

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001521-WC

MALONE FREIGHT LINES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-99879

RONALD DALE BURDEN; ROGER D. RIGGS,
ADMINISTRATIVE LAW JUDGE; WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART AND
VACATING IN PART AND REMANDING

*** **

BEFORE: BARBER, BUCKINGHAM, and HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: Malone Freight Lines, Inc., petitions for review of an opinion of the Workers' Compensation Board (Board) which affirmed an award by administrative law judge (ALJ) of temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits to Ronald Dale Burden. Malone contends that the ALJ erroneously determined the termination date for TTD benefits and erroneously failed to assign some portion of Burden's disability rating to prior injuries. We affirm the award of PPD benefits; however, because the ALJ failed to make adequate findings of fact in support of his award of TTD

benefits, we vacate the award of those benefits and remand for additional findings.

Prior to his present work-related injury, Burden suffered two prior injuries to his back. In 1994, Burden suffered a back strain while working at Pizza Hut, after which he missed several days of work. Then, on November 1, 1998, while unloading firewood at home, Burden sprained his back, after which he missed one day of work.

On November 9, 1998, while working for Malone as a dispatcher, Burden went to the restroom and noticed a sign warning of a wet floor which had been mopped. Burden stated that when he came out of the restroom he slipped on the wet floor, struck a bench, and landed on the floor. After falling, he felt a sharp burning pain in his low back with pain and pressure down his right hip and right leg. He also experienced tingling and numbness in his right foot. Burden was taken by ambulance to the Owensboro Mercy Health Systems Hospital, where he was treated in the emergency room and released the same day.

Following his injury, Burden returned to work part-time for approximately three weeks in April 1999. He quit due to his pain and had not returned to work at the time of the ALJ decision in this case. Burden eventually underwent fusion surgery on October 12, 1999.

On October 23, 2000, Burden filed an Application for Resolution of Injury Claim with the Department of Workers' Claims. The claim was subsequently assigned to an ALJ for final adjudication. On January 14, 2002, the ALJ entered an opinion

and award granting Burden PPD benefits based upon an impairment rating of 25% and TTD benefits for the period of November 9, 1998, through August 2, 2001 (excepting the three weeks Burden returned to work in April 1999). The ALJ assigned no portion of the impairment rating to the injuries sustained by Burden in the prior Pizza Hut accident or the firewood accident.

Malone subsequently appealed to the Board. On June 19, 2002, the Board entered an opinion affirming the ALJ's award of PPD and TTD benefits. This petition for review followed.

Malone first contends that the ALJ erred by awarding TTD benefits for a period of time after Burden was determined to be at maximum medical improvement. The ALJ awarded Burden TTD benefits from November 9, 1998, the date of the work-related injury, until August 2, 2001, the date Dr. Phillip A. Tibbs assessed Burden with permanent restrictions. Malone argues that TTD benefits were payable only until Burden had reached maximum medical improvement and that maximum medical improvement occurred either (1) on October 17, 2000, pursuant to the uncontradicted opinion of Dr. Gregory Gleis that Burden reached maximum medical improvement on that date or, alternatively, (2) on November 14, 2000, when Dr. Tibbs assigned the permanent impairment rating upon which the ALJ eventually relied. By implication, the ALJ's TTD award determined that the date of maximum medical improvement was August 2, 2001, or later.

"Temporary total disability" means "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would

permit a return to employment." KRS¹ 342.0011(11)(a). Awards of TTD benefits are appropriate when a worker is totally disabled by the effects of a compensable injury but has not yet reached maximum medical improvement. Clemco Fabricators v. Becker, Ky., 62 S.W.3d 396, 397-398 (2001). "TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market." W.L. Harper Construction Company, Inc. v. Baker, Ky. App., 858 S.W.2d 202, 205 (1993). See also Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327, 329 (2000). The duration of TTD benefits is a question of fact. W. L. Harper Construction at 205.

The ALJ's consideration of the TTD issue in his opinion and award was minimal, which has hindered our review of the issue. The opinion and award stated, in relevant part, as follows:

The plaintiff is entitled to temporary total disability benefits from November 9, 1998 through the date on which Dr. Tibbs assigned limitations and restrictions on August 2, 2001. He is entitled to recovery at the rate of \$205.73 per week for each week during that time except for the three week period following March 30, 1999.

Since the ALJ resolved the TTD issue in favor of Burden, who had the burden of proof on the issue, the question on

¹Kentucky Revised Statutes.

appeal is whether substantial evidence in the record supported the decision. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984). Substantial evidence is evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971); Transportation Cabinet v. Poe, Ky., 69 S.W.3d 62, 69 (2001).

