

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002661-WC

MICHAEL HOSKINS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NOS. WC-00-89774 and WC-84-38210

LEECO, INC.; W. BRUCE COWDEN,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI and HUDDLESTON, Judges.

HUDDLESTON, Judge: Michael Hoskins appeals from a Workers' Compensation Board opinion affirming an administrative law judge's decision finding that he failed to sustain his burden of proof to establish an increase in his occupational disability as the result of a worsening of his condition related to a work-related shoulder injury he suffered in 1984. The Board also affirmed the ALJ's finding that the injury to Hoskins's anterior cruciate ligament (ACL) is not related to a work event.

Hoskins, now 45 years of age, has a tenth grade education with no specialized training. He began working for Leeco in August

1981. Since that time, he has performed a variety of jobs, most recently working as a supply man operating a motor. Prior to his employment as an underground coal miner, Hoskins engaged in carpentry and manual labor for a brief period of time. On November 28, 1984, while working "outside on a main line head drive" for Leeco, he sustained an injury to his left shoulder. As a result, Hoskins filed a workers' compensation claim which was resolved in an opinion rendered on March 7, 1988, in which he was found to have a 20% occupational disability.¹

Initially, Hoskins missed work for approximately nine months due to the injury. Three weeks after he returned to work, he reinjured the shoulder while "shoveling belt," resulting in a seven or eight month absence. Upon returning the second time, Hoskins was able to continue working despite his shoulder problem until January 2000 although he purportedly experienced increasing weakness, numbness and discomfort which significantly limited his activities at both home and work.²

¹ There is some discrepancy as to which one of Hoskins's shoulders was injured. While the ALJ refers to a "right shoulder injury," the Board says he "sustained an injury to his left shoulder," noting that, initially, the March 1988 opinion refers to his left shoulder while a later discussion in the same opinion refers to problems with his right shoulder. We agree with the Board, however, that this issue is not significant on appeal.

² In the discharge summary prepared by Hoskins's attending physician, Dr. Phillip Corbett, upon his release after his third hospital admission, Hoskins is described as initially suffering from a dislocated right shoulder. Initially, Dr. Corbett performed an evaluation (under anesthesia) of Hoskins's shoulder along with an arthroscopic examination and arthroscopic capsulorrhaphy (to stabilize the anterior capsule of his shoulder). Because of recurrent dislocations, Dr. Corbett performed arthroscopic surgery with stapling in October 1985. Hoskins subsequently underwent a procedure to have the staples removed due to continuing pain and
(continued...)

On January 24, 2000, Hoskins was operating a "mantrip" when, as he describes it, he stepped on a slick rock and twisted his knee. Following that incident, Hoskins's knee "locked up" and wouldn't straighten.³ According to Hoskins's testimony, he is limited in his movements as his knee hurts if he stands in one position for too long, walks too quickly or walks on surfaces such as concrete. He also suffers from a constant tingling sensation and numbness, even when trying to sleep. Consequently, he has not returned to work since the injury.

Hoskins acknowledges that he injured his left knee while playing basketball with his daughter in 1997. He subsequently underwent surgery to repair a medial meniscus⁴ tear of his left knee. After recovering from that procedure, Hoskins returned to work, albeit in a different capacity, and did not experience any significant difficulties with his knees until the incident at work in January 2000.

² (...continued)
decreased range of motion. In his deposition, Dr. Corbett recognizes that Hoskins sustained a fractured right clavicle in 1984.

³ This was not Hoskins first work-related knee injury. He twisted his right knee in 1987 during the course of his employment and underwent arthroscopic repair of a right medial meniscal tear in March 1989. In 1997, he injured his left knee while crawling in the mines. He was subsequently placed on light duty for a period of time before undergoing another arthroscopic procedure.

⁴ A crescent-shaped structure, as the fibrocartilage in certain joints. Williams & Wilkins, Stedman's Concise Medical Dictionary, p. 611 (2nd ed. 1994).

In March 2000, Dr. Garnett Sweeney, who had previously treated Hoskins for his shoulder and knee problems,⁵ performed arthroscopic surgery on Hoskins's left knee. Dr. Sweeney later testified that Hoskins had a tear of the medial mensicus, a small tear in the inner edge of the lateral mensicus and a slightly attenuated, slightly positive drawer sign in the ACL. In a June 2000 entry from Dr. Sweeney's medical records, he reports that Hoskins slipped on a piece of bacon at McDonald's subsequent to the surgery (May 2000) and felt a weakness in his left knee. At that time, Dr. Sweeney indicated that the anterior drawer of the knee was more pronounced than it had been when he performed the surgery. However, in his estimation, the slipping incident was of minor importance, i.e., a "giving" in a slippery environment more than an injury.

