

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002520-WC

COOPER PAINTING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-72515

JEFFREY DALE OSBORNE;
ROGER D. RIGGS,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, HUDDLESTON and GUIDUGLI, Judges.

HUDDLESTON, Judge: Cooper Painting appeals from an opinion by the Workers' Compensation Board that reversed a decision by an Administrative Law Judge dismissing Jeffrey Dale Osborne's disability claim following reconsideration, and remanded the case for further findings by the ALJ.

Osborne was born in October 1969, has a ninth grade education, and has worked as a painter since 1992. During his employment with Cooper, Osborne sustained four work-related

injuries on January 2, 1997, June 16, 1997, October 15, 1997, and July 16, 1998. On January 2, 1997, Osborne injured his right foot and ankle in a slip and fall. He missed one week of work following the incident. On July 16, 1997, he injured his right knee and back when he fell climbing a wet ladder to the platform of a lift. He subsequently underwent arthroscopic surgery and physical therapy, and missed approximately five weeks of work. On October 15, 1997, Osborne injured his lower back and shoulder when another worker dropped his end of a walk board the two were carrying causing him to stretch his back. He missed approximately four months of work. After each of these incidents, Osborne returned to work with a few temporary physical restrictions.

Osborne sought treatment from Dr. John Gilbert for back and leg pain in July 1997. Dr. Gilbert found evidence of soft tissue injury in the lumbosacral area, a bruised stretch nerve and bilateral leg sciatica. An MRI of the lumbar spine was unremarkable. In August 1997, Dr. Gilbert prescribed pain medication and some physical therapy, but allowed him to continue performing light duty work while avoiding heavy lifting, bending and/or twisting. Osborne did not see Dr. Gilbert between August 1997 and July 1998.

On July 16, 1998, Osborne was injured in a work-related vehicle accident resulting in extreme low back pain and groin pain. A CT scan and x-rays performed immediately afterward in a hospital emergency room indicated some mild bulges in his discs at the L2-3, L3-4 and L4-5 levels, but no obvious herniation. A few days after the accident, Osborne was seen by Dr. Gilbert complaining of

increasing back and neck pain. On May 24, 1999, Dr. Gilbert performed a myelographic study that indicated some nerve root compression on the left side at the L4-5 level. Osborne has not returned to work since the July 1998 accident.

In December 1998, Dr. Michael Best, an orthopedic surgeon, examined Osborne and performed a functional capacity evaluation (FCE). Based on his examination and review of the medical history, Dr. Best found only a soft tissue injury with no pathology. A CT scan showed some bulging discs, but they were within normal limits. Dr. Best stated that the FCE indicated some significant subjective magnification of symptoms. He felt that Osborne needed no further treatment and indicated he could return to his regular employment without restrictions following a short, initial period of medium-duty work. He assessed Osborne as having no physical impairment using the DRE model pursuant to the American Medical Association (AMA) Guidelines.

On June 5, 1999, Dr. Daniel Primm, Jr., an orthopedic surgeon, examined Osborne. His examination showed no signs of disc herniation, radiculopathy or significant lumbar spine injuries. X-rays revealed only a minimal narrowing of the disc space at the L5-S1 level. Dr. Primm found no functional impairment. He stated Osborne was at maximum medical improvement and could return to work with no permanent restrictions following a six- to eight-week period of physical restrictions.

On August 18, 1999, Dr. Gilbert again examined Osborne and submitted a Form 107 medical report containing his medical evaluation. His diagnosis indicated Osborne suffered from low back

pain, disc bulge, lumbar radiculopathy, groin pain, intractable left leg pain, soft tissue injury in the lumbosacral area, back spasms, bilateral leg sciatica and insomnia. Dr. Gilbert's patient history stated that Osborne "was working with some scaffolding and slipped on something wet on the floor and as he fell caught himself with his arms. Since that time he has had terrible back pain that goes down both legs but it is worse on the right than the left." He assessed Osborne with a 10% permanent whole body impairment under the AMA Guidelines. Dr. Gilbert further stated that Osborne could not return to his previous employment and recommended that he not lift weights more than 10 to 20 pounds; avoid bending, walking, standing or sitting more than 30 minutes; and avoid climbing, reaching, grasping or operating heavy equipment.

