

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000572-WC

NORTHWEST AIRLINES, AS INSURED
BY KEMPER NATIONAL INSURANCE
COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-92-23709 & WC-98-68909

ALBERT ANDERSON;
NORTHWEST AIRLINES, AS INSURED
BY LIBERTY MUTUAL INSURANCE
COMPANY;
ROBERT WHITTAKER, DIRECTOR
OF SPECIAL FUND;
HON. RONALD JOHNSON,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, MCANULTY AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Northwest Airlines, as insured by Kemper National Insurance Company (hereinafter "Kemper") has petitioned this Court for review of the Workers' Compensation Board's (hereinafter "Board") February 20, 2002, opinion affirming the Administrative Law Judge's (hereinafter "ALJ") September 20,

2001, opinion and award. The ALJ found that Albert Anderson (hereinafter "Anderson"), upon reopening, established a worsening of his condition due to a 1991 injury and awarded permanent, total disability benefits, apportioning 50% to Northwest Airlines as insured by Kemper and 50% to the Special Fund. Having considered the parties' excellent briefs, the record, and the applicable case law, we affirm.

Because we do not believe that the Board misconstrued controlling statutes or precedent or committed an error in assessing the evidence, and because we cannot improve upon the Board's well-reasoned and well-written opinion, we will adopt it in full as our own. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

Petitioner, Northwest Airlines, ("Northwest"), appeals from a decision by Hon. Ronald Johnson, Administrative Law Judge ("ALJ"), awarding the respondent, Albert Anderson ("Anderson"), permanent and total occupational disability benefits upon reopening due to a worsening of his condition.

Our resolution of this appeal first requires that we set out the procedural history, as well as identify the parties and the claims. Anderson was originally injured on March 31, 1991, while working for Northwest. At the time of Anderson's 1991 injury, Kemper National Insurance Company insured Northwest. We will refer to Northwest as insured by Kemper national Insurance Company hereinafter as "Kemper." The 1991 injury resulted in a 1994 settlement agreement for benefits based on an 18% permanent partial impairment related to a neck and low back condition. On August 25, 1998, Anderson sustained another work-related injury to his neck and low back, also while employed by Northwest. At the time of the 1998 injury, Liberty Mutual Insurance Company insured Northwest. We will refer to

Northwest as insured by Liberty Mutual Insurance Company hereinafter as "Liberty."

On July 21, 2000, Anderson filed Claim No. 98-68909, related to the 1998 injury. On October 23, 2000, Anderson moved to reopen his 1994 settlement, Claim No. 92-23709, alleging a worsening of his occupational disability. At a January 10, 2001, benefit review conference, the ALJ consolidated the 1998 injury claim and the reopening. On February 8, 2001, Anderson amended his 1998 claim to include repetitive trauma to his lumbar spine.

By opinion and award dated September 20, 2001, the ALJ found that Anderson's current condition resulted from a worsening of his 1991 injury and awarded Anderson benefits for permanent and total occupational disability. Kemper filed a petition for reconsideration, arguing the ALJ failed to assess Anderson's degree of occupational disability as of the date of his original settlement in 1994. Anderson filed a petition for reconsideration alleging the opinion and award lacked necessary language regarding Anderson's right to recover medical benefits. By order dated October 18, 2001, the ALJ sustained both petitions for reconsideration and found that Anderson's March 31, 1991 injury resulted in an occupational disability of 18%.

The record on appeal contains no medical records or testimony from the original claim, other than historical information contained within the evidence submitted upon reopening. Upon petition for reconsideration, the ALJ determined that Anderson was 18% occupationally disabled at the time of the 1994 settlement. As neither party has argued on appeal that the ALJ's finding of 18% was improper and the 1994 settlement agreement was clearly based on an 18% occupational disability, we accept 18% as Anderson's degree of occupational disability in 1994.

Anderson is fifty-five years old. He has a high school education and no other vocational or specialized training. Anderson began working for Northwest in July 1976 as a baggage handler. His duties consisted primarily of loading, unloading and cleaning aircraft. In 1984, Anderson was promoted to

a supervisory position, where he remained until he ceased employment on December 30, 1999. Anderson testified that as a supervisor his duties still included loading, unloading and cleaning aircraft, as well as overseeing other employees.