According to Dr. Sweeney's testimony, Hoskins's major injuries are "the initial index injury which weakened his ACL and the squatting injury which tore a cartilage further destabilizing the knee and possibly injuring, to a greater extent, the ACL." He further testified that Hoskins suffered from an attenuation of the medial meniscus and the ACL after his most recent work-related injury, opining that Hoskins had gradually destroyed his ACL and

⁵ Dr. Sweeney treated Hoskins on multiple occasions beginning in 1989 for the injury to his right knee which is not the subject of a reopening claim. After performing two arthroscopic surgeries in connection with that injury, he released Hoskins to work in January 1990. Dr. Sweeney later examined Hoskins after the basketball injury. Hoskins also saw him in January 1999 in relation to pain in his right shoulder, but no specific injury was documented. Dr. Sweeney next saw Hoskins in February 2000 at which time he presented with left knee pain and a history of his knee locking when he squatted at work.

medial mensicus. He reiterated his belief as to the insignificance of the McDonald's incident in a July 2000 entry⁶ and emphasized that upon arthroscopy Hoskins had attenuation of the ACL due to the mining injury and needs reconstruction of the ACL as a consequence. Dr. Sweeney also acknowledged that he said Hoskins "may well need ACL reconstruction" in October 1997 but qualified that statement by explaining that his reference at that point was to the likelihood that one would be needed given Hoskins's age, occupation and already damaged knee. His prediction was correct, however, as he has determined that Hoskins currently needs an ACL reconstruction. Dr. Sweeney assessed Hoskins as having a 7% functional impairment based on the meniscus removal and overall instability of the knee with 4% attributable to torn cartilage.

Ultimately, Hoskins filed an application for resolution of injury claim alleging that he suffered a work-related knee injury while working in the mines on January 24, 2000, and also moved the ALJ to reopen his claim based on the shoulder injury he sustained while working in the course and scope of his employment as a coal miner on November 28, 1984. The matter was assigned to an ALJ for further adjudication. In an order entered on February 5, 2001, the presiding ALJ consolidated the two claims.

At the hearing before the ALJ, Hoskins introduced the report of Dr. James Templin who evaluated Hoskins at the request of his counsel on March 16, 2001. Dr. Templin made multiple

⁶ "His Workman's Comp carrier is claiming that he did all this at McDonald's but this is totally untrue."

diagnoses,⁷ finding within reasonable medical probability that Hoskins's injury is the cause of his complaints. Using the most recent American Medical Association (AMA) Guides to Evaluation of Permanent Impairment, he arrived at a permanent whole body impairment of 25% for Hoskins. In Dr. Templin's opinion, Hoskins is unable to return to activities requiring repetitive or extensive use of the right arm for pushing, pulling, lifting, twisting, turning or activities above shoulder level. He is also precluded from engaging in activities requiring stooping, crouching, kneeling, squatting and climbing. In sum, he lacks the physical capacity to return to the type of work performed at the time of injury.

In response, Leeco presented the medical report of Dr. Daniel Primm who evaluated Hoskins on September 21, 2000. Dr. Primm diagnosed Hoskins as having medial meniscal tears of the right knee, status post partial medial meniscectomy of both knees and a left knee injury secondary to a sports-related injury with ACL and meniscal tears. Although Dr. Primm agreed that Hoskins would benefit from a left ACL reconstruction, he was not convinced from a review of the medical records that the need for it is secondary to a work-related injury. By way of explanation, Dr. Primm referred to Dr. Sweeney's postoperative notes following the basketball injury, observing that the first mention of ACL laxity was made at that time and such an injury is more likely to produce

⁷ Chronic low back pain syndrome, chronic bilateral knee pain, chronic right shoulder pain, s/p (status post) right shoulder surgery, history of left foot fracture, s/p right knee total medial meniscectomy, s/p left knee total medial meniscectomy, left knee ACL tear.

an ACL tear. Based on the history of meniscectomy, he determined that 3% is the appropriate functional impairment, with a 7% impairment to the body as a whole based on ligament laxity. Dr. Primm also recommended that Hoskins avoid work requiring regular squatting, kneeling or crawling. However, he felt that Hoskins could return to modified work operating the shuttle car. In a supplemental report, Dr. Primm indicated that, upon reviewing Dr. Sweeney's records, he concluded that the slip at McDonald's did have "at least some effect on the previous ACL tear," ultimately finding that the ACL tear originated as a result of the basketball injury and was further aggravated by the slip and fall at McDonald's.