On December 3, 1999, Dr. Bart Goldman conducted an extensive functional capacity evaluation and reviewed Osborne's medical records. As with the earlier FCE, Dr. Goldman believed the results revealed inconsistent effort indicating symptom magnification. He noted that Dr. Best's and Dr. Primm's evaluations contained no objective findings of significant injury and most of the imaging studies were normal. Dr. Goldman disagreed with Dr. Gilbert's impairment assessment and felt Osborne could return to work with a short period of temporary restrictions.

Osborne initially filed his application for resolution of injury claim on April 26, 1999, listing the four above-noted injuries. In July 1999, an arbitrator found that any claim based on the January 1997 injury was barred by the two-year statute of

limitations.¹ She also found there was insufficient evidence of functional impairment to support the claim for compensation. Osborne sought review by an Administrative Law Judge.

During the hearing before the ALJ, Osborne testified that he had problems with pain, weakness and throbbing in his right knee. He also stated that he could not carry the 40-50 pound paint buckets due to his knee and pain in his lower back. Osborne said that he could not stand or sit for more than 10-15 minutes because of extreme pain in his back and groin areas. He indicated that he has constant pain and takes medication prescribed by Dr. Gilbert.

On March 30, 2000, the ALJ issued an opinion finding Osborne to be permanently partially disabled based on an impairment of 10% subject to enhancement under KRS 342.730(1)(c)1 because of his inability to return to work as a painter. The ALJ indicated that his decision was predicated primarily on Dr. Gilbert's evaluation and the injury Osborne sustained in the motor vehicle accident of July 16, 1998. He stated that Osborne appeared to have recovered from the first three injuries. The ALJ accepted Osborne's complaints of continuing symptoms from the July 1998 injury, but found that the evaluations of Drs. Best, Primm and Goldman did not support a claim of permanent total disability.

On April 13, 2000, Cooper filed a petition for reconsideration² based, inter alia, on Dr. Gilbert's Form 107 and the ALJ's focus on the July 1998 injury as the basis for the award. Cooper asserted that Dr. Gilbert's impairment rating as reflected

¹ See Ky. Rev. Stat. (KRS) 342.185(1).

² See KRS 342.281.

in the patient history in the Form 107 was not attributed to the July 1998 incident. It argued the ALJ's erroneous reading of Dr. Gilbert's Form 107 medical report was subject to reconsideration because the error was patent on the face of the opinion.³

On June 1, 2000, the ALJ accepted the petition for reconsideration and issued an order denying Osborne's claim for compensation. The ALJ noted in the order that he had found no occupational disability resulting from the first three injuries and that Dr. Gilbert's Form 107 indicated that Osborne's functional impairment was attributable to an earlier injury, rather than the July 1998 motor vehicle accident. Osborne appealed the decision to the Workers' Compensation Board.

In his brief before the Board, Osborne challenged the petition for reconsideration and subsequent order on both procedural and substantive grounds. He contended that the ALJ was procedurally precluded from reconsidering the merits or changing the factual findings of his original opinion on a petition for reconsideration.⁴ He also maintained that the ALJ erred in finding Dr. Gilbert's functional impairment assessment did not include the July 1998 injury. Meanwhile, Cooper asserted that the ALJ's initial opinion was based on the mistaken belief that Dr. Gilbert's functional impairment was based on the July 1998 injury, and the order on the petition for reconsideration corrected an erroneous review of the record. It noted that Dr. Gilbert's Form 107

³ See Eaton Axle Corp. v. Nalley, Ky., 688 S.W.2d 334 (1985).

⁴ See Wells v. Beth Elkhorn Coal Corp., Ky., 708 S.W.2d 104 (1986).

referred to an incident involving a slip and fall rather than a motor vehicle accident.

