

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001165-WC

VINCENZO'S, INC.

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-94-26138

JUDY JO SLAUGHTER; DENIS
S. KLINE, Administrative
Law Judge; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; GUIDUGLI and TACKETT, Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on a petition for review of an opinion of the Workers' Compensation Board (board), which reversed and remanded an opinion and award of an Administrative Law Judge (ALJ) in a reopening proceeding. The ALJ denied the worker's claims for additional medical and disability benefits.

We have reviewed the record, the opinions of the ALJ and the board, the petition for review, and the response thereto. Essentially, appellant employer contends that the evidence did

not compel a finding in favor of appellee Judy Jo Slaughter, and that the board therefore erred by reversing the ALJ's decision. However, the board in fact reversed the ALJ because it determined that the ALJ had an erroneous understanding of the medical evidence, which it then relied upon in denying Slaughter's claims. Contrary to appellant's argument, the board did not substitute its judgment as to the weight, credibility, and/or sufficiency of the evidence for that of the ALJ. Rather, it merely remanded the matter to the ALJ for entry of a new award consistent with an error-free interpretation of the medical evidence.

Having reviewed the record herein, we find ourselves in complete agreement with the board's opinion. Hence, we adopt that opinion, written by Board Member Jonathan Stanley, as our own as follows:

Petitioner, Judy Jo Slaughter ("Slaughter"), appeals from an opinion and order rendered on January 8, 1999 by the Hon. Denis S. Kline, Administrative Law Judge ("ALJ"), denying her request for additional disability and medical benefits on reopening against the respondent, Vincenzo's Inc. ("Vincenzo's"). Now on appeal, Slaughter argues that the ALJ in his decision exhibited an erroneous understanding of the evidence and therefore should be reversed.

Slaughter was born on October 1, 1942 and is a resident of Louisville, Kentucky. She has a tenth grade education and no vocational or specialized job training. In 1958, Slaughter began working as a waitress for various restaurants. She also worked for a brief period as a factory worker for a printing company. After her children were born in the early 1960s, Slaughter left

public sector employment to raise her family. During this time, she worked occasionally as a teacher's assistant for her son's school and at a day care owned by her cousin. She reentered the workforce in the 1980s as a caterer in the Jewish community for Mr. Pollack, who had contracts with multiple Jewish Synagogues. Slaughter worked for Mr. Pollack for a year and a half before going to work for Vincenzo's, another catering company. During her first year of employment with Vincenzo's, when business was slow, Slaughter also worked sporadically for another caterer in Prospect, Kentucky conducting outside barbecues.

On June 3, 1994, Slaughter suffered a work-related injury when she slipped and fell on a wet floor, fracturing her right hip. She ultimately entered into a settlement agreement with Vincenzo's in August 1995 based upon a 3 percent disability. No application for benefits was ever filed.

After a period of recovery, in May 1996, Slaughter attempted to return to work as a caterer in time for the Kentucky Derby. She worked three Derby parties during a two-week span. However, because of increasing problems, which Slaughter relates to her original accident, she was unsuccessful and has not returned to work since.

Following the Derby parties in 1996, Slaughter again sought medical attention. Initially, this treatment was denied by Vincenzo's insurance company. Finally, Slaughter was permitted medical care in July 1996, and temporary total disability ("TTD") benefits were re-instituted for a period of six weeks.

In April 1997, Slaughter, this time with the assistance of counsel, filed a motion to reopen alleging increased medical and occupational disability due to the effects of her June 3, 1994 injury. Slaughter specifically alleged continuing pain in her right hip, which has spread to her low back, both buttocks, and left leg.

On October 16, 1997, Slaughter's claim was ordered reopened by Chief ALJ Donna Terry. Ultimately, petitioner's claim was assigned to ALJ Kline for adjudication.

In addition to Slaughter's testimony at the hearing and by deposition, evidence before the ALJ consisted of the deposition and various medical records of Dr. David P. Rouben, the depositions and medical records of Dr. Stephen Kirzinger, the medical report of Dr. Gregory Gleis, and the medical records of Dr. Steven Reiss.