In addition to the above medical evidence, the ALJ also considered the medical report of Dr. Richard Sheridan who evaluated Hoskins in March 2001. After reviewing the medical reports and depositions documenting Hoskins's history, Dr. Sheridan determined that Hoskins incurred an acute dislocation of the right shoulder from the work event of 1984 and subsequently underwent reconstructive surgery for multiple recurrent dislocations of the right shoulder. Based on the AMA Guides, he arrived at a 14% whole-man impairment based on the right shoulder injury. In Dr. Sheridan's opinion, Hoskins is at maximum medical improvement (MMI) for his shoulder and no restrictions are necessary in reference to that problem. Dr. Sheridan found that Hoskins merits a 1% whole-man impairment attributable to the medial and lateral meniscectomies and removal from his left knee secondary to the previous work event. Consistent with Dr. Primm's diagnosis, Dr.

Sheridan was of the opinion that Hoskins's need for ACL reconstruction is most likely related to the basketball injury as that "is a very common mechanism for a tear in the ACL and indeed his ACL was noted to be attenuated at the time of his arthroscopy by Dr. Sweeney." He also felt that Hoskins has reached MMI for his knees and no restrictions are warranted.

Leeco also introduced the medical report of Dr. Robert Goodman who evaluated Hoskins in March 2001 at its request. With respect to the left knee, Dr. Goodman felt that Hoskins suffers an impairment of 8% with half attributable to the work injury and the other half due to "outside injuries." As to causation, he concluded that both the basketball injury and the work injuries, along with the "injury" at McDonald's contributed to the cruciate laxity. Like the other doctors, he found that the ACL reconstruction is probably necessary. He also expressed doubt as to Hoskins's ability to do underground mining. In a supplemental report, Dr. Goodman indicated that his examination showed a full range of motion and no instability for Hoskins's shoulder with no objective evidence of worsening over the 7% impairment previously assigned.

Upon reviewing all of the medical reports and testimony, the ALJ placed emphasis on the report of Dr. Sheridan, relying on his determination that no restrictions are appropriate with regard to Hoskins's shoulder injury. The ALJ also focused on Dr. Goodman's opinion that Hoskins's condition as it relates to his shoulder has not worsened since the initial examination, ultimately denying Hoskins's motion to reopen. In addition, the ALJ found

that the need for ACL reconstruction is not due to the work injury and, as such, relieved Leeco of responsibility for the surgery. In so doing, the ALJ concentrated on the entry from Dr. Sweeney's medical records dated October 10, 1997, (following the basketball injury and preceding the work-related injury to the same knee), wherein he indicated that Hoskins continued to experience discomfort and swelling in the knee and commented that Hoskins had a hint of a drawer and might need an ACL reconstruction in the future. The ALJ specifically found that the opinions of Dr. Primm and Dr. Sheridan were more credible as to the origin of the ACL tear.

However, the ALJ also found that a new injury occurred to the meniscus of the left knee as a result of the continual squatting that was inherent in Hoskins's job duties based on the findings of Dr. Sweeney.⁸ Because the new injury happened after December 12, 1996, the ALJ found that the income benefits are controlled by Kentucky Revised Statutes (KRS) 342.730 as amended by the 1996 General Assembly. As such, the 4% functional impairment rating translated to a grid factor of .75 which equated to an occupational disability of 3%. Pursuant to the findings of Dr. Goodman and Dr. Templin, the ALJ further concluded that Hoskins does not possess the physical capacity to return to the type of work he performed at the time of injury and awarded income benefits for permanent partial disability according to KRS 342.730(1)(c)(1) (one and a half times as otherwise determined).

⁸ In addition, the ALJ found that Hoskins had no preexisting active disability in relation to the meniscus injury.

In a workers' compensation claim, the claimant bears the burden of proving each of the essential elements of her claim.⁹ Where the party that bears the burden of proof before the ALJ is unsuccessful, the question on appeal is whether the evidence compels a different result.¹⁰ Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ.¹¹ It is not enough for Hoskins to show there is merely some evidence that would support a contrary conclusion.¹² As long as the ALJ's opinion is supported by any evidence of substance, it cannot be said that the evidence compels a different result.¹³

The ALJ, as factfinder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence.¹⁴ The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof.¹⁵ Furthermore, the Board may not substitute its judgment for that of the ALJ in

⁹ Snawder v. Stice, Ky. App., 576 S.W.2d 276, 280 (1979).

¹⁰ Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984).

¹¹ REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985).

¹² McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974).

