

RENDERED: SEPTEMBER 21, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001019-WC

WALLACE WALES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-00686

SEVEN COUNTIES SERVICES;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: DYCHE, GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Wallace Wales (Wales) appeals from an order of the Workers' Compensation Board (the Board) entered April 11, 2000, which affirmed an opinion and award of Administrative Law Judge John B. Coleman (the ALJ), which granted him benefits based on a 9.75% permanent partial disability. We affirm.

Wales contends that the ALJ erred in apportioning 75% of his disability to a prior injury. Having reviewed the record, we

agree with the Board's opinion and adopt the following portion as our own:

Wales was employed by Seven Counties as a youth counselor. He was injured on August 3, 1998, when he was involved in a motor vehicle accident. He began to suffer pain in his neck and left shoulder following this incident. He was eventually diagnosed as suffering a left rotator cuff tear. Surgery was performed on September 9, 1998 to repair the tear. Wales remained off work until March 1, 1999. While he was receiving treatment for the left shoulder problems, Wales began to complain of numbness in the right hand and fingers. An MRI indicated a herniated disc at C3-C4.

Wales had previously been treated for neck and upper back injuries that he suffered in an automobile accident in February 1997. Wales stated that his neck problems cleared up within a few weeks of the accident.

Medical records from Dr. Nehil's treatment of Wales in 1997 were introduced into the record. His records indicate that Wales initially complained of pain in the neck and upper back. Wales was diagnosed as suffering cervical and thoracic strain. In an update of March 24, 1997, Dr. Nehil noted that Wales complained of shooting pains in both arms and from the shoulders to the elbows. Dr. Nehil's records indicate that Wales continued to complain of pain in the neck and upper back through his last visit on February 20, 1998. As of August 1997, Dr. Nehil stated that Wales' primary problem was in his upper back rather than in his neck.

Wales introduced records from Dr. Thomas Lehmann, his treating orthopedic surgeon. He noted that Wales had complaints of numbness in the right hand on September 24, 1998. An MRI of the cervical spine was performed in November 1998. This indicated disc protrusion at C3-C4 with moderate encroachment of the left neural foramen. In an updated November 30, 1998 report, Dr. Lehmann stated that Wales was complaining of

numbness and pain in both the left and right arm. He stated Wales gave a history of suffering neck and back pain following a motor vehicle accident a couple of years previous, but that these problems cleared up after approximately three months. Wales also repeated that his low back had bothered him more than his neck following the previous accident. Dr. Lehmann treated Wales' neck complaints with epidural injections, physical therapy and medication.

Records from Dr. Richard Sweet, a partner of Lehmann, were also introduced. Dr. Sweet performed surgery to repair Wales' rotator cuff tear on September 9, 1998. Dr. Sweet assessed a 6% impairment under the AMA Guides due to Wales' shoulder condition. He did not assign any permanent restriction.

Records from Dr. Lansing Cowles were also introduced. Dr. Cowles apparently performed a discectomy on Wales' cervical spine in January 2000. He was released to return to work on March 16, 2000. In May 2000, Wales again reported pain in his neck and left shoulder.

Seven Counties submitted records from Dr. Eugene Giles, Wales' family physician. These records indicate that Wales was treated for thoracic pain in 1994. Wales was also seen for complaints of back pain in August 1996. Dr. Giles saw Wales following his 1997 automobile accident and Wales complained of back and neck pain at that time. Following the 1998 injury, Wales gave Dr. Giles complaints of shoulder and back pain. In April 1999, Dr. Giles referred Wales for a cervical evaluation. Dr. Giles also had Wales undergo physical therapy.

A report from Dr. John Guarnaschelli was also introduced. Dr. Guarnaschelli felt that Wales had no objective findings and there were no true signs of radiculopathy. He did not feel that Wales was a good candidate for cervical surgery. Dr. Guarnaschelli believed Wales' complaints of neck pain were out of proportion to any radicular or myleopathic changes that he saw on clinical examination.

Seven Counties also submitted a report from Dr. Ellen Ballard, a specialist in occupational medicine. Dr. Ballard stated that electroneurodiagnostic testing indicated a mild ulnar neuropathy bilaterally. She felt this was an incidental finding and not related to his work-related injury. Dr. Ballard believed that Wales had no further need of physical therapy as of her March 1999 examination. Dr. Ballard assessed a 6% impairment under the AMA Guides for Wales's cervical problems. She felt that 90% of this impairment was due to pre-existing conditions.

A hearing was held on this claim on September 28, 2000. In the hearing order, the ALJ kept proof time open for two weeks following that date, apparently so that Seven Counties could submit testimony from Dr. Gregory Gleis. Dr. Gleis's report was not submitted until October 26, 2000.

