

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000386-WC

HENRY I. SIEGEL COMPANY

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-6364

TERESA HULIN; SPECIAL FUND;
THOMAS A. NANNEY, Administrative
Law Judge; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; DYCHE and KNOX, Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on a petition for review of an opinion of the Workers' Compensation Board (board) affirming in part, reversing in part, and remanding an opinion an award of an Administrative Law Judge (ALJ). The ALJ awarded appellee Theresa Hulin benefits for a 20% occupational disability and apportioned liability for the award equally between appellant Henry I. Siegel Company (Siegel) and appellee the Special Fund. The board concluded that the ALJ erred by assessing any liability against the Special Fund. On appeal, appellant contends that the board erred by reversing the ALJ's apportionment finding and by

affirming the remainder of the ALJ's opinion and award. We disagree. Hence, we affirm.

Appellee Teresa Hulin sustained a work-related injury to her lower back on March 8, 1995, as she lifted a box of clothing which weighed approximately thirty pounds. She returned to work two days after the accident after being treated with muscle relaxers and pain relievers. She continued to work until she was terminated by appellant in June 1996 for reasons unrelated to her injury.

Hulin filed a claim for benefits in August 1996. In this connection, written medical reports from three physicians were filed. Dr. Morris W. Ray reported that his findings from Hulin's MRI included "moderate desiccation of the L4-5 disc . . . some bulging of the L1-2 disc . . . [and] minimal bulging of the L4-5 disc." However, Dr. Ray did not express an opinion as to the issues of causation or permanent impairment. Dr. Laxmaiah Manchikanti, an anesthesiologist with a sub-specialty in pain management, reported that Hulin's low back pain was causally related to the March 8, 1995, work-related injury. Moreover, he diagnosed Hulin as suffering from "lumbar disc displacement, lumbar facet arthropathy, degenerative disc disease of lumbar spine and ilio-lumbar syndrome." Neither Dr. Ray nor Dr. Manchikanti expressed an opinion regarding physical limitations to which Hulin should adhere.

Dr. Robert J. Barnett, who evaluated Hulin in October 1996, reported that Hulin "obviously has a medically documented injury with possible ruptured disc . . . she has a 10% permanent physical impairment to the whole body due to her industrial

injury.” Dr. Barnett further stated that the work-related injury was the cause of Hulin’s physical impairment and that no part of the impairment stemmed from the arousal of a preexisting nondisabling dormant or degenerative condition into disabling reality. Unlike the other physicians, he placed limitations on her physical activities. Hulin also filed a vocational evaluation in support of her claim which contained an opinion that she suffered from an occupational loss of 50% to 55% as a result of her injury.

The ALJ found that Hulin’s work-related lower back strain aroused a preexisting degenerative condition into disabling reality and resulted in an occupational disability of 20%. The ALJ apportioned liability for the award equally between appellant and the Special Fund. On appeal, the board found that there was no evidentiary support for the ALJ’s finding that the work-related injury aroused a preexisting degenerative back condition into disabling reality. Accordingly, the board reversed the ALJ’s apportionment finding and directed that all liability be apportioned against appellant. The ALJ’s opinion and award was affirmed in all other respects. This appeal followed.

Appellant contends that the board erred by reversing the ALJ’s apportionment finding. We disagree.

KRS 342.1202(1), which was in effect on the date of Hulin’s injury, mandated that an award of workers’ compensation income benefits in a back injury claim be apportioned equally between the employer and the Special Fund where the award is based “in whole or in part, on a pre-existing disease or

pre-existing condition of the back” In Bennett v. Special Fund, Ky. App., 919 S.W.2d 225 (1996), we addressed this mandated apportionment pursuant to KRS 342.1202 as follows:

[T]he evidence must establish that the degenerative disc disease or other pre-existing condition played a role in the present occupational disability. While based upon our experience, we may assume that to be the case, assumptions are not a valid basis for rendering the decision. . . .

KRS 342.1202 specifically notes that equal apportionment is appropriate in back cases when the disability is based in whole or part on a pre-existing condition. That statement in our opinion necessitates direct evidence from the Plaintiff or the Defendant employer to establish by competent evidence that any pre-existing condition played a role in the present occupational disability.

919 S.W.2d at 226-27. See also Whittaker v. Huff, Ky., 962 S.W.2d 878 (1998). Thus, for there to be 50/50 apportionment pursuant to KRS 342.1202(1), the claimant or the employer must not only prove the existence of a preexisting condition, but also adduce direct evidence that the work-related injury aroused that preexisting condition into disabling reality and that the claimant’s occupational disability is at least partially attributable to the preexisting condition. We perceive no substantial evidence exists to support such a finding in the instant action.

The ALJ stated that he relied upon the “combined testimonies of Dr. Ray and Dr. Manchikanti” to find that the work-related injury aroused a preexisting degenerative condition into disability reality, and appellant contends that the reports of Dr. Ray and Dr. Manchikanti do indeed provide credible evidence to support the ALJ’s apportionment finding. However, we

agree with the board's conclusion that, while the existence of a preexisting degenerative condition is certainly supported by the reports of Dr. Ray and Dr. Manchikanti, neither report provides substantial evidence to support the ALJ's finding that the work-related injury aroused such preexisting condition into disabling reality. Indeed, there is simply no direct evidence that the work-related injury aroused such preexisting degenerative condition into disabling reality. Further, appellant points to no evidence in the record which supports such a finding. Instead, appellant merely claims that the evidence "lead[s] to the conclusion that [the degenerative disc disease] was aroused." As stated in Bennett, however, "assumptions are not a valid basis for rendering the decision." 919 S.W.2d at 226. We conclude, therefore, that the board did not err by finding that there is no evidence to support the ALJ's apportionment finding. Moreover, we note that appellant's attempts to distinguish Bennett are unpersuasive.

Next, appellant contends that the existence of a degenerative disc condition necessarily provides the only basis for an award of permanent partial disability herein. We disagree.

Appellant's argument in this vein is based upon the inaccurate premise that Hulin's degenerative condition is the cause of her permanent occupational disability. In his Form 107, Dr. Barnett states that the March 1995 injury caused Hulin's disability and that no part of her impairment was the result of the arousal of a preexisting degenerative condition. Dr. Barnett further stated that Hulin's impairment was "due to her industrial

injury." Clearly, therefore, contrary to appellant's contention, a preexisting degenerative condition does not provide the only basis for an award of permanent disability benefits. Rather, Dr. Barnett's testimony clearly was substantial evidence sufficient to support a finding that Hulin's impairment was caused by her work-related injury. Moreover, the mere fact that Dr. Barnett examined Hulin eighteen months after her injury, nor the fact that the impairment rating assigned to her by Dr. Barnett related to a surgically treated disc when her work-related injury did not necessitate surgery, do not render Dr. Barnett's opinions incapable of belief. This is especially true since appellant could have exercised its right to cross-examine Dr. Barnett, but chose not to take his deposition. See Union Underwear Co., Inc. v. Scarce, Ky., 896 S.W.2d 7 (1995).

As is often noted, the function of this court's review is to correct the board only where 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, appellant has failed to point to any evidence which was overlooked by the board, and the view of the evidence taken by the board is "neither patently unreasonable nor flagrantly implausible." Id. at 688. It follows that the board's opinion as to the apportionment issue may not be set aside.

The board's opinion is affirmed.

ALL CONCUR.

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