Dr. Rouben first saw Slaughter upon referral from Dr. Robert Beanblossom on June 4, 1994 for treatment. Dr. Rouben initially diagnosed the petitioner as suffering from an intertrochanteric fracture of her right hip and an injury to her right knee. Slaughter subsequently underwent a open reduction and internal fixation for her hip fracture and an arthroscopy of her right knee. Over time, Dr. Rouben opined, Slaughter's hip fracture healed, but she continued to experience pain in the right thigh and weakness in the right leg. She also noticed an indentation of the right buttock due to atrophy. Finally, Dr. Rouben determined that Slaughter reached maximum medical improvement on August 1, 1995. He released her to full and unrestricted duty at that time.

In approximately January 1996, Slaughter reported to Dr. Rouben that she began to notice an indentation of her left buttock. She was placed back into physical therapy in May 1996 for treatment of the left hip, which caused pain to radiate into the left leg. Her pain was described as being located in her low back, buttocks, right hip, right anterior and posterior thigh, in the medial and lateral aspect of the right thigh, and in the left posterior thigh. Initially, Dr. Rouben was uncertain of the etiology of petitioner's gradually increasing complaints.

By letter dated October 1, 1996, Dr. Rouben referred Slaughter to Dr. Stephen Kirzinger for purposes of helping him determine the plausible etiology of the

atrophy of her left gluteal musculature. Dr. Rouben specifically requested information from Dr. Kirzinger as to whether there was a direct connection between her left buttock muscular deficiency and the fall that she experienced in June 1994. Subsequently, an MRI dated November 8, 1996 demonstrated that Slaughter had desiccation at the L4-5 and L5-S1 disk levels. There was also evidence of a central disk herniation with subligamentous herniations at both L4-5 and L5-S1. EMG studies reveal a mild S1 radiculopathy. In a progress note dated November 18, 1996, Dr. Rouben noted that Dr. Kirzinger had attributed Slaughter's gluteal nerve palsy directly to the contusion she sustained when she fell on her buttock and fractured her hip in 1994. At his deposition, taken August 24, 1998, Dr. Rouben testified that in his opinion, the only explanation for the changes involving Slaughter's left buttock muscle loss and associated weakness was her 1994 fall at work. Specifically, Dr. Rouben stated that, "Given the fact that there is no integral evidence of either a persistent pressure injury to the nerve or a new traumatic injury to the nerve, I would have no other explanation to it." In a progress record dated November 27, 1996, Dr. Rouben permanently restricted Slaughter to a "sit down job or light duty job," as a result of her ongoing progressive problems.

Dr. Kirzinger testified that he first examined Slaughter on October 29, 1996. He subsequently treated her on a fairly regular basis until 1997. He then began treating her again regularly during the last few months of 1998. Dr. Kirzinger described Slaughter's ongoing problems as a flare up of the symptoms associated with her 1994 accident. Following an EMG and MRI scan, Dr. Kirzinger diagnosed Slaughter as having an inferior gluteal nerve injury on the left side resulting in weakness and atrophy of the gluteus maximus muscle and symptoms on the right side consistent with a S1 nerve root contusion. These findings, in Dr. Kirzinger's opinion, were directly attributable to the events of June 1994. Dr.

Kirzinger assessed a total impairment to Slaughter's body as a whole of 14 percent. Of this amount, 6 percent was attributable to the claimant's left side problems. Two percent represented her previous impairment secondary to her right hip fracture. Dr. Kirzinger opined that Slaughter remains temporarily totally disabled due to her injuries.

Dr. Gleis performed an independent medical evaluation ("IME") at the request of Vincenzo's on December 22, 1997. Following his evaluation, he diagnosed Slaughter as suffering from a right hip fracture with minimal loss of range of motion, right thigh pain secondary to the right hip fracture, and subcutaneous atrophy at the left and right upper outer quadrants of the buttock attributable to either IM injections or direct contusions from her fall. He also diagnosed low back pain, hypesthesia compatible with right saphenous nerve distribution and radiculopathy, all of unknown etiology. With regard to Slaughter's fractured right hip only, Dr. Gleis assessed a 2 percent impairment to the body as a whole.

