RENDERED: October 1, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000118-WC

PRECAST SERVICES, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-01484

CHRIS CROWLEY;
SPECIAL FUND;
SHEILA C. LOWTHER,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: COMBS, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: Precast Services, Inc. appeals from an opinion of the Workers' Compensation Board that dismissed its appeal and affirmed an administrative law judge's opinion which held that Chris Crowley, a former Precast employee, now has a 55 percent permanent partial occupational disability as the result of an injury Crowley received while working for Precast.

In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the Supreme Court of Kentucky set forth the standard of review to be utilized when reviewing the Workers' Compensation Board: "[T]he Court of Appeals 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." Id. at 687. Perceiving no error, we adopt the opinion of the Board as our own:

> **GREATHOUSE, Member.** Precast Services, Inc., ("Precast") appeals from an Opinion and Award rendered by Hon. Sheila C. Lowther, Administrative Law Judge ("ALJ"), awarding the claimant, Chris Crowley ("Crowley"), benefits for a 55% occupational disability as a result of an injury to his low back, allegedly incurred while employed by Precast. On appeal, Precast argues that the ALJ's award of occupational disability benefits is not supported by substantial evidence, that the ALJ's finding that Crowley suffered a work-related injury is not supported by the evidence, and that the ALJ erred in finding Precast liable for payment of prior medical expenses.
>
> Crowley is 54 years old and has a high school education. He has received vocational training as an ironworker. Crowley began working as an ironworker in 1975 and has worked continuously until November 1995.
>
> Crowley testified that he was injured on November 21, 1995 when he fell at a construction site. He

initially received medical treatment for an injury to his knee. Crowley stated that he was taken by the union steward to see Dr. Watkins. On the day following the accident, Crowley began to experience problems with his low back. Crowley stated that he saw Dr. Watkins twice and was then referred by Watkins to Dr. Jacob O'Neill. Dr. O'Neill then began treating Crowley for his back problems.

On January 5, 1996, Crowley was involved in a motor vehicle accident. Crowley stated that he attempted to see Dr. O'Neill following this accident but was told by someone in Dr. O'Neill's office that Dr. O'Neill would no longer be able to treat him because it was no longer a workers' compensation injury. Crowley then sought treatment through his HMO at the Welborn Clinic. He was eventually referred to Dr. Oexmann, who performed a laminectomy in March 1996.

Crowley testified that he thought that Precast's workers' compensation carrier had denied payment of his medical expenses. Dr. Oexmann's bills were turned in to Crowley's HMO. Crowley stated that he spoke to Patrice Winston, a claims adjuster for Precast's workers' compensation carrier. Crowley stated that Winston told him that she wanted him to obtain a second opinion. Crowley states that he agreed to this but preferred not to see Dr. O'Neill. Crowley stated that to his knowledge, an IME was never scheduled.

Crowley has not returned to work since the date of his injury. He stated that following the surgery performed by Dr. Oexmann, he had some improvement of his symptoms. However, he does not feel that they have improved to the point that he can return to work.

In support of his claim, Crowley submitted a report and records from Dr. James B. Oexmann, his treating neurosurgeon. Dr. Oexmann stated that a myelogram and CT scan indicated lumbar stenosis at the L4-5 level and to a lesser extent at the L3-4 level. Dr. Oexmann also felt that there was some nerve root impingement. He stated that there was no frank disc herniation, however. Dr. Oexmann stated that he performed a laminectomy on March 19, 1996. He stated that this apparently relieved Crowley's symptoms to some extent. Dr. Oexmann assessed a 16% impairment under the AMA Guides.

In a statement given in a civil action resulting from Crowley's January 1996 motor vehicle accident, Dr. Oexmann stated that the motor vehicle accident aggravated Crowley's low back symptoms. He stated that there was a good chance that Crowley would have had further back problems even without the second accident. Dr. Oexmann stated that Crowley probably would have required surgery at some point in the future even if the second accident had not occurred.

Crowley also submitted records from Community Methodist Hospital. These records indicate that he

underwent physical therapy there in December 1995 at the direction of Dr. O'Neill. There records indicate that Crowley had complaints of back pain and difficulty performing the physical therapy maneuvers.

Precast submitted records from Dr. David Watkins, the family physician that initially treated Crowley. These records indicate that Crowley was initially seen for an injury to his knee. Subsequently, he began to complain of low back problems and was referred to Dr. O'Neill.