Anderson was first injured on March 31, 1991, when he sustained a lifting injury to his neck and low back. As a result of the injury, Anderson underwent fusion surgery at C5-7. The claim was settled in 1994 for benefits based on 18% occupational disability. Thereafter, Anderson returned to work full-time for Northwest until he sustained another injury to his middle and low back on August 25, 1998, when he was pushing up on a cargo door. He stated that he experienced sharp pain in his middle and low back, with the low back primarily affected. He underwent his second fusion surgery at L3-5 on January 27, 2000. Anderson last worked for Northwest on December 30, 1999. He has not returned to work since that date. He testified he currently experiences pain in his low back, left leg, neck and shoulder. He stated his pain is present every day, with some days being worse than other days. His daily activities include laying in his swimming pool, operating a riding lawnmower, grocery shopping, and watching television.

In support of his claim upon reopening, Anderson submitted testimony and medical records from Dr. George Raque, a neurosurgeon; Dr. John Dimar, an orthopedic surgeon; and, Sally Moore, a vocational rehabilitation consultant. Dr. Raque began treating Anderson in 1994 for his neck and low back condition that resulted from his March 1991 injury. Diagnostic tests ordered by Dr. Raque in 1995 revealed multiple level disc bulging, stenosis at L3-4, disc protrusion and stenosis at L4-5, disc protrusion at the S1 nerve root at L5-S1, and spondylosis at C3-4. Dr. Raque recommended a three-level fusion, but Anderson opted instead for a course of epidural blocks. Dr. Raque continued treating Anderson on a fairly regular basis for his neck and low back complaints. In January 2000, he performed a two-level fusion. Dr. Raque considered the surgery successful and in an office note of

March 28, 2000, stated that Anderson "is doing well and his leg and back pain are better. He is walking over a mile and doing a lot." Dr. Raque testified that he attributed 50% of Anderson's condition to the repetitive nature of his work at Northwest; 25% to the natural aging process; and, 25% to the 1998 injury.

Dr. Dimar first examined Anderson on October 15, 1999, upon referral from Dr. Raque. After reviewing a myelogram and x-rays, Dr. Dimar diagnosed severe advanced degenerative disease at L3-4 and L4-5 with spinal stenosis. Dr. Dimar recommended continued spinal blocks and anti-inflammatory medication. He stated that Anderson would require future surgery because of instability in his back. In an August 18, 2000, report, Dr. Dimar stated Anderson's January 2000 surgery resulted in reduced leg and back pain. He did not believe Anderson had reached maximum medical improvement at the time of the exam, but nevertheless opined that Anderson would not be able to return to his previous type of employment with Northwest.

Sally Moore conducted a vocational evaluation, which included a medical records review, a physical examination and several telephonic interviews with Anderson. Based on his physical restrictions, job history, education, depression, inability to concentrate and chronic pain, Ms. Moore concluded Anderson was neither able to perform in a competitive job market, nor a good candidate for vocational rehabilitation.

Liberty submitted medical evidence from Dr. Martin Schiller, an orthopedic surgeon; Norton Hospital records; and, additional records of Dr. George Raque. Dr. Schiller examined Anderson on October 4, 2001. He diagnosed cervical and lumbar degenerative arthritis. Dr. Schiller believed the 2000 surgery was necessitated by Anderson's arthritis and was not related to the alleged 1998 work injury. He believed the alleged 1998 injury was a temporary exacerbation of a preexisting, active low back condition. Dr. Schiller assessed a 10% permanent impairment, with 9% attributed to the lumbar condition and 1% attributed to the cervical condition.

He stated that Anderson should avoid lifting more than twenty pounds, stooping, bending or crawling. He also expressed concern that Anderson's fusions were not solid and additional surgery might be required.

