RENDERED: DECEMBER 14, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001007-WC

SEVEN COUNTIES SERVICES, INC. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-98-59792

ELIZABETH LENTZ;
HUMANA HEALTH PLANS;
HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant, Seven Counties Services, Inc. ("the employer") seeks review of an opinion of the Workers' Compensation Board, affirming the ALJ's decision as it pertains to causation and in allowing the admission of certain expert medical testimony. We affirm for the reasons set forth below.

The Appellee, Elizabeth Lentz ("Lentz"), filed a form 101, application for resolution of injury claim, on April 28, 2000, alleging that she injured her low back when she slipped in

water on June 28, 1998. Lentz was treated by Dr. Rand and underwent back surgery in September 1998 and again in March 1999. Sometime in April or May 1999, Lentz fell while walking in her yard at home; thereafter, she underwent a third surgery.

In an opinion rendered October 23, 2000, the ALJ determined that Lentz was "totally occupationally disabled as a result of the injury of June 28, 1998." Nevertheless, the ALJ also found that a 1996 motor vehicle accident would have resulted in a 10% occupational disability had the motor vehicle accident "been a work-related injury," which it was not. The ALJ carved out 10% and awarded Lentz 90% of a total for so long as she remains disabled. The ALJ determined that "any sequelae from the fall in the yard . . . [was] related to the work-related injury of June 28, 1998." The ALJ further found that Lentz's medical expenses incurred after the fall were work-related and the responsibility of the employer.

On November 3, 2000, the employer filed a petition for reconsideration, contending that the ALJ's findings were not supported by substantial evidence. The employer maintained that it was error for the ALJ to have relied upon the opinion of the physician who had evaluated Lentz, Dr. Tinsley Stewart. Dr. Stewart had voluntarily surrendered his medical license and had been ordered not to practice medicine in an unrelated proceeding. The employer also argued that the ALJ erred in considering prior active disability in determining that Lentz was totally disabled; furthermore, the ALJ erred in finding a relationship between Lentz's fall at home and her work-related injury.

On November 13, 2000, Lentz filed a response, contending that the employer had waived its right to dispute the submission of Dr. Stewart's report by failing to timely object or to preserve the issue at the prehearing conference. Lentz explained that Dr. Stewart's report was attached to the form 101, that the employer had deposed Dr. Stewart on July 10, 2000, and had questioned him regarding his temporary suspension and an "Agreed Order of Indefinite Restriction." Lentz noted that the prehearing conference was held on August 9, 2000, and counsel for the employer did not identify his objection to the admission of Dr. Stewart's report at that time. By order of November 20, 2000, the ALJ denied the employer's petition for reconsideration. Another order was rendered December 12, 2000, denying the employer's petition for reconsideration.

On December 20, 2000, the employer filed a notice of appeal to the Board. On December 28, 2000, Lentz filed a notice of cross-appeal. The employer argued that the ALJ erred in relying upon Dr. Stewart's testimony because the statutory definition of physician contained in KRS 342.0011(32) means physicians "acting within the scope of their license"; Dr. Stewart's license had been surrendered before he evaluated Lentz. The employer also argued that the ALJ erred in finding a relationship between the fall Lentz had sustained at home and the work-related injury. In addition, the employer argued that it was error to consider Lentz's prior nonwork-related disability in determining she was totally disabled under KRS 342.730(1)(a).

Following amendment in 1994, the statute prohibits consideration of nonwork-related impairment in determining total disability.

On cross-appeal, Lentz argued that the evidence compelled a finding that she was totally disabled and that she should have been awarded benefits accordingly, without an active carve out.

On April 11, 2000, the Board rendered an opinion, affirming in part, and reversing in part, and remanding. The portions relevant to the issues on appeal are set forth below:

> Lentz testified that Dr. Rand recommended that she walk following her surgery. In May 1999, Lentz was walking in her yard and took a bad step on uneven ground resulting in a fall . . . .
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> . . . .
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> [At his deposition], Dr. Stewart was also questioned concerning the suspension of his medical license. He testified he voluntarily surrendered his license in December 1999 and it was reinstated on February 17, 2000. He explained that he became addicted to pain killers after hip replacement surgery. He denied any prior problems with drugs in his life. Seven Counties filed evidence into the record indicating that Dr. Stewart regained his license on March 21, 2000, on a restricted basis. The evidence further indicated that Dr. Stewart had been treated for chemical dependency 20 years previously and had a relapse approximately 13 years ago. Lentz, in her brief before this Board, points out that February 17, 2000, the date Dr. Stewart testified his license was reinstated, was actually the date the Kentucky Board of Medical Licensure met. It was Dr. Stewart's understanding that he had regained his license when he evaluated Lentz in March 2000.
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> The ALJ listed the medical evidence in the record he considered and concluded on the issue of causation as follows:

