

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001263-WC

KRISPY KREME

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-1119355

DELMAR BATSIS; SPECIAL FUND;
HONORABLE JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: COMBS, HUDDLESTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Krispy Kreme petitions for the review of a decision of the Workers' Compensation Board which allowed an employee to increase an award on reopening for a claim for a low back injury and a claim for total temporary disability (TTD) that occurred after the initial award but before the filing of the motion to reopen. We reverse the Board because we believe there was no causation shown for the low back injury and we believe this TTD is not authorized by law.

Delmar Batsis (Delmar) was a truck driver for Krispy Kreme on September 21, 1974, when he was involved in a work-related accident. His form 11 alleged "cervical spine injury and both knees severely injured. Lumbar region of the spine was injured also." Dr. Sexton performed a cervical laminectomy for a protruding cervical disc in November of 1974, and he performed right knee surgery to repair torn knee cartilage in June of 1995. Delmar received \$4,737.88 in TTD and settled the claim on December 22, 1975, for a lump sum of \$37,861.39, representing a 35 1/2% occupational disability for "protruded disc - torn knee cartilage".

Over the years, Delmar had five knee revisions on the right knee, paid for by Krispy Kreme. The last knee surgery was performed January 23, 1997, after which Delmar underwent physical therapy until he was released to return to work on June 9, 1997. There were allegations of other periods of time off for previous knee surgeries but no definite periods of time. Delmar moved to reopen his claim on October 13, 1997, due to change of condition which resulted in more TTD and low back problems.

Although there is a reference in form 11 to injuries to the lumbar region of the back, Dr. Sexton, a treating physician from 1974 through 1998, makes no reference to any treatment for low back pain. Dr. Ford also treated Delmar from 1974 through 1993. Dr. Ford's records indicate Delmar had low back problems beginning March 27, 1976. In April of 1977, Delmar again complained to him of low back pain. X-rays revealed spurring at L4-5. In early 1982, Delmar was again seen by Dr. Ford for lower

back pain and hip pain. In February of 1989, Delmar was again seen for lower back pain radiating into the right leg. X-rays revealed a fusion of the sacroiliac joint on the right side. On August 5, 1993, Delmar returned to Dr. Ford experiencing leg pain and numbness. An MRI was taken which revealed multiple herniated discs at L4-5 and L5-S1 with nerve root compression. Dr. Reidle started treating Delmar's knee in November of 1996, and requested an MRI of the lower back in 1998. This MRI showed a herniated disc at L5-S1 with some narrowing.

As to causation of the lower back problems, we have an independent medical evaluation by Dr. Collis and an opinion by Dr. Reidle, a treating doctor. Dr. Collis found the lower back condition, assessed a 10% impairment, but opined that the lower back problems were not the result of the original work-related injury. Dr. Reidle's opinion was not as clear. Dr. Reidle started seeing Delmar in January of 1998 for the low back condition. As stated earlier, he found a herniated disc at L5-S1 with some narrowing. As to causation, the doctor was asked specifically:

Doctor, within reasonable medical probability, would a herniated disk [sic] in 1998 be connected to a 1974 automobile accident that somebody had been going around with for 24 years?

The doctor answered: "I don't know." A second time the doctor was asked whether the automobile accident 24 years earlier was related to or caused the back problems to which the doctor again stated he didn't know. A third time, after discussing the back condition and treatment, the doctor was asked about causation to

which he replied: "As we discussed before, we don't know. He had the problem and needed treatment." A fourth time the doctor agreed that he didn't really know the cause of the low back problem, only that it was there and the problem was consistent with what the patient told him about the other doctor's treatment. The doctor had no history of the prior automobile accident and no records of prior back trouble or treatment from other doctors. Only when given the hypothetical question "could the low-back problems that you treated him for have been related to that type of accident?", did the doctor answer, "It could." The doctor was then asked if "By the same token, it might not be related . . .", and the doctor answered, "That's correct. I don't have access to the records to know what was done and when it was done and what was found."

The arbitrator ordered the claim reopened on December 11, 1997, and issued a benefit review determination on April 21, 1998. Delmar requested and was granted a hearing before the ALJ which found, based on Dr. Reidle's testimony, that the low back problems were related to the work-related injury of September 21, 1974, but that there was no increase in occupational disability. As to the TTD for knee surgery, the ALJ found the employer could not be liable for TTD for periods before the date of the motion to reopen. The Worker's Compensation Board affirmed the finding as to causation on the low back injury and reversed the denial of the TTD.