Dr. Gleis felt that Wales had a preexisting cervical condition. He based this opinion upon Dr. Nehil's treatment for neck problems for approximately a year following the February 28, 1997 non-work-related accident. In his report, Dr. Gleis misidentified the date of a thoracic MRI taken at Dr. Nehil's request. Dr. Gleis stated that the MRI was performed in July 1998, when in fact it was performed in July 1997. There is no indication in Dr. Gleis's report that the date of this thoracic MRI had any bearing on his opinion regarding Wales's cervical condition. Dr. Gleis assessed a 15% impairment under the AMA Guides for Wales' cervical condition. He stated that he would apportion at least 75% of this impairment to a preexisting active condition.

On November 20, 2000, Wales filed a motion to file a supplemental report from Dr. Nehil. Wales stated that the report was being filed in response to the report of Dr. Gleis. In this report, Dr. Nehil stated that during his treatment of Wales in 1997 and early 1998, his primary complaints were of upper back pain. He stated that Wales' neurological examination was entirely normal.

Dr. Nehil stated that during the time he saw Wales, he did not see any signs of a significant neck injury.

Although Dr. Nehil's supplemental report was submitted with a motion and outside of proof time, the ALJ did not enter an order admitting that report into the record. The ALJ issued his opinion and award on November 28, 2000. In that opinion, the ALJ referred to the previously filed records of Dr. Nehil, but did not make reference to Dr. Nehil's November 15, 2000 report. The ALJ did refer to Dr. Gleis's report. After reviewing the evidence, the ALJ concluded that Wales had a 6% impairment due to his rotator cuff injury, relying upon the testimony of Dr. Lehmann. Relying upon Dr. Gleis's testimony, the ALJ also found that Wales had a 15% impairment due to his cervical condition, but that 75% of the impairment was due to a preexisting active condition. The ALJ therefore awarded benefits based upon a 9.75% impairment for the cervical spine and shoulder injuries. No petition for reconsideration was filed following the ALJ's award.

Wales now appeals from the ALJ's opinion, arguing the ALJ's opinion is in error because there is no indication that he considered Dr. Nehil's report. Furthermore, Wales argues it was error for the ALJ to rely upon Dr. Gleis's opinion, because Dr. Gleis was under the mistaken impression that the thoracic MRI was performed only a few weeks before the August 1998 injury, when it was actually performed more than a year prior to that injury.

We must agree with Wales's contention that the ALJ apparently did not review Dr. Nehil's supplementary report. We note that Wales filed a motion to admit Dr. Nehil's report only eight days before the ALJ issued his opinion and award. It is unclear whether the ALJ actually received the report from the Department of Workers' Claims prior to issuing his opinion. Furthermore, we would note that the report was submitted outside of proof time, hence an order from the ALJ would be required in order for the report to be

admitted into the record. There is no indication the ALJ considered Wales' motion to file the supplemental report.

Unfortunately, we believe this issue has not been properly preserved. In Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985), the Supreme Court held that when a party is seeking an appeal on errors which are patent upon the face of the award, it must first file a petition for reconsideration in order to preserve those errors for appeal. In essence, where a patent error appears in an order or award, the ALJ must be given an opportunity to correct it before that error may be raised on appeal. In 1994, KRS 342.281 was amended to include the statement that "the failure to file a petition for reconsideration shall not preclude an appeal on any issue." This language was essentially a legislative repeal of the holding in Eaton Axle. See Smith v. Dixie Fuel Co., KY., 900 S.W.2d 609 (1995).

In 1996, KRS 342.281 was again amended and the above language omitted. The Court of Appeals has held that the deletion of that language reinstated the holding in Eaton Axle. Hall's Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000). Thus, the law at present is that where patent error or an omission of fact occurs in an ALJ's decision, it must be preserved for appeal by filing a petition for reconsideration with the ALJ. Smith v. Dixie Fuel Co., supra.

We believe the ALJ's failure to rule on Wales' motion to file Dr. Nehil's report and his omission of any mention of that supplemental report in his opinion and award are patent errors appearing upon the face of the opinion. Since Wales did not file a petition for reconsideration, we are precluded from considering this issue on appeal.

We would further point out that even if Wales had properly preserved the issue, we believe there is substantial evidence to support the ALJ's finding. The testimony of

Dr. Ballard would clearly support an apportionment of 75% of the impairment due to the cervical condition to a preexisting active condition. Furthermore, there is no indication in Dr. Gleis's report that his mistaken date for the thoracic MRI affected his opinion regarding a preexisting condition in the cervical spine. While Dr. Nehil felt there was no indication of a significant neck injury during his treatment of Wales in 1997, Dr. Gleis was of a different opinion. It is well settled that the testimony of the treating physician need not be afforded any greater weight than that of an evaluating physician. Wells v. Morris, Ky. App., 698 S.W.2d 321 (1985). 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 evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). We believe it was well within the ALJ's prerogative to accept the testimony of Dr. Gleis over that of Dr. Nehil.

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

ALL CONCUR.

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