RENDERED: NOVEMBER 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1999-CA-002340-WC

TOM DREXLER PLUMBING — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-98009

ANCIL FARMER, JR.; HON. THOMAS A. NANNEY, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: DYCHE, GUIDUGLI AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Tom Drexler Plumbing petitions for review of an opinion of the Workers' Compensation Board rendered on August 27, 1999, which affirmed an opinion of the Administrative Law Judge, awarding permanent partial disability benefits to the appellee, Ancil Farmer, Jr. Having reviewed the record and the Board's opinion, we are unable to conclude that the Board committed an

error in construing the law, or in assessing the evidence.[1] Thus, we affirm.

Farmer, a licensed plumber with a 10th grade education, had worked with Tom Drexler since 1981, first as a partner, then as an employee. In his application for benefits, Farmer alleged that he sustained an injury to his back as the result of three work-related incidents, all of which occurred near the end of 1997. Farmer testified that he first strained his back on September 23, 1997, lifting a steel bath tub from a residence. He was treated with a muscle relaxant and returned to work after a week's vacation. On October 23, 1997, Farmer strained his back again while insulating pipes, a job that required that he lay flat on his back in the crawl space under a house. While performing this job, Farmer had to hold his head up all day to keep it out of the mud. The resulting back sprain was again treated with a muscle relaxant and, for the next several weeks, Farmer asked, and was allowed, to perform light duty jobs. On December 31, 1997, Farmer sustained a serious injury to his back while using a jackhammer. Following this incident, Farmer did not respond to conservative treatment and was required to undergo back surgery in February 1998. He has not been able to work as a plumber or perform heavy labor since that time.

Drexler denied Farmer's claim for disability benefits alleging that the injury did not arise out of his employment, that he had failed to give it due and timely notice and that his

[1]See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), which sets forth the standard this Court is to utilize in its review of a decision of the Board.

condition was the result of a pre-existing, active disability. Medical reports from Farmer's treating physicians, Dr. David Britt and Dr. Wayne Villaneuva, a neurosurgeon, were submitted to the arbitrator, along with the medical report of Dr. Michael Best, who performed an independent medical evaluation for Drexler. On September 10, 1998, the arbitrator issued a benefit review determination which concluded that Farmer had incurred a work-related injury resulting in a 10% permanent impairment and that Farmer could not return to the type of work that he had done prior to the injury. Utilizing the formula contained in KRS[2] 342.730(1)(a) and (c)1, the arbitrator awarded Farmer benefits of $50.29 per week for 425 weeks.

Drexler sought a de novo hearing before an ALJ. In the pre-hearing order and memorandum entered on January 19, 1999, the only contested issues were identified as "notice, extent of disability, [and] causation/work-relatedness." A hearing was conducted by the ALJ on February 1, 1999. No additional contested issues were raised at the hearing. On March 31, 1999, the ALJ rendered his opinion and award and arrived at the same resolution of Farmer's claim as the arbitrator had reached. After describing the three incidents which Farmer alleged had culminated in his disabling condition, the ALJ concluded as follows:

> Having reviewed [Farmer's] testimony as well as the other evidence mentioned above, it is my finding that [Farmer] did give due and timely notice to [Drexler] of the first two incidents. However, I do not believe

[2]Kentucky Revised Statutes.

> that the incident of September 1997 and October 1997 resulted in any permanent impairment. Clearly, [Drexler] had due and timely notice of the injury of December 31, 1997 since [Farmer] was off work on vacation for approximately a week following this injury and [Drexler] acknowledges that it received notice no later than January 12, 1998. Since this injury is apparently the injury that has resulted in [Farmer's] permanent disability, a delay of two weeks under the circumstances as presented in this case, does not constitute a failure of notice.
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> . . .
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> The medical testimony from Dr. Best and Dr. Villaneuva has established that [Farmer] has sustained a 10% impairment to the body as a whole under the AMA Guidelines based upon DRE lumbosacral Category 3 with radiculopathy. [Farmer] has undergone a surgical procedure by Dr. Villaneuva. Dr. Villaneuva has imposed permanent restrictions of no lifting greater than 50 lbs. and no repetitive lifting greater than 25 lbs. He specifically recommended that [Farmer] quit plumbing work. Having found that [Farmer] has sustained a work-related injury resulting in a 10% impairment, and having further found that he does not retain the physical capacity to return to the work he was performing prior to the injury, [Farmer's] benefits shall be calculated as follows:
>
> $335.27 X 10% = $33.53
> $ 33.53 X 1.0 = $33.53
> $ 33.53 X 1.5 = $50.29
>
> [Farmer] shall be entitled to such temporary total disability benefits at the rate of $338.58 per week from January 1, 1998 through September 29, 1998, the date [Farmer] reached maximum medical improvement according to Dr. Villaneuva.

Drexler filed a petition for reconsideration on April 7, 1999, and asked the ALJ to reconsider his decision and make additional findings on the issues of causation, pre-existing conditions and the natural aging process. The motion was denied

on April 26, 1999. Drexler appealed to the Board and argued that the ALJ erred in (1) failing to make adequate findings with respect to the issue of causation, (2) awarding temporary total disability beyond June 25, 1998, and (3) failing to attribute one-half of the permanent disability to the natural aging process. In its review, the Board affirmed the ALJ's disposition of Farmer's claim and Drexler has sought further review in this Court.

