

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000440-WC

VICTORIA GREENE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-06334

UNITED STEEL WORKERS; ROBERT L.
WHITTAKER, DIRECTOR OF SPECIAL FUND;
DENIS S. KLINE, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2000-CA-000518-WC

UNITED STEEL WORKERS

CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-06334

VICTORIA GREENE; ROBERT L.
WHITTAKER, DIRECTOR OF SPECIAL FUND;
DENIS S. KLINE, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE. Victoria Greene (Greene) petitions for a review of an opinion of the Workers' Compensation Board (Board) awarding her temporary total disability benefits (TTD) but failing to award her permanent disability benefits for spinal problems associated with a fall at her employment. United Steel Workers (USW) has also filed a petition for review of that portion of the Board's opinion awarding Greene temporary total disability benefits. Upon review of the record and the arguments of counsel, we affirm.

Greene, who was born in 1956, had been employed as a security/office manager for USW since 1975 when she fell down a flight of stairs at work on August 3, 1994. In the fall, she landed on her back and struck her neck on one of the stairs. Greene was taken to the emergency room where she was treated, prescribed pain medication and muscle relaxants, and released.

Prior to the fall, Greene had been diagnosed to be suffering from scoliosis since childhood. Although it had not caused her any occupational limitations or restrictions, in December, 1993, Greene saw Dr. John Johnson, an orthopedic surgeon, complaining of increasing pain in her neck and back as well as migraine headaches. Dr. Johnson's examination indicated that Greene exhibited a 49 degree right thoracic curvature of her spine that he diagnosed as idiopathic scoliosis. Dr. Johnson noted that Greene's left shoulder was higher than her right, her right leg was shorter than her left, and she had right thoracic rib prominence. Dr. Johnson told Greene that there was a 60-70% probability that her scoliosis would continue to progress and

that surgical intervention to correct the curvature of her spine was probably necessary. In March 1994, Greene saw Dr. Johnson again complaining of continued pain in her neck and back and he recommended surgery as a viable option for her scoliosis.

On July 25, 1994, Greene saw Dr. Peter Kirsch, another orthopedic surgeon, for a second opinion on her condition and the need for surgery. Greene told Dr. Kirsch that she had been experiencing consistent neck and back pain for several years. She complained especially that in the prior six months, she had experienced significant worsening of lower back pain that radiated into her right shoulder. She also stated that she had fallen down stairs two or three times in recent months. Based on Greene's information that sitting and typing at work tended to aggravate her neck and back pain, Dr. Kirsch recommended anti-inflammatory drugs, dorsal lumbar support, and conservative treatment including physical therapy and use of a TENS unit.

Following her fall, Greene saw Dr. Kirsch again on August 10, 1994. At that time, she complained of constant pain in her neck and back and exhibited limited flexation. He diagnosed an acute cervical, dorsal and lumbar muscle strain superimposed on her already existing condition with possible aggravation due to the fall. Dr. Kirsch again recommended conservative treatment with physical therapy, anti-inflammatory drugs and rest. On August 24, 1994, Greene's condition appeared to improve slightly, so Dr. Kirsch continued with conservative measures and eventually released her to return to work on December 2, 1994.

In late December, 1995, Greene was examined by Dr. Johnson because of continued pain in her neck and back. Although Greene stated that her pain had worsened after the fall, Dr. Johnson's examination and MRI test indicated that her condition had not changed since his earlier examination of her in December, 1993 and March, 1994. In January, 1995, Dr. Johnson performed spinal surgery on Greene placing two steel rods in the thoracic region and fusing the disks from the T5 level to T12 level. Following the surgery by Dr. Johnson, Greene still experienced pain, so she returned to Dr. Kirsch, who had an MRI performed and consulted with Dr. Richard Jelsma on the results. The MRI suggested multiple disk protrusions, especially at the C5-6 level, early disk degeneration and osteoarthritis. Dr. Jelsma opined that there was no disk herniation and that Greene's pain was possibly due to facet arthritis associated with spondylosis or scoliosis. After further conservative treatment was unsuccessful, Dr. Kirsch referred Greene to Drs. David Petruska and John Guarnaschelli, two neurosurgeons, in April, 1995.