Precast also submitted records from Dr. Jacob O'Neill, an orthopedic surgeon. Dr. O'Neill stated that Crowley presented with a bizarre gait, walking in a stooped position with his knees flexed. Dr. O'Neill stated that this did not correspond very well with his diagnosis. Dr. O'Neill stated, however, that by January 2, 1996, Crowley was exhibiting a normal gait. Dr. O'Neill diagnosed a healed sprain and flare-up of degenerative arthritis in the right knee, lumbosacral strain, and degenerative disc disease at L4-5 and L5-S1. He felt that Crowley would be able to return to work without restrictions as of January 15, 1996, therefore, there was no impairment rate under the AMA Guides.

Precast also submitted a report from Dr. Robert L. Keisler, an orthopedic surgeon. Dr. Keisler reviewed Crowley's medical records. His impression was of multiple level degenerative disc disease of the lumbar

spine with spinal stenosis syndrome and a history of two or more acute episodes. He stated that the traumatic event in November 1995 produced a temporary exacerbation of symptoms that was expected to last for 6 to 12 weeks. Dr. Keisler felt that the surgery performed in March 1996 was done for long-standing pre-existing changes and not for any condition that developed as a result of the 1995 or 1996 injuries.

Precast also submitted records from the Welborn Clinic. These records indicate that Crowley was treated in 1989 for complaints of pain in both legs. The records indicate that hereditary polyneuropathy was suspected. In September 1995, Crowley was seen with complaints of bilateral foot pain with a duration of some eight or nine years. These records indicate that this may have been due to damage caused by childhood polyneuropathy. A January 17, 1996 note indicates that Crowley was seen at the clinic following his motor vehicle accident. According to the note, Crowley did not feel that his back was any worse following the motor vehicle accident than it had been following the work-related injury in November 1995.

Precast also submitted an affidavit of Patrice Winston, the adjuster handling Crowley's workers' compensation claim. Winston stated that Crowley designated Dr. O'Neill as his treating physician and never notified them of an intent to change the

designation to Dr. Oexmann. She stated that she asked Crowley to continue treatment with Dr. O'Neill but that Crowley refused to do so. TTD benefits were discontinued on January 15, 1996, the date on which Dr. O'Neill indicated that Crowley would be able to return to work. Winston stated that Crowley never informed her that Dr. Oexmann was going to perform surgery on his low back. She stated that the first notification of the March 1996 surgery that she received was a letter from Crowley's attorney dated September 27, 1996. She further stated that Dr. Oexmann had not submitted a treatment plan in accordance with 803 KAR 25:096(5), nor had any medical bills been received from Dr. Oexmann within 45 days of the date that the service was rendered.

After reviewing the evidence, the ALJ concluded that Crowley's ongoing complaints and his back surgery were related to the November 1995 injury. In reaching this conclusion, she relied primarily upon the testimony of Dr. Oexmann.

The ALJ also found that Crowley suffered a 55% occupational disability, stating:

> Mr. Crowley is 53 years old. Essentially his entire work life has been spent as an ironworker. The Petitioner-employee testified concerning the rigorous demands of this employment. Both Dr. Oexmann and Dr. Keisler acknowledged that Mr. Crowley retains a significant degree of functional

> impairment. Mr. Crowley himself testified that he is not capable of returning to the type of employment which he has done in the past. In fact, Mr. Crowley has not returned to any form of employment since the 1995 accident. However, the Administrative Law Judge is aware that the Petitioner-employee also suffers from a hereditary form of polyneuropathy which may be a factor in that. Taking into consideration Mr. Crowley's age, his education, his employment history, and the functional impairment which he retains as a result of his back condition, it is the finding of the Administrative Law Judge that the Petitioner-employee retains a 55% permanent partial occupational disability. Liability for this is apportioned equally between the Respondent-employer and the Special Fund, pursuant to the parties [sic] stipulation.

In the Opinion and Award, the ALJ stated that the issue of Precast's liability for medical expenses was not yet ripe since none of Dr. Oexmann's bills had been submitted. Precast filed a petition for reconsideration requesting that the ALJ rule on this issue, pointing out that if it is required to contest the expenses later by filing a motion to reopen, the burden of proof will be upon it rather than on Crowley. In an order dated September 9, 1998, the ALJ held that the 45-day rule

found in KRS 342.020(1) was only applicable post-award, likening this situation to the one in R.J. Corman R.R. Const. v. Haddix, Ky., 864 S.W.2d 915 (1993). The ALJ did not address Precast's argument that it should not be held liable for Dr. Oexmann's bills because Dr. Oexmann was never designated as Crowley's treating physician pursuant to 803 KAR 25:096, Section 3.

