determine whether or not Silvey's condition was caused by an injury she sustained at Equitable. If he so determines, it already having been determined in a previous proceeding that the 1994 injury was not the cause and that finding being res judicata, he shall find that the more recent incident or cumulative trauma sustained at Equitable is

the cause and then make such other findings as may be necessary.

Accordingly, the decision of the ALJ is hereby REVERSED and this matter REMANDED for proceedings consistent with this opinion.

It is from this adverse opinion and order that Equitable petitions this Court for review.

Before we begin our discussion of this case, it should be pointed out that Silvey has failed to file a reply brief. As such, pursuant to CR 76.12(8)(c)(iii), this Court would be justified in deeming such a failure as a confession of error resulting in a reversal of the judgment without considering the merits of the case. Despite appellee's failure to comply with the appellate rules, we find it more appropriate to proceed under CR 76.12(8)(c)(i) and accept the appellant's statement of the facts and issues as correct. Unfortunately for Equitable even if we accept its statement of facts and issues as correct we must affirm the Board's opinion.

The sole issue presented is whether or not the Board substituted its judgment for that of the ALJ. Having thoroughly reviewed the record, we conclude that it did not. The function of this Court in reviewing the Board's decision herein is to correct the Board only if we perceive that it "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 Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). Here, the Board found that the ALJ had

misconstrued and misinterpreted the medical evidence presented by Dr. Pagani. The Board found that the ALJ by concluding that Dr. Pagani's testimony was "wholly unbelievable" had committed an error in assessing the evidence so flagrant as to cause gross injustice. Western Baptist, supra. Reviewing the specific facts of this case, we agree. Hence, the Board's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Lexington, KY

BRIEF FOR APPELLEE, SPECIAL
FUND:

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