The Board rendered an opinion reversing and remanding the ALJ's order on petition for reconsideration. It held that the ALJ acted properly in accepting the petition for reconsideration because of the apparent discrepancy between Dr. Gilbert's Form 107 and the ALJ's initial findings concerning the first three injuries. The Board felt the ALJ correctly concluded that he mistakenly believed Dr. Gilbert's functional impairment rating was based on the July 1998 injury, rather than the June 1997 injury.

Nevertheless, the Board held that the case should be remanded to the ALJ for reconsideration because the ALJ's misreading of Dr. Gilbert's Form 107 potentially impacted his initial finding that Osborne did not suffer from an impairment caused by any of the first three injuries, as well as his finding of impairment from the July 1998 injury. The Board held that Osborne, like Cooper, was entitled to a conclusion based on an accurate interpretation of the evidence. It further stated that a review of the definitional provisions in KRS 342.0011 involving "permanent partial disability,"⁵ "permanent impairment rating,"⁶ and "permanent disability rating,"⁷ indicated that if there is a permanent impairment rating pursuant to the AMA Guidelines which is attributable to a claimed work-related injury, "then the worker is entitled to an award for permanent partial disability pursuant to

⁵ KRS 342.0011(11)(b).

⁶ KRS 342.0011(35).

⁷ KRS 342.0011(36).

KRS 342.730(1)(b) even if the ALJ concludes there is no 'occupational disability.'" Thus, the Board construed the statutes to require that Osborne be awarded compensation if the ALJ finds that there "is an impairment rating attributable to any of the claimed work-related injures." The Board concluded:

Therefore, we are compelled to reverse and remand the decision of the ALJ to initially reconsider his factual findings based upon the correct understanding and interpretation of the report of Dr. Gilbert and, in the event he concludes that the claimed injury which resulted in that impairment has no impact upon the physical capacity of Osborne to return to his prior work, an award of 10% should be entered. If, however, he concludes after consideration of the report that while the injury resulted in no immediate impact but the injury subsequently limited Osborne's physical capacity to return to work at the same job, then the enhancer should be used"

This appeal followed.

Cooper raises two issues on appeal. First, it challenges the Board's finding that the case should be remanded for reconsideration based on Dr. Gilbert's evaluation. Cooper states there is no indication that the ALJ had not already performed such an analysis in his review of the petition for reconsideration and the Board did not identify anything in the order of reconsideration to suggest this was not the case.

We agree with the Board that a remand to the ALJ is appropriate. As the Board noted, the ALJ initially relied upon Dr. Gilbert's opinion and his 10% impairment rating despite the contrary opinions of the other three physicians, and the otherwise unremarkable objective medical studies. An ALJ has discretion to rely on the opinion of a single physician over conflicting opinions by other physicians.⁸ The ALJ also found that the evidence supported the conclusion that Osborne continued to have residual medical symptoms and difficulties. Obviously, Dr. Gilbert's opinion and Osborne's subjective testimony were major factors in the decision.

Furthermore, as the Board noted, the ALJ's finding that any disability was related to the July 1998 motor vehicle accident, and not any of the three prior injuries, was based on the absence of an impairment being assigned or significant restrictions imposed by any physician as a result of the earlier injuries, and Osborne's return to work after the earlier incidents. The ALJ's order on reconsideration fails to explicitly indicate whether he took Dr. Gilbert's opinion into account in evaluating the June 1997 injury. The ALJ's failure to explain or attempt to rectify the apparent conflict in the weight and credibility given to Dr. Gilbert's opinion in his two opinions justified the Board's decision to remand the case.⁹

⁸ See, e.g., Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000).

⁹ See, e.g., Cook v. Paducah Recapping Service, Ky., 894 S.W.2d 684 (1985) (stating that the claimant was entitled to have his claim decided on the basis of correct findings of basic fact).

