

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000892-WC

BARAK, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-98513

WILLIAM A. STOCKSDALE; SHELIA C.
LOWTHER, ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, EMBERTON AND MILLER, JUDGES.

EMBERTON, JUDGE: Two issues are presented in this appeal from an award to appellee, William Stocksdale, of permanent total occupational disability benefits stemming from a neck injury he sustained while in the employ of appellant, Barak: (1) whether the Administrative Law Judge erred in refusing to "carve out" as non-compensable the percentage of Stocksdale's disability allegedly resulting from a prior active condition; and (2) whether the ALJ erred in failing to conclude that half of Stocksdale's impairment is non-compensable because it is a consequence of the effects of the natural aging process. Finding

no reversible error in either proposition advanced by appellant, we affirm the opinion of the Workers' Compensation Board.

Stocksdale sustained a work-related injury on November 27, 1997, while moving pipes in a crawl space. He testified that at the time the incident occurred he felt a sharp pain between his shoulder blades and he experienced a gradual onset of numbness in his hands. Although he continued to work for approximately two weeks following the incident, the severity of his symptoms increased to the point that he ceased working for Barak on December 16, 1997, and he has not returned to work since that time.

Stocksdale admitted in his deposition that he had previously suffered problems in his low back for which he sought treatment by a chiropractor. Although he denied ever seeking chiropractic treatment for any neck complaints, Stocksdale stated that the chiropractor had treated his neck as part of treatment on his whole back. In support of his claim for benefits, Stocksdale offered evidence from Dr. Daria Schooler, his treating neurosurgeon. Dr. Schooler diagnosed a cervical disc herniation and performed a discectomy and fusion in January 1998. She noted that Stocksdale appeared to suffer from a cervical myelopathy related to prolonged neck extension while crawling on his hands and knees. Stocksdale also submitted a report from Dr. O. James Hurt, an orthopedic surgeon. After assessing a 49% impairment under the AMA Guides, Dr. Hurt noted that Stocksdale had degenerative disc disease at several levels and attributed 50% of his impairment to this pre-existing condition.

The employer submitted records from Dr. Mark Allen, Stocksdale's treating chiropractor. In August 1995, Dr. Allen treated Stocksdale for pain in his right shoulder and noted at that time complaints of a stiff neck with "popping." The records indicated regular treatments for right shoulder pain and stiff neck through August 1996. Stocksdale received similar treatments on January 6, 1997, and November 24, 1997. All other treatment by Dr. Allen occurred after the November 27, 1997, injury.

The employer also introduced a report from Dr. Gregory Gleis, an orthopedic surgeon, who was of the opinion that Stocksdale suffered a pre-existing active condition of the cervical spine for which he had been treated for several years. It was Dr. Gleis's opinion that at least 50% of Stocksdale's impairment rating should be apportioned to the effects of the pre-existing natural aging process.

After reviewing the evidence, the Administrative Law Judge concluded that Stocksdale was totally occupationally disabled and entered the following finding concerning the existence of a prior active condition and the effects of the natural aging process.

Mr. Stocksdale was apparently seen on numerous occasions by Dr. Allen, his wife's employer. He underwent chiropractic adjustments, and the treatment notes contained reference to a stiff neck. However, there is no indication that Dr. Allen or any other physician ever assessed an impairment rating because of these complaints. There is no indication that Dr. Allen or any other physician ever restricted the plaintiff's activities in any way. Mr. Stocksdale himself testified that he was able to work without restrictions, performing any task he was called upon to do. His routine

work activities involved heavy lifting. They also required the manual dexterity necessary to use tools and the balance necessary to safely climb stairs and ladders. The Administrative Law Judge found Mr. Stocksdale to be a highly credible and persuasive witness.

Dr. Schooler had the opportunity to treat Mr. Stocksdale over a prolonged period of time. She obtained a variety of diagnostic tests, and performed surgery. Of the physicians who offered opinions concerning the plaintiff's permanent impairment, she is the only one who saw him immediately after the injury and prior to the surgery. She estimated that Mr. Stocksdale retained a 15% impairment due to the cervical myelopathy arising out of his injury. . . . She did not attribute any portion of Mr. Stocksdale's impairment to a pre-existing active dormant [sic] condition. The Administrative Law Judge finds this evidence from the treating physician to be the most credible and persuasive. For that reason, it is the Administrative Law Judge's finding that no portion of the plaintiff's impairment and resulting disability is attributable to a pre-existing active condition or to the effects of the natural aging process.

In affirming the conclusion of the ALJ, the Board rejected the contention a percentage of Stocksdale's disability had to be attributed to the effects of the natural aging process under Kentucky Revised Statutes (KRS) 342.0011(1), as well as the proposition that a portion of his disability was noncompensable as being due to a pre-existing active disability. We find no error in the Board's decision.

In McNutt Construction v. Scott,¹ the Kentucky Supreme Court addressed the confusion which has arisen concerning the

¹ Ky., 40 S.W.3d 854, 859 (2001).

exclusion of the effects of the natural aging process from the definition of "injury" in KRS 342.0011(1):

As we construe the definition of "injury," the critical question is one of causation. Although KRS 342.0011(1) clearly indicates that the effects of the natural aging process are not considered to be an "injury," it also clearly indicates that work-related trauma "which is the proximate cause producing a harmful change in the human organism" is an "injury." When the two provisions are considered in concert, it appears that the purpose is to emphasize that only those harmful changes which are proximately caused by work-related trauma are compensable pursuant to Chapter 342. Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of injury. . . . (FN omitted). (Emphasis added).

The McNutt analysis was recently reaffirmed by the Kentucky Supreme Court in Commonwealth, Transportation Cabinet V. Guffey, 2000-SC-0029-WC (rendered April 26, 2001).

Applying these principles to the ALJ's findings concerning Stocksdale's condition, we are convinced that her decision comports both with the fact and the statute as explained in McNutt. Although there was evidence in Dr. Gleis's report indicating that Stocksdale had a prior active impairment, the ALJ correctly observed that Dr. Schooler, the treating physician, did not assign any percentage of Stocksdale's disability to the effects of a prior active condition or the natural aging process. On this state of the record, we cannot say that the evidence

compelled a contrary result.² Furthermore, in light of our review of the medical evidence and the claimant's testimony, we are not persuaded that the ALJ's findings were unreasonable or contrary to the statutory directives.

Finally, our review of the Board's affirmance of the ALJ's decision convinces us that it was not patently unreasonable nor flagrantly implausible, nor was there any indication that the decision would result in a gross injustice.³

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert A. Winter, Jr.
Ft. Mitchell, Kentucky

BRIEF FOR APPELLEE WILLIAM A.
STOCKSDALE:

Robert L. Catlett, Jr.
Louisville, Kentucky

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

³ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).