We agree with Malone that KRS 342.0011(11)(a) establishes a two-prong test that TTD benefits are payable until (1) maximum medical improvement has been reached, or (2) the injury has reached a level of improvement which would permit a return to employment. Central Kentucky Steel v. Wise, Ky., 19 S.W.3d 657 (2000), clarifies that prong two applies, not to a release to perform minimal work, but, rather, to work that was customary to the claimant or that he was performing at the time of the injury. Id. at 659. Malone does not object to the assignment of August 2, 2001, as the date applicable to prong two. Rather, Malone contends that prong one, maximum medical improvement, was achieved at a much earlier date. Malone asserts that the ALJ and the Board essentially ignored prong one of the test.

Malone initially contends that the date of maximum medical improvement must be considered as October 17, 2000, on the basis that its independent medical examiner, Dr. Gleis, expressed the uncontradicted opinion that Burden reached maximum medical improvement on that date. Since no other date of maximum medical improvement is explicitly expressed by any other witness

in the case, Malone argues that Dr. Gleis' testimony is uncontradicted. Where the ALJ does not state his reasons for rejecting uncontradicted evidence put forward by the employer, which evidence would have defeated employee's claim, an award of TTD benefits cannot be sustained. Collins v. Castleton Farms, Inc., Ky. App., 560 S.W.2d 830, 831 (1977).

In the alternative, Malone contends that, at the latest, maximum medical improvement occurred on November 14, 2000, the date Dr. Tibbs assigned the permanent impairment rating upon which the ALJ ultimately relied. Malone contends that since the time was ripe for assessing a permanent impairment rating on November 14, 2000, the only reasonable inference is that Burden had reached maximum medical improvement as of that date. In support of this proposition, Malone quotes the AMA Guides, 5th Edition, § 1.2., as follows:

An impairment is considered permanent when it has reached **maximum medical improvement (MMI)**, meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment. The term *impairment* in the Guides refers to **permanent impairment**, which is the focus of the Guides. (Emphasis original).

The Board addressed the TTD issue, in relevant part, as follows:

In the case sub judice, the record contained conflicting medical opinions as to the date Burden reached maximum medical improvement and regarding his capability of returning to work. Nonetheless, the ALJ chose to rely on the evidence from the treating surgeon, Dr. Tibbs. Dr. Tibbs' [sic] did not assign any permanent restrictions until the date of his August 2, 2001 deposition. Other medical records in evidence from Dr. Tibbs do not

indicate that he had released Burden to return to any type of work or assigned any restrictions at any earlier date than August 2, 2001. Therefore, given that Burden's job requirements at Malone consisted primarily of answering the telephone, when coupled with the specific restrictions imposed by Dr. Tibbs, we believe it was reasonable for the ALJ to infer that Burden could return to his previous type of work as a dispatcher. Jackson v. General Refractories Co., Ky. 581 S.W.2d 10 (1979). It was not until Dr. Tibbs imposed those restrictions on August 2, 2001, that Burden met the test for cessation of TTD as provided by Central Kentucky Steel v. Wise, *supra*. We consequently also affirm the ALJ's determination on the second issue. Special Fund v. Francis, [Ky., 708 S.W.2d 641 (1986)], and KRS 342.285.

In regard to the Board's assessment of the ALJ's decision, we identify two problems. First, we have examined the medical records submitted by Dr. Tibbs, including the November 14, 2000, letter from Dr. Tibbs to Burden's counsel, and Dr. Tibbs' deposition testimony, and are unable to locate any record of Dr. Tibbs stating an opinion as to when Burden reached maximum medical improvement. We are not persuaded that merely because Dr. Tibbs assigned permanent restrictions on the date of his deposition, August 2, 2001, that that translates into an expression of an opinion that maximum medical improvement was reached on that date. Second, the Board's decision reflects that it may have interpreted the Central Kentucky Steel case as holding that TTD benefits terminate when and only when an employee is released to perform work of the type which he customarily performs without regard to maximum medical improvement. In Central Kentucky Steel, however, the employee returned to work on September 30, 1997, and did not reach maximum

medical improvement until October 28, 1997. We construe Central Kentucky Steel as not affecting preceding authorities which would require a cut-off of TTD benefits at an earlier date if maximum medical improvement is reached prior to an employee's release to perform the type of work he customarily performs.

Because the ALJ's minimal consideration of the TTD issue in his opinion and award does not explain his reasoning with respect to maximum medical improvement matters, we remand the case back to the ALJ for additional findings of fact concerning his reasoning for determining that August 2, 2001, was the appropriate date to terminate TTD benefits. In particular, the ALJ should make a finding of fact regarding the date maximum medical improvement was reached and set forth his reasoning in arriving at that date.

