RENDERED: JULY 21, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003153-WC

CASTILLE, INC. APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-92-41154

VIRGIL BASS;
HONORABLE RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Castille, Inc. (Castille) appeals from an opinion of the Workers' Compensation Board (the Board) entered December 10, 1999, which affirmed an opinion, award and order entered by the Administrative Law Judge (ALJ) on July 22, 1999, finding Virgil Bass (Bass) to be totally disabled. We affirm.

Bass sustained a work-related back injury on October 17, 1991, while employed by Castille. Bass filed a claim for benefits which was ultimately settled on July 30, 1993, for a lump sum payment of $25,386.27 representing a 28% occupational

disability rating. Neither party joined the Special Fund to Bass's original claim for benefits.

On July 30, 1998, Bass filed a motion to reopen his prior claim on the ground that his occupational disability had increased since the time he settled his original claim. Although the Special Fund was not a party to the original claim, it was listed as a defendant on the motion to reopen. The motion to reopen was granted. Bass submitted testimony and/or medical records from Dr. George Raque (Dr. Raque) and Dr. Gregory Gleis (Dr. Gleis). Castille submitted medical records from Dr. Martyn Goldman (Dr. Goldman).

Dr. Raque testified by deposition. He stated that a CT scan and MRI of Bass's lumbar spine taken five months after his original injury showed degenerative disc disease at L4-5. In Dr. Raque's opinion, this condition predated his injury because "[t]hat kind of thing takes years to form[,] [i]t doesn't form in five months." According to Dr. Raque, the pre-existing degenerative changes at L4-5 were aroused into disabling reality as a result of the 1991 injury and contributed to his injury and current impairment. Neither Dr. Gleis nor Dr. Goldman noted the existence of any pre-existing degenerative condition.

In an opinion and award entered July 22, 1999, the ALJ found Bass to be totally disabled. As to whether any portion of the reopening award could be apportioned to the Special Fund based on the testimony of Dr. Raque, the ALJ held:

> The Special Fund was not a party to the original proceeding and apparently became a party to this reopening procedure because the plaintiff erroneously listed the Special Fund

> as a party on his motion to reopen. Any attempt to apportion liability to the Special Fund on this reopening is now barred by the statute of limitations. Although I find no order joining the Special Fund, out of an abundance of precaution the ALJ shall include an order dismissing the Special Fund from this case.

In an order denying Castille's petition for reconsideration, the ALJ stated:

> Neither plaintiff nor the employer thought it necessary from 1991 through the settlement . . . to join the Special Fund as a party on the basis of the medical [sic] then available. The ALJ was not persuaded by a medical opinion, made six years after the fact, that plaintiff's disability was due in part to injury arousal of a pre-existing dormant condition.

The Board affirmed and this appeal followed.

Castille maintains that the ALJ erred in failing to apportion liability for the award obtained on reopening based on the testimony of Dr. Raque. We disagree.

We agree with Castille that under the dictates of Dickerson v. Twentieth Century Hoov-R-Line, Ky., 893 S.W.2d 365 (1995), an employer cannot be held liable for the Special Fund's share of an award when there has been no joinder of the Special Fund to the action. In that case, neither the claimant nor the employer moved to join the Special Fund despite the fact that both were aware that overwhelming evidence supported the existence of a pre-existing condition which was aroused into disabling reality as a result of the injury. In holding that the employer could not be held responsible for the Special Fund's portion of the award, the Court stated:

> In 1982, the scheme for payment of workers' compensation benefits which is set forth in KRS 342.120 was amended. Since that time, the employer has paid the injured employee only to the extent of its own liability, and the Special Fund has paid its liability directly to the worker. Therefore, the employer and the Special Fund are now in the posture of co-defendants . . . and the liability of the Special Fund is considered to be direct and not derivative. Palmore v. Helton, Ky., 779 S.W.2d 196 (1989). As co-defendants, neither the employer nor the Special Fund bears responsibility for the other's liability, As between the employer and the Special Fund, there is no third party defense.
> Workers' compensation proceedings are adversarial in nature, and it is the responsibility of each party to protect its own interests. As in any other adversarial procedure, a plaintiff cannot rely upon a named defendant to join another defendant who is directly liable to the plaintiff. Although it is often the employer who joins the Special Fund, KRS 342.120(2) provides that either claimant or the employer could have moved to have the Special Fund named a party to the claim. As noted by the Board and the Court of Appeals, claimant was aware of the contents of Dr. Donleu's testimony at the time of his deposition, had sufficient time thereafter to move for joinder of the Special Fund in compliance with KRS 342.120(2), and had an obligation to protect her own interests by moving to name the Special Fund as a party to the claim. Under these circumstances, we are not persuaded that the equitable relief which she requests is justified.

Dickerson, Ky., 893 S.W.2d at 367-368 (1995). See also Leistner v. Concession Air, Inc., Ky. 892 S.W.2d 567 (1995). However, the difference between Dickerson and the case at hand is that in this case there is no overwhelming evidence to support Castille's assertion that Bass had a pre-existing dormant condition which was aroused into disabling reality by the injury.

As both the ALJ and the Board pointed out, Dr. Raque is the only doctor to state that Bass's injury aroused a pre-existing condition into disabling reality. Neither Dr. Gleis nor Dr. Goldman noted the existence of a pre-existing condition. Thus, we agree with the Board that the ALJ's opinion was supported by substantial evidence, and adopt the following portion of the Board's opinion as our own:

> The claimant in a workers' 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 Castille 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 may not reverse. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).
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> 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 medical 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).
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> . . . .

> Initially, the ALJ stated that he was dismissing the Special Fund because it was not a party to the original claim and that any claim would now be barred by limitations. In response to Castille's petition for reconsideration, the ALJ stated that he was simply unpersuaded by Dr. Raque's testimony made six years after the fact that Bass had a pre-existing condition that had been aroused into disabling reality by his 1991 injury. The ALJ further noted that neither party thought it necessary to join the Special Fund as a party based upon the medical evidence available during the pendency of the original claim.
>
> Castille is correct that the only explicit evidence concerning the arousal of a pre-existing condition is Dr. Raque's statement that degenerative conditions were present prior to the 1991 injury and were aroused by that injury. However, both Dr. Goldman and Dr. Gleis reviewed medical reports and imaging studies. Neither doctor diagnosed any pre-existing condition. The ALJ is empowered to draw all reasonable inferences from the evidence. Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1979). Where the issue is the existence or nonexistence of a medical condition, we do not believe that it is unreasonable for the ALJ to conclude that a physician will diagnose all conditions which he feels are present. Therefore, in this case, we believe that the fact that neither Dr. Goldman nor Dr. Gleis diagnosed any pre-existing dormant condition that was aroused by the 1991 injury is substantial evidence supporting the ALJ's finding that there were no pre-existing dormant conditions that were aroused by the 1992 injury.

Having considered the parties' arguments on appeal, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
L. J. Hollenbach Louisville, KY	Charles Ched Jennings Louisville, KY