Dr. Guarnaschelli initially attempted conservative treatment with physical therapy and drugs, but Greene continued to have severe pain in her neck. A myelogram and CAT scan conducted for Dr. Petruska indicated the presence of degenerative disk disease at the C5-6 and C6-7 levels. On August 9, 1995, Dr. Guarnaschelli performed a spinal fusion discectomy by removing the disks at the C5-6 and C6-7 levels and inserting bone from her hip. Greene continued to experience some pain in her neck and weakness in her arms. In April, 1996, Dr. Petruska placed her on

several restrictions including no lifting more than ten pounds, no lifting above her head, and avoidance of repetitive movement. He recommended that Greene not return to work because of her scoliosis, cervical degenerative disks disease, lumbar and cervical discectomy and fusion, and continued pain. Dr. Petruska also referred Greene to Dr. Lounette Humphrey, a pain psychiatrist for counseling. Greene has not returned to work since her fall in August, 1994.

On August 2, 1996, Greene filed an application for adjustment of injury claim seeking workers' compensation benefits based on injuries received in her August, 1994 fall down the stairs at work. After the claim was assigned to an ALJ, the parties conducted extensive discovery including the taking of depositions of Greene, Dr. Johnson, Dr. Kirsh, Dr. Petruska, and Dr. Humphrey, along with production of various medical records. USW denied the claim on the basis that Greene's injury did not arise out of and in the course of employment but was due to a pre-existing condition.

On May 13, 1999, the parties attended a prehearing conference. The prehearing order listed as the contested issues for the formal hearing, inter alia, extent and duration, active disability, and medical expenses. On May 14, 1999, Greene submitted her stipulations and witness list in preparation for the formal hearing in which she acknowledged USW had paid her regular salary from August, 1994, through April, 1996,¹ and her

¹ Greene was retained on the regular payroll under a provision in the union collective bargaining agreement . In
(continued...)

medical expenses. She also listed as the contested issues as apportionment and extent and duration of the injury.

On June 23, 1999, the ALJ conducted a formal hearing at which Greene testified. At the beginning of the hearing, Greene stated that she had received her full salary until April, 1996, and no workers' compensation benefits. When she indicated that she had not been told the salary payments were a substitute for workers' compensation benefits, USW's attorney objected stating the parties had agreed at the prehearing conference that Greene was not seeking TTD benefits because she had received her salary payments. USW's attorney noted that TTD benefits were not listed as a contested issue in the prehearing conference order. The ALJ noted that that issue need not be explicitly listed, but rather was subsumed under the "extent and duration" of disability issue, but he expressed some uncertainty about whether Greene's attorney had waived a claim to TTD benefits.

Greene testified that she takes anti-depressant and pain medication but that she continues to experience constant pain in her neck and thoracic spinal region. She stated that she cannot stand or sit for a very extended period and is limited in her ability to bend or lift objects.

On August 12, 1999, the ALJ issued an extensive opinion and order denying Greene's claim for benefits. The ALJ declined to decide whether Greene was entitled to TTD benefits finding that she had waived that issue by agreement at the prehearing

¹(...continued)
April 1996, she was placed on retirement and began receiving pension benefits based on a disability status.

conference, and therefore had not preserved it for review. The ALJ noted that USW did not dispute that the August, 1994, fall at work may have aggravated Greene's pre-existing spinal problems but argued that she had received her full salary and medical expenses related directly to that incident. Because Dr. Kirsch released Greene to work as of December 2, 1994, the major issue involved whether the two spinal surgeries and Greene's alleged disability condition thereafter was caused by the fall and was work related for purposes of workers' compensation.² The ALJ stated:

The plaintiff, of course, bears the burden of proof on the issue [of causation]. She has established that the fall of August 03, 1994 was an "aggravation of her pre-existing problems." She has failed to convince me, however, that this "aggravation was any more significant than the others." The simple fact that it was on that date that she ceased work is not particularly persuasive. She was, in fact, treated conservatively and released to work by Dr. Kirsch after approximately four months. The reason she did not return to work is unclear, however, she has failed to persuade me that it was the August 03, 1994 work related fall. I believe that she returned to her "baseline" physical condition on or about December 02, 1994, and that any problems which she experienced from that point forward are solely due to the pre-existing conditions of degenerate disc disease, scoliosis, and arthritis.