After reviewing the evidence, the ALJ found Anderson to be permanently and totally occupationally disabled. The ALJ found that all of Anderson's current disability resulted from a worsening of the effects of the 1991 injury. He awarded benefits for total disability beginning on October 23, 2000. The award was apportioned 50% to Kemper and 50% to the Special Fund. The ALJ stated:

This is not a situation where the plaintiff injured in 1991 continues working symptom free for 10 years and then has another injury. Rather there is a continuing relationship between Dr. Raque and the plaintiff and continuing discussions of whether or not the plaintiff should get surgery in the lumbar spine. In this particular case there was a significant injury [and] subsequently there have been numerous exacerbations. It is significant that the incident in 1998 is not well documented and there was not specific treatment by Dr. Raque for the 1998 injury. Rather we have, in this case, a situation where the plaintiff has had a continuing deterioration of his back condition to the point that surgery was required. The defendant/employer was aware of the plaintiff's original condition, had allowed the plaintiff to continue in the same type of job with the continuing exacerbations to his physical condition that were bound to occur. The neurologic studies in 1994 and 1999 were not appreciably different. The difference is the progressive symptoms that the plaintiff has experienced as a result of the 1991 injury. The apportionment testimony by the various physicians, including Dr. Raque, has not been overlooked. The 1998

injury did not produce any different physiological condition in the plaintiff. Objective medical evidence would not have shown a different MRI before or after the 1998 incident. The real question is what is the difference between continuing exacerbations of a pre-existing injury and multiple mini-traumas that produce a compensable condition. In this particular case we had an initial incident which produced a harmful change to the plaintiff's body. That condition never became non-symptomatic. Rather, the plaintiff had continuing problems with that condition throughout the period of time from 1991 forward until surgery in January of 2000. There has not been an appreciable change in the neurologic condition over that entire period. Rather, what we have is a degeneration of the plaintiff's condition as a result of the 1991 injury.

Kemper now appeals from the ALJ's opinion and award, arguing the ALJ erroneously disregarded uncontradicted causation testimony. Kemper argues it was Dr. Raque's uncontradicted opinion that 50% of Anderson's current condition should be apportioned to the repetitive heavy labor he performed for Northwest. Kemper contends that because Dr. Raque was the only physician to testify regarding the cumulative effects of the repetitive heavy manual labor Anderson performed for Northwest, the ALJ cannot disregard his testimony without providing an explanation. We find no merit in that particular argument.

While we agree with Kemper that generally an ALJ cannot disregard uncontradicted medical evidence without reasonable explanation, we do not agree that Dr. Raque's testimony was uncontradicted. See Eizabethtown Sportswear v. Stice, Ky. App., 72 S.W.2d 732 (1986); Commonwealth of Kentucky v. Workers' Compensation Board, Ky. App., 697 S.W.2d 540 (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 medical evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). Furthermore, the ALJ may choose to believe parts of the evidence and disbelieve other parts, even if it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977).

Our review of the evidence reveals that Dr. Raque and Dr. Schiller offered contradictory testimony regarding the cause of Anderson's disability. Dr. Raque believed 50% of Anderson's condition should be apportioned to repetitive trauma; 25% to the natural aging process; and, 25% to the 1998 injury. On the other hand, Dr. Schiller believed Anderson's current disability resulted from the 2000 low back fusion, which in turn had resulted from Anderson's preexisting active degenerative arthritis in the low back that began in 1991. Dr. Schiller specifically stated the alleged 1998 injury was not the basis for the 2000 surgery. Additionally, the medical evidence, as a whole, reveals that Anderson received regular medical treatment for his neck and back conditions from the time of the 1994 settlement to the date he filed his reopening. The ALJ resolved the conflicting evidence in favor of Liberty.

In the instant case, Anderson alleged a worsening of his 1991 injury, a new 1998 injury, and a claim for cumulative trauma. Evidence was presented that would have supported a conclusion that any, all, or a combination of these was the cause of Anderson's disability. While another fact finder may have reached a different conclusion, there was evidence before the ALJ, specifically from Dr. Schiller, constituting substantial evidence of probative value to support a finding that Anderson's current condition is a result of a worsening of the effects of his 1991 injury. We have not been directed to any evidence of record that would lead us to a conclusion

that the ALJ erred as a matter of law and for this reason, we must affirm. KRS 342.285.

Accordingly, the opinion and award of the ALJ is hereby **AFFIRMED**.

The Board's opinion affirming the ALJ's opinion and award is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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