On appeal, Krispy Kreme questions the sufficiency of the evidence holding it liable on reopening for the lower back

condition, and whether the employer can be held liable for TTD which accrued before the worker's motion to reopen is filed. The function of the Court of Appeals in reviewing the Board "is to correct the Board only where the . . . Court perceives the Board had 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 (1992). We believe this is such a case as to the causation of the lower back injury and in misconstruing the law as to TTD. Case law in Kentucky holds that the trier of fact in Worker's Compensation cases is to be accorded considerable deference. "When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Moreover, "the finder of fact, and not the reviewing court, has the authority to determine the quality, character, and substance of the evidence presented. . . ." Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). The record reveals that the uncontroverted medical evidence of Dr. Collis as to causation was that the low back condition was not the result of the original work-related injury. Dr. Reidle was the only other doctor that testified as to causation. Four times in a row, Dr. Reidle stated he could not say whether or not the low back injury was related to the September 21, 1974 injury. He then admitted it was possible, but

that he didn't have the records and couldn't give an opinion either way. The ALJ and the Board's reliance on Dr. Reidle's testimony to show causation within the realm of reasonable medical probability is an error so flagrant as to cause a gross injustice under Western Baptist Hospital, 827 S.W.2d at 687 and must be reversed. In order for the lower back injury to be compensable, the claimant has to show it is causally related to the original injury. Jude V. Cubbage, Ky., 251 S.W.2d 584 (1952). A mere possibility does not satisfy the claimant's initial burden. Marcum v. General Elec. Company, Ky., 479 S.W.2d 640 (1972).

The second issue is whether Delmar may recover TTD for unknown periods prior to the date that he filed his motion to reopen. Although Delmar testified to unknown periods, the Board accepted the specific period of January 23, 1997 (the last surgery), to June 9, 1997, when he was released to return to work. The Board didn't award anything for the unspecified periods, so we are limiting our discussion of TTD for January 23, 1997 to June 9, 1997. In this jurisdiction, "a new award in a compensation case shall not be retroactive so as to affect a previous award as to any sums already paid thereunder." Hayden v. Elkhorn Coal Corp., Ky., 238 S.W.2d 138, 140 (1951) (emphasis added); see also Schabb v. Irwin, 298 Ky. 626, 628; 183 S.W.2d 814, 816 (1944). Also, we deem KRS 342.125(4) (former KRS 342.125(1) similar) to be controlling. KRS 342.125(4) provides, in relevant part:

Reopening shall not affect the previous order or award as to any sums already paid

thereunder, and any change in the amount of compensation shall be ordered only from its date of filing the motion to reopen.
(emphasis added).

That language is not susceptible to multiple interpretations or strained conclusions. "When the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written." McCracken County Fiscal Court v. Graves, Ky., 885 S.W.2d 307, 309 (1994) (quoting Lincoln County Fiscal Court v. Dept. of Public Advocacy, Com. of Ky., Ky., 794 S.W.2d 162 (1990)). Accordingly, we adjudge that the language of KRS 342.125(4) is sufficiently clear and that the Board erred in ordering TTD for the period ending before the filing of the motion to reopen.

For the foregoing reasons, the opinion of the Workers' Compensation Board is reversed and remanded for the entry of an appropriate order.

HUDDLESTON, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

COMBS, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I disagree with the majority opinion and would affirm the sound reasoning of the Board, which found causation for the low back injury. I find that this is a classic case in which Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992) clearly applies and precludes this court from substituting its judgment for that of the Board. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). The Board reviewed the conflicting

medical reports before it and exercised its statutory prerogative in selecting and rejecting the evidence according to its expertise and discretion. According, I would affirm as to the issue of causation.

As to the timing of the TTD payments awarded prior to the filing of the motion to reopen, I concur with the majority and would vacate and remand on that issue alone.

BRIEF FOR APPELLANT:

C. A. Dudley Shanks
Louisville, Kentucky

BRIEF FOR APPELLEE, DELMAR
BATSIS:

Wayne C. Daub
Louisville, Kentucky

BRIEF FOR APPELLEE, SPECIAL
FUND:

Joel D. Zakem
Louisville, Kentucky