² Causation deals with factual casual connection associated with the requirement that a compensable injury "arise out of" the employment; while work-relatedness involves time, place, and circumstances of the accident associated with the "in the course of" the employment requirement. See, e.g., Stapleton v. Fork Junction Coal, Co., Ky., 247 S.W.2d 372 (1952); Arthur Larson and Lex K. Larson, Larson's Workers' Compensation, Desk Edition, §3:4 (1999); KRS 342.0011(1).

The ALJ subsequently denied Greene's petition for reconsideration.

On appeal, the Board affirmed the ALJ's opinion denying Greene permanent disability benefits, but it reversed his decision denying her TTD benefits, and remanded the case for further consideration by the ALJ on the issue of TTD benefits. The Board found ample evidence to support the ALJ's conclusion that the August 3, 1994, fall caused no more than a temporary aggravation of her pre-existing problems. It also held, however, that Greene had properly preserved the issue of TTD benefits as reflected in the prehearing order's listing of "extent and duration" of disability as a contested issue. The Board remanded the case for a determination of whether Greene was entitled to TTD benefits and any offsets or credits allowed to USW because Greene continued to receive her full salary. Both Greene and USW have petitioned the Court for review of the Board's opinion.

We begin with a discussion of this Court's limited scope of review on appeal of a workers' compensation administrative decision. In order for an injury to be compensable under the Workers' Compensation Act, there must be a causal connection between a work-related injury and the harm or disability. The employee has the burden of proving every element of claim by showing that an injury is work-related, that being that it arises out of and in the course of employment. Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000); Jones v. Newberg, Ky., 890 S.W.2d 284, 285 (1994); Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327, 329 (2000). As the fact-

finder, the ALJ has the authority to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993); Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., Ky., 951 S.W.2d 329, 331 (1997); Luttrell v. Cardinal Aluminum Co., Ky. App., 909 S.W.2d 334, 336 (1995). "The fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof." Magic Coal, 19 S.W.3d at 96. See also Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999); Halls Hardwood Floor, 16 S.W.3d at 329. When the decision of the fact-finder is against the party with the burden of proof, that party bears the additional burden on appeal of showing that the evidence was so overwhelming that it compels a finding in his favor and that no reasonable person would have failed to be persuaded by it. Bullock v. Peabody Coal Co., Ky., 882 S.W.2d 676, 678 (1994); Special Fund v. Francis, 708 S.W.2d 641, 643 (1986); Mosely v. Ford Motor Co., Ky. App., 968 S.W.2d 675, 679 (1998). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker, 998 S.W.2d at 482. Upon review of the Board's decision, the appellate court's function is limited to correcting the Board "only where the the [sic] 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." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992). See also Huff Contracting v. Sark, Ky. App., 12 S.W.3d 704, 707 (2000); Duff Truck Lines, Inc. v. Vezolles, Ky. App., 999 S.W.2d 224, 227 (1999).

In the current case, Greene saw both Dr. Johnson and Dr. Kirsch prior to the August, 1994, fall with complaints about progressive lower back and neck pain. Dr. Johnson recommended spinal surgery during his consultations with Greene in December, 1993, and March, 1994, in order to correct the curvature of her spine caused by scoliosis. After the fall, Greene was examined by Dr. Johnson in November, 1995, and an MRI at that time indicated essentially no objective change in the condition of her thoracic and lumbar back regions from the earlier period. Dr. Johnson testified that while the fall may have subjectively aggravated her pre-existing condition, he found no objective evidence of aggravation of her scoliosis. Dr. Kirsch stated that his examination of Greene after the fall indicated that she had suffered a soft tissue injury or muscle strain of her neck and low back area because of the fall. Both he and Dr. Jelsma interpreted a subsequent MRI as indicating that she had some bulging of her cervical discs but no herniation. They attributed her condition to hypertrophic degenerative arthritis and spondylosis, possibly related to the scoliosis. Dr. Kirsch stated, "I think she had developed an acute cervical, dorsal and lumbar muscle strain superimposed on her already existing condition."