Dr. Reiss, who saw Slaughter on December 12, 1996, also opined that petitioner's [sic] has left gluteal atrophy. However, he was uncertain as to the etiology.

As stated above, on January 8, 1999, the ALJ rendered an opinion dismissing Slaughter's claim for additional TTD or permanent disability benefits. In so doing, the ALJ stated that he specifically relied solely upon the testimony of Dr. Rouben. The ALJ stated in relevant part as follows:

The first issue presented is whether the plaintiff's current complaints and problems are related to her June 3, 1994 work injury. Of course, any problem which is directly related to her hip fracture is related to her work injury. It is also noted that Ms. Slaughter has been complaining of

right leg pain since her initial treatment with Dr. Rouben, and I believe that any treatment which she received for right leg pain in [sic] compensable. I will specifically conclude that the left gluteal nerve injury and any associated complaints including left leg pain are not compensable. I found the testimony of Dr. Rouben to be most persuasive. I did not find Dr. Kirzinger's testimony to be [at] all credible.

The plaintiff has requested additional total disability benefits and medical expenses. She has failed to convince me that she has any period of temporary total disability for which she had not been compensated. Again, I will rely upon the testimony of Dr. Rouben.

The final issue is whether she has had an increase in her occupational disability since August of 1995. Again, based upon the testimony [of] occupational disability [by] Dr. Rouben, I will conclude that she has not had an increase. She has failed to present any credible medical evidence which would support a conclusion that the restrictions placed upon her activities at this time are any greater than they were in August of 1995. Her claim for any additional permanent partial disability benefits is DENIED.

Now on appeal, Slaughter argues that (1) the ALJ erred in finding that her left hip and lower extremity problems, as well as her low back condition, are not related to her work-related fall on June 3, 1994, and (2) the ALJ also erred in finding that Slaughter failed to show an increase in her occupational disability upon reopening. In making these arguments, Slaughter specifically cites to the fact that the ALJ

relied exclusively on Dr. Rouben in reaching his conclusions. Petitioner further argues that given Dr. Rouben's opinion as expressed in his deposition, the ALJ exhibited an erroneous understanding of the evidence and therefore should be reversed. We agree.

While we recognize that the ALJ, as fact finder, has the sole authority to determine weight, credibility, substance, and inferences to be drawn from the evidence, we also acknowledge that the parties are entitled to findings of fact based [on] a correct understanding of the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985). The ALJ by law must support his ultimate conclusions with correct facts taken from the evidence. Shields v. Pittsburg & Midway Coal Mining Co., Ky. App., 634 S.W.2d 440 (1982).

Given the ALJ's reliance on Dr. Rouben to support his rulings, the Board must conclude that the dismissal of Slaughter's reopening may have resulted from an erroneous understanding of Dr. Rouben's testimony and medical records. Whitaker v. Peabody Coal Co., Ky., 788 S.W.2d 269 (1990). The ALJ expressly cites to Dr. Rouben's opinions as his grounds for concluding that Slaughter's left gluteal nerve palsy with associated symptoms of radicular pain, weakness, and atrophy are not work related. However, Dr. Rouben specifically testified in direct opposition to the ALJ's finding. Furthermore, ALJ Kline also relied solely on Dr. Rouben as the basis for concluding that Slaughter is not entitled to an increase in her occupational disability since her August 1995 settlement. However, the uncontradicted evidence reflects that although in August 1995 Dr. Rouben was of the opinion that Slaughter could return to her normal and customary job activities as a caterer without restrictions, by November 1996 Dr. Rouben had restricted Slaughter to light and sedentary activities only. Given these facts, Dr. Rouben's testimony and findings with regard to causation and increased disability constituted an insufficient basis upon which

to dismiss the petitioner's claim. For these reasons, this claim shall be remanded for further consideration by the ALJ.

The board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James R. Wagoner
Louisville, KY

BRIEF FOR JUDY JO SLAUGHTER:

Thomas A. Dockter
Bardstown, KY