As its first issue, Drexler contends that the ALJ did not make sufficient findings to support his conclusion that Farmer's impairment was the result of the December 31, 1997 injury at work. The Board disagreed and, citing Big Sandy Community Action Program v. Chaffins,[3] held that "it is unnecessary for the fact-finder to detail the entirety of his mental reasoning." The Board then outlined detailed testimony relating to the issue of work-relatedness that supported the ALJ's finding that Farmer's disabling back condition was the result of the injury sustained while using a jackhammer on December 31, 1997. Nevertheless, Drexler insists that the findings of the ALJ are inadequate to provide a meaningful review, and that the Board's opinion "misses the point of the appeal."

Clearly, the Board did not miss the point. It is settled that where the party with the burden of proof was successful before the ALJ, the issue before the Board is whether

[3]Ky., 502 S.W.2d 526 (1973).

there is substantial evidence to support the ALJ's findings.[4] Further, while Drexler argues that there was a "significant" issue presented with respect to work-relatedness, the record indicates otherwise. The evidence upon which Drexler primarily relied consisted of a note in Farmer's treating physician's medical records pertaining to his visit on January 5, 1998, which indicated that Farmer's most recent back problems resulted from a coughing episode and did not contain any reference to the jackhammer incident. The ALJ's failure to recite this evidence does not mean the evidence was overlooked, but could just as easily reflect the fact that the ALJ did not find it worth mentioning. In any event, the ALJ did describe in detail the three work-related incidents related by Farmer and specifically found, from that testimony and the medical evidence, that the December 31, 1997 jackhammer incident was the cause of Farmer's continuing back problems. We agree with the Board that the ALJ is not required to set forth his entire thought processes and we hold that the findings rendered by the ALJ sufficiently apprised the parties of the basis of his decision to comport with the standard set forth in Shields v. Pittsburg & Midway Coal Mining Co.[5]

Next, Drexler contends that the Board erred in affirming the ALJ's award of temporary total disability benefits for the period January 1, 1998, to September 29, 1998. The ALJ

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[4]Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

[5]Ky.App., 634 S.W.2d 440, 444 (1982) ("basic facts" must be "clearly set out to support the ultimate conclusions").

relied upon the testimony of Farmer's surgeon, Dr. Villaneuva, who opined that Farmer did not reach maximum medical improvement until September 29, 1998, which testimony, as the Board concluded, is clearly sufficient to support the ALJ's award of TTD. However, because Dr. Villaneuva also released Farmer on June 25, 1998, with the restriction that he perform light duty work only, Drexler reasons that the ALJ erred in awarding any TTD beyond the earlier date.

Drexler argues that KRS 342.0011(11)(a), which defines "[t]emporary total disability" as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment," precludes as a matter of law, an award of TTD to an injured worker after he is released to any type of work. Further, Drexler insists that it is irrelevant that it had no light duty work available for Farmer, or that Farmer did not actually return to work. Nevertheless, we believe that the Board properly interpreted the statutory definition of "temporary total disability" so as not to preclude an award of TTD merely because an injured worker was released to perform "some employment." Rather, as this Court recently held in considering the identical issue, it is apparent that the Legislature contemplated a "return to employment" commensurate with the worker's regular work.[6]

Finally, Drexler argues that the Board erred in affirming the ALJ's award even though the award failed to

[6]Halls Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327, 329-30 (2000); see also W.L. Harper Construction Co., Inc. v. Baker, Ky.App., 858 S.W.2d 202 (1993).

attribute any of the permanent disability to the natural aging process.[7] The Board declined to address the merits of this argument because Drexler failed to raise the issue before the fact-finder. Drexler contends that since it raised the issue in its petition for reconsideration, that the Board was "mistaken" in failing to address the issue. We disagree. Having failed to identify as "contested" any issue with respect to the natural aging process prior to the ALJ's decision, Drexler was precluded from attempting to litigate the issue in a petition for reconsideration. Thus, the Board did not err in holding that the issue was not properly preserved for further review.[8]

In any event, the evidence supports the ALJ's award without any deduction for the natural aging process. The medical evidence established that Farmer's back condition was dormant and non-disabling prior to December 31, 1997, and that any degenerative changes were aroused by the work-related injury and not the aging process. Indeed, Dr. Best, the IME, opined that Farmer had a 10% "whole-person impairment," 50% of which he attributed to the arousal of a pre-existing, congenital entity. As this Court recently held, "the terms 'dormant non-disabling condition' and 'natural aging process' cannot be equated and held to be synonymous with one another."[9]

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[7]KRS 342.0011(1), enacted by the Legislature effective December 12, 1996, provides in part that "'[i]njury' does not include the effects of the natural aging process."

[8]See Webb v. Wolfe Creek Collieries, Ky.App., 859 S.W.2d 129 (1993); and 803 KAR 25:010E, §11 (6) and (7).

[9]Ingersoll-Rand v. Edwards, Ky.App., ____S.W.3d ____
(continued...)

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Douglas A. U'Sellis<br>Louisville, KY | Ched Jennings<br>Louisville, KY |

[9](...continued)
(rendered 9/15/2000). Also, this Court in Commonwealth of Kentucky, Transportation Cabinet v. Frank Guffey, 1999-CA-000753-WC (rendered 12-10-99), which is pending in the Supreme Court, rejected the argument that a dormant non-disabling condition is no longer compensable under the 1996 legislative changes, and held:

> That which is a dormant, non-disabling condition has not now become "the natural aging process." When a claimant has degenerative changes that were dormant and non-disabling but were aroused by a work-related trauma, it is not the effects of the natural aging process that is compensated but rather the disabling effects of the injury upon those dormant and non-disabling conditions that is compensated. The 1996 Act merely codifies the law as it had been interpreted prior thereto.