Dr. Petruska deferred to Dr. Johnson on Greene's lower back problems but treated her for her neck problems. The ALJ discounted his testimony because he did not have a thorough knowledge of Greene's prior medical history. Dr. Petruska's deposition indicates that he did not obtain records or information about Greene's prior medical treatment and had only a rudimentary understanding that she had been diagnosed with scoliosis. In any event, Dr. Petruska's testimony on the issue of causation is equivocal at best. Although he opined that the fall aggravated or exacerbated her pre-existing problems, he did not state that it alone caused a permanent disability. He believed that she could not return to work on a regular basis because of the lumbar scoliosis, the cervical degenerative disc disease and the two fusion surgeries.

Based on a review of the record, we cannot say that the ALJ's conclusion that the August 1994 fall resulted in a temporary aggravation of her pre-existing problems constitutes an error in assessing the evidence so flagrant as to cause gross injustice. Greene has failed to present contrary evidence so overwhelming that it compelled a decision in her favor. Consequently, the Board did not err in affirming the ALJ's opinion that Greene had not satisfied her burden of proving causation sufficient to support an award of permanent disability benefits.

On cross-appeal, USW challenges the Board's decision reversing the ALJ's finding that Greene did not preserve the issue of TTD benefits. The Prehearing Order and Memorandum

includes a stipulation that no TTD benefits had been paid and lists "extent and duration" of disability as one of the contested issues. USW argues that Greene's attorney indicated at the prehearing conference that she was not seeking TTD benefits and that that understanding is reflected in the prehearing conference order because the issue of TTD benefits is not listed as one of the contested issues. However, when this issue was raised at the formal hearing, the ALJ stated that TTD benefits do not have to be specifically listed as a separate issue but would be subsumed within the listed contested issues involving extent and duration of disability. Despite this fact, the ALJ referred to unrecorded discussions at the prehearing conference in finding that Greene had effectively waived the issue and not preserved it for review. The Board criticized the ALJ for referring to unrecorded oral discussions at the prehearing conference as a basis for his decision. It held that the issue of extent and duration of disability includes the questions of recovery for both TTD benefits and permanent disability benefits.

We agree with the Board that USW has not shown that Greene failed to preserve the issue of TTD benefits for administrative review. As the ALJ indicated at the formal hearing, TTD benefits are typically considered to be included as a component of the extent and duration of disability because the statute allows recovery of both TTD benefits and permanent disability benefits. Greene offered testimony on her receipt of salary while off work following the fall as part of the collective bargaining agreement. There is no indication in the

transcript of the formal hearing that Greene believed she waived this issue at the prehearing conference. We agree with the Board that the ALJ improperly relied on unrecorded comments or discussions by the parties at the prehearing conference.

USW contends that the workers' compensation administrative regulations in effect at the time of the prehearing conference and formal hearing required Greene to specifically include TTD benefits in the pleadings to preserve the issue. However, the regulations merely require filing a notice of contested issues and, unlike prior versions of the regulations, do not indicate that failure to list an issue constitutes a waiver. Compare 803 KAR 25:011 §8(7) (1994) with 803 KAR 25:010 §12(4) (1999). USW erroneously states that Greene stipulated that she was not seeking TTD benefits and refers to portions of the regulations dealing with factual stipulations. See 803 KAR 25:010 §17. In any event, USW has provided no citations to statutory, administrative or case law contrary to the Board's position that TTD benefits are included within the category of issues referred to as extent and duration of disability.

The record simply does not support USW's position that Greene should be held to have intentionally waived the issue and failed to preserve it. Accordingly, we believe the Board did not err or exceed its authority in reversing the ALJ's ruling that Greene did not preserve the issue of TTD benefits and remanding the case for further consideration of her entitlement to those

benefits and USW's entitlement to any offsets or credits based on Greene's continued receipt of her salary.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

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