Second, Cooper argues that the Board erred in requiring that a minimum 10% functional impairment rating be assigned regardless of any vocational impact or occupational disability. It asserts that given the conflicting medical opinions, the Board's ruling improperly substitutes its judgment for that of the ALJ.

We believe that Cooper misunderstands the Board's action and the scope of the remand. The Board indicated that on remand, the ALJ should re-evaluate Osborne's disability status with respect to the earlier injuries, primarily the June 1997 injury, in light of the view that Dr. Gilbert's opinion was not based solely on the July 1998 injury. As Cooper notes, credibility and weight of the evidence is within the sole province of the ALJ as fact-finder.¹⁰ While we question the apparent focus in the statutes solely on impairment as opposed to occupational disability for determining a permanent partial disability,¹¹ the 1996 amendments to KRS 342.730 clearly severely restrict an ALJ's discretion when determining the extent of a worker's permanent partial disability.¹² Under the amendments, awards for permanent partial disability are a function of the worker's AMA impairment rating, the statutory multiplier for that rating, and whether the worker can return to the pre-injury

¹⁰ Miller v. East Kentucky Beverage/Pepsico, Inc., Ky. App., 951 S.W.2d 329, 331 (1997); Luttrell v. Cardinal Aluminum Co., Ky. App., 909 S.W.2d 334, 336 (1995).

¹¹ See, e.g., Newberg v. Weaver, Ky., 866 S.W.2d 435, 436 (1993) (stating the purpose and policy of the Workers' Compensation Act is to compensate disabled workers for the decrease in their wage earning capacity resulting from injury caused by work).

¹² Ira A. Watson Dept. Store v. Hamilton, Ky., 34 S.W.3d 48, 51 (2000); McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854, 859 (2000).

employment.¹³ As the Board noted, the vocational impact of the injury is relevant to the third factor under KRS 342.730(1)(c) involving the post-injury type of work the worker can perform, rather than the initial determination of a compensable permanent partial disability under KRS 342.730(1)(b). Nevertheless, the ALJ retains discretion on determining whether a worker has sustained a work-related impairment or injury in the first instance. As the court stated in the recent case of McNutt Construction/First General Services v. Scott:

Although the [Workers' Compensation] Act underwent extensive revision in 1996, the ALJ remains in the role of the fact-finder. KRS 342.285(1). It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability at that particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured.¹⁴

¹³ Id.; KRS 342.730(1)(b) and (c).

¹⁴ McNutt, supra, n. 12, at 859-60 (citations omitted). See also Ira A. Watson Dept. Store, supra, n. 12, at 52.

In the current case, Cooper interprets the Board's opinion as mandating a minimum permanent partial disability award based on a 10% functional impairment rating. Although the opinion is somewhat unclear, a review of the entire opinion indicates that the Board did not find that Osborne was entitled to an award and the ALJ is free to determine this issue in the first instance based on a re-evaluation of Dr. Gilbert's Form 107 medical report and the other evidence. The Board directed the ALJ to utilize the 10% functional impairment rating only if the ALJ first decides that Osborne has suffered a work-related functional impairment. This was based on the fact that Dr. Gilbert is the only physician to assess a functional impairment rating and the ALJ had already accepted Dr. Gilbert's impairment rating in his initial opinion. The error with respect to Dr. Gilbert's Form 107 medical report that justified reconsideration of the initial award did not involve the level of the impairment or percentage amount of the rating, but rather which injury caused the impairment. Consequently, we do not believe the Board erred in stating that the ALJ should utilize the 10% functional impairment rating if he finds a permanent function impairment.

The function of the Court of Appeals in reviewing decisions of the Workers' Compensation Board is to correct the Board only when it has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice.¹⁵ Cooper has not shown that the Board

¹⁵ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1972); Huff Contracting v. Sark, Ky. App., 12 S.W.2d 704, (continued...)

misconstrued existing law or committed a flagrant error in assessing the evidence.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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¹⁵ (...continued)
707 (2000).