> . . . Dr. Stewart admitted that plaintiff's impairment prior to the injury of June 28, 1998 would have been 5% pursuant to the AMA Guidelines. These factors must be balanced against the fact that plaintiff was working full time and unrestricted at the time of the June 28, 1998 injury . . . .
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> . . . .
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> In response, Lentz contends that the issue of Dr. Stewart's qualifications was not properly preserved nor raised by Seven Counties.
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> 803 KAR 25:010E, Section 11, deals with the benefit review conference. The regulation provides that a purpose of the conference is to narrow and define issues and if at the conclusion . . . the parties have not reached an agreement on all issues, the ALJ shall . . . prepare a summary stipulation of all contested and uncontested issues . . . . Section 7 of the regulation states that "[o]nly contested issues shall be the subject of further proceedings." Clearly the prehearing order and memorandum does not list Dr. Stewart's qualifications as an issue. Furthermore, Section 9 . . . provides that a party may file the testimony of two physicians and "[o]bjection to the filing of a medical report shall be filed within ten (10) days of the filing of the notice or the motion for admission." Although it is not entirely clear when Seven Counties became aware of Dr. Stewart's qualification problem, it never filed an objection to the submission of his medical report.
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> We agree with Lentz that it would be patently unfair and highly prejudicial to strike her medial evidence regarding permanent impairment, the cause of her condition and restrictions. The issue was not timely raised and therefore Seven Counties is precluded from raising it at this late date.
>
> Seven Counties next argues the ALJ erred in finding that a subsequent fall to the ground in May 1999 was related to the work injury . . . .

> Lentz testified that Dr. Rand recommended that she walk. The courts have consistently held that benefits are allowable for all injurious consequences flowing from the original injury which are not attributable to an independent intervening cause. See, Beech Creek Coal Co. v. Cox, Ky., 237 SW2d 56 (1951) and Elizabethtown Sportswear Center v. Stice, Ky. App., 720 SW2d 732 (1986). Accordingly, we find that the ALJ did not err in determining the injuries incurred as the result of the fall at home are work-related.
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> Seven Counties next argues the ALJ erred when he took into consideration Lentz's pre-existing active disabilty in determining she was totally disabled. Here, we agree with Seven Counties. KRS 342.730(1)(e) specifically provides that nonwork-related impairment cannot be considered in determining whether an employee is totally disabled.
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> . . . .
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> Accordingly, the [ALJ's] decision . . . is hereby **AFFIRMED IN PART** and **REVERSED IN PART** on the issue of active disability, and this matter is **REMANDED** . . . .[1] (Emphasis original.)

On appeal to this Court, the employer contends that the ALJ erred in allowing Dr. Stewart's testimony to be considered, pointing out that it filed a motion to strike the doctor's reports, upon receipt of records from the Kentucky Board of Medical Licensure on August 31, 2000. The ALJ denied the motion to strike. The motion does not reveal the date that the employer actually requested the records from the licensure board. As the Workers' Compensation Board stated, it is unclear when the employer became aware of Dr. Stewart's qualification problem. We

[1] We believe that the employer has properly appealed from a final order as it pertains to the issues raised on this appeal. See Whittaker v. Morgan, Ky., 562 SW3d 567 (2001).

agree with the Board's analysis of the issue and adopt their reasoning as our own.

The employer also contends that the ALJ's determination that the subsequent fall was related to the work-injury lacks a substantial evidentiary foundation. We disagree. Lentz testified by deposition and at the hearing. She explained that she had returned to light duty work in December 1998, after her first surgery. She continued to work until February 7, 1999, when Dr. Rand took her back off work. Lentz had surgery for the second time on approximately March 10, 1999. Lentz fell in her yard while she was out walking in April or May 1999. At that time, Lentz was still "under recovery" from the March 1999 surgery and had not returned to work. Lentz testified that Dr. Rand had told her to walk and that is what she was getting ready to do when she fell. Although another factfinder may have reached a different conclusion than did the ALJ in this case, the Board's analysis of the issue is correct and we affirm.

ALL CONCUR.

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