Precast now appeals from the ALJ's opinion, arguing that her finding of permanent partial occupational disability is not warranted by the evidence because there is uncontradicted evidence that Crowley does not suffer any occupational disability. It also argues that the ALJ's award of 55% occupational disability is not supported by substantial evidence. We disagree.

The claimant in a worker's compensation claim bears the burden of proving each of the essential elements of his claim. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Where the party that does not bear the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the ALJ's opinion is supported by substantial evidence. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). It is not enough for Precast to show that there is merely some evidence which would support a

contrary conclusion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). As long as the ALJ's opinion is supported by any evidence of substance, we must affirm. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Furthermore, this Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence in questions of fact. KRS 342.285(2).

Dr. Oexmann assessed a 16% impairment under the AMA Guides. Dr. Keisler clearly stated that Crowley had a significant degree of impairment. None of the medical evidence discusses specific restrictions to be placed on Crowley. Crowley testified that he did not feel he was able to return to the sort of work he has done in the past. The claimant's own testimony can be evidence of probative value in making a determination of occupational disability. Caudill v. Maloney's Discount Stores, supra.

We believe that this is substantial evidence supporting a finding that Crowley does suffer an occupational disability. The ALJ has wide discretion in translating evidence of functional impairment into an assessment of occupational disability. Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976). We therefore find no error with the ALJ's award of 55% occupational disability benefits.

Precast next argues that the ALJ's finding that Crowley's medical condition is causally related to his work injury is not supported by substantial evidence. Precast argues that the only evidence regarding a causal connection is mere speculation by Dr. Oexmann. We disagree.

In the statement given by Dr. Oexmann in the civil action concerning Crowley's motor vehicle accident, he stated:

> Q Is there any way to say whether or not, given the fact that he had improved to the point that he was going to go back to work — never did, but was getting ready to go back to work — if we assume that to be true between the two accidents, and then after the second accident, he ultimately ended up with you, is there any reason to believe that he would not have been able to start functioning again and maybe

avoid the surgery had it not been for the auto accident in January 1996?

A This would be speculation, and most patients that become symptomatic from spinal stenosis will eventually progress and have surgery or — and so I think there's a good chance he would have had problems with or without the second accident.

Q Would the second accident have accelerated the symptoms and the problems that necessitated the surgery?

A It may have contributed some. It would be very hard to quantify any amount.

* * *

Q Okay. So ultimately it's your opinion he probably would have ended up with surgical intervention at some point in the future --

A Yes, sir.

Q — Based on the stenosis and the fact that it was symptomatic?

A Yes, sir.

In his December 4, 1997 report, Dr. Oexmann stated that the January 1996 motor vehicle accident aggravated Crowley's symptoms.

The ALJ is empowered to draw all reasonable inferences from the evidence, and where more than one

reasonable inference may be drawn, the ALJ is free to choose which to draw. Jackson v. General Refractories Company, Ky., 581 S.W.2d 10 (1979). We believe that the above evidence from Dr. Oexmann, taken as a whole, is sufficient to give rise to a reasonable inference that the November 1995 injury was the cause of Crowley's low back problems and that the January 1996 injury merely aggravated his symptoms. Certainly, the ALJ could have drawn other conclusions from this same evidence, but we will not substitute our judgment in factual matters for that of the ALJ. KRS 342.285(2).

Lastly, Precast argues that the ALJ's finding that the medical bills of Dr. Oexmann would be compensable is contrary to law. Although Precast has not yet received any bills from Dr. Oexmann, it points out that Dr. Oexmann was never designated as Crowley's treating physician pursuant to 803 KAR 25:096, Section 3, and that if any bills for past treatment are received from Dr. Oexmann, they will have been submitted more than 45 days from the date that the service is rendered in contravention of the requires of KRS 342.020(1).

We believe that the ALJ was correct in her Opinion and Award when she stated that this issue was prematurely raised. The compensability of a medical bill cannot properly be determined until such time as it is actually submitted to the employer or its carrier for payment. Furthermore, since it appears that the Welborn HMO may

have already paid Dr. Oexmann's bills, it would have an interest in any proceedings regarding the compensability of those bills under KRS Chapter 342 and should therefore be a party in such proceedings.

WHEREFORE, IT IS HEREBY ORDERED, on the Board's own motion, the ALJ's order on petition for reconsideration be, and the same is hereby REVERSED and VACATED and the ALJ's original ruling regarding the compensability of Dr. Oexmann's bills is hereby REINSTATED.

Accordingly, the decision by Hon. Sheila C. Lowther, Administrative Law Judge, as originally rendered, is hereby **AFFIRMED**, and the appeal by Precast Services, Inc. is hereby **DISMISSED**.

ALL CONCUR.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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