While we agree that it would be proper to conclude that August 2, 2001, was the date Burden was released to do the type of work he customarily performs, absent additional findings by the ALJ, we are not persuaded that there is substantial evidence in the record to support that August 2, 2001, or a later date, was also the date of maximum medical improvement. We therefore vacate and remand for additional findings regarding this issue.

Malone also contends that the ALJ erred in assigning no portion of Burden's 25% impairment rating to his pre-existing medical injuries. Malone argues that although Dr. Tibbs assessed a 25% impairment rating under the AMA Guides, he nevertheless testified that only one-half of the impairment, or 12.5%, was due to the work injury, and that some part of the other 12.5% was due

to the pre-existing anatomical nature of Burden's back. Malone acknowledged, however, that Tibbs was unable to express an opinion about the magnitude of the pre-existing active impairment.

The ALJ addressed the issue as follows:

According to the testimony of Dr. Phillip A. Tibbs, the treating neurosurgeon, Mr. Burden has been suffering with spondylolisthesis² for several years which is documented by his medical records. He said spondylolisthesis was not caused by his recent injuries but pre-existed anything that happened in November of 1998 for several years. He said he was also of the opinion that Mr. Burden had chronic problems with his back periodically and episodically until he finally suffered injury on November 9, 1998 when he fell at work. Dr. Tibbs did note that he had no history of a November 1, 1998 incident, however, after reviewing the emergency room records he stated that the November 1 incident was apparently another episodic incident which was properly diagnosed as a back sprain. He said the November 9, 1998 incident when he fell at work was, in his opinion, the cause of his severe symptomatology with disabling back and leg pain. He assigned a 25% impairment when one uses the Fourth or Fifth Edition of the AMA Guidelines and felt that half was due to the November 9 fall at work with half being due to his pre-existing condition. There was some discussion by Dr. Tibbs as to whether the condition would be considered pre-existing dormant or active, however, the Administrative Law Judge interprets Dr. Tibbs' opinion to be that, though Mr. Burden had episodic back difficulties due to spondylolisthesis, it was the November 9, 1998 incident which resulted in his symptoms and required surgical fusion.

²In his deposition testimony, Dr. Tibbs stated, "Spondylolisthesis is a defect in the pars interarticularis, which is a connecting bridge of bone from one part of a joint to another. When spondylolisthesis exists, there's a structural weakness in the spine that predisposes slippage of one bone upon the other."

. . . .

The treating physician, Dr. Tibbs, was confronted with the same medical scenario which the Administrative Law Judge now faces. Even with that he continued to be of the opinion that the fall at work was the cause of Mr. Burden's severe difficulties and that the November 1 incident was simply an episodic occurrence similar to those which Mr. Burden has periodically experienced due to his spondylolisthesis over the years.

Mr. Burden has testified that he periodically had back problems through the years and felt, even after the November 1 incident, that though he was still having some back problems he was able to return to work until he fell on the wet floor. The Administrative Law Judge had the opportunity to observe Mr. Burden during his testimony at [the] Hearing and feels that this man has not fabricated the incident of November 9, 1998. Reaching this conclusion the Administrative Law Judge accepts the opinion of Dr. Tibbs, who, after reviewing all of the medical records, still remained convinced that the November 9, 1998 incident was that which resulted in his present severe symptoms. The Administrative Law Judge accepts Dr. Tibbs's opinion with reference to an impairment of 25%.

The fact-finder, the ALJ, rather than the reviewing court, has the sole discretion to determine the weight, credibility, quality, character, and substance of evidence and the inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). The ALJ has the discretion to choose whom and what to believe. Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 422 (1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16

(1977). Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). In instances where the medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977).

If work-related trauma causes nonwork-related degenerative changes to be aroused into disability and to result in an impairment, that harmful change is compensable. McNutt Construction v. Scott, Ky., 40 S.W.3d 854, 859 (2001); Bright v. American Greetings Corp., Ky., 62 S.W.3d 381, 384 (2001). The ALJ's interpretation of Dr. Tibbs' medical evaluations and deposition testimony that Burden's prior back problems were as a result of episodic back difficulties due to spondylolisthesis and that it was the November 9, 1998 incident which resulted in his symptoms and required surgical fusion was a reasonable interpretation of the evidence. We agree with the Board:

Dr. Tibbs testified that one-half, or 12.5% of Burden's impairment was pre-existing. He also testified that some part of the pre-existing portion "may" have been active and, for that reason, based on our interpretation, offered no opinion as to any apportionment. Furthermore, we believe the evidence from Dr. Tibbs, when taken as a whole, reasonably demonstrates that Burden's condition remained relatively dormant from 1994 until November 1998, and that his low back pain did not become truly chronic until after his November 9, 1998 fall. Burden had returned to work without restrictions following the November 1, 1998 