¹³ Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

¹⁴ Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

¹⁵ Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

matters involving the weight to be afforded the evidence on questions of fact.¹⁶ The function of the Court of Appeals when reviewing the Board's decision is to correct it only where the 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."¹⁷

Here, the ALJ specifically relied upon the testimony of Dr. Sheridan and Dr. Goodman in denying the reopening as to Hoskins's shoulder injury. As is frequently the case, the evidence upon reopening is conflicting. Dr. Templin and Dr. Sweeney are both of the opinion that Hoskins's physiological condition has deteriorated in relation to the shoulder, resulting in a decreased vocational capacity. In addition, they cite the fact that Hoskins has developed post-traumatic arthritis as further evidence of his increased symptomatology, noting that it limits his ability to use his upper extremities. In contrast, Dr. Sheridan and Dr. Goodman, while acknowledging the development of the arthritis, did not believe that it justified additional restrictions or an alteration in the physiological impairment. When, as is the case here, there is conflicting evidence, it is the function of the ALJ and only the ALJ to assess the weight and credibility to be given to the evidence. While Hoskins's testimony relating to the difficulties he has experienced with his shoulder is probative, it does not

¹⁶ Ky. Rev. Stat. (KRS) 342.285(2).

¹⁷ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

dictate the outcome as the ALJ is not required to rely upon it.¹⁸ While deterioration is to be anticipated when a traumatic injury is coupled with years of additional manual labor, the evidence falls short of compelling a contrary conclusion. Equally problematic for Hoskins as it relates to the reopening is that benefits are not available for anything short of a permanent total disability as a result of the shoulder injury. As observed by the Board:

While an individual may reopen at any time in which benefits might be accessible as a result of a 1984 injury, permanent partial disability benefits would only extend for a period of 425 weeks, which has long since expired. Hoskins' [s] only opportunity to receive benefits upon reopening would be to establish that the shoulder injury by itself had deteriorated to such a point that it was totally disabling. We believe that even the testimony of Hoskins himself would make it difficult for a fact finder to conclude that absent the additional problems that the shoulder alone was totally disabling. Ultimately, it is rare that the evidence compels a finding of a greater or lesser degree of occupational disability.¹⁹

As we agree with the Board's analysis of the reopening issue, the significant question becomes whether the ALJ was compelled to conclude that the damage to Hoskins's ACL and the

¹⁸ See Caudill, supra, n. 15.

¹⁹ Citations omitted.

recommended reconstruction are connected to the work event of January 2000. As with the shoulder injury, there is conflicting testimony. Dr. Goodman believes the work event at issue contributed at least 50% to the ACL problems. Similarly, Dr. Sweeney, the treating physician, is of the opinion that Hoskins's primary ACL problem is attributable to the "mine accident." Dr. Sweeney also made an effort to explain the October 1997 note in which he predicted that an ACL reconstruction would be necessary in the future, characterizing it as a recognition of minor laxity in the ACL at the time and an observation that the ongoing stress being placed on the knee would likely lead to the need for further surgery. In his opinion, the removal of the meniscus, which was necessitated by the mining accident, was more likely to cause ACL instability as opposed to the repair of the meniscus that took place in 1997. Although there were minor "drawer" changes in 1997, he believes they were noticeably worse after the 2000 injury. Dr. Sweeney also believes that the slip at McDonald's was a result of the ACL laxity rather than the cause of it. In conflict with this assessment is the evidence from Dr. Sheridan and Dr. Primm, both of whom are of the opinion that any ACL tear and/or laxity is more consistent with the 1997 basketball injury or the slip and fall than the squatting activities at work. Neither doctor believes that there is a causal connection between the work activities and the ACL problems.

On appeal, Hoskins is faced with the difficult task of establishing that the evidence compelled a contrary result. As Hoskins's treating physician, Dr. Sweeney was arguably in the best

position to evaluate his condition and he addressed the interaction of all of the events in his opinion. However, the ALJ is not obligated to afford greater deference to the treating physician than the examining physician when the two physicians rely on basically the same information for their evaluation.²⁰ As implied by the ALJ, the mere aggravation of an already existing condition does not necessarily constitute a work-related compensable injury.²¹

As to the ultimate determination regarding the causation of the knee injury, we agree with the Board and adopt the following reasoning as our own:

Certainly there was evidence that would have supported a causal connection and would have supported a finding of a greater degree of occupational disability than was found by the ALJ. However, there was equally credible and significant evidence to support the ALJ's ultimate conclusion that the ACL problems were unrelated to the work event of January 2000. So long as the evidence supports the conclusion of the ALJ, even if another reasonable conclusion could have been made, his decision may not be disturbed on appeal.

Because the Board did not misconstrue controlling statutes or precedent or "commit an error in assessing the evidence so flagrant as to cause gross injustice," its opinion is affirmed.

²⁰ See Yocom v. Emerson Elec. Co., Ky. App., 584 S.W.2d 744 (1979).

²¹ See Calloway County Fiscal Court v. Winchester, Ky. App., 557 S.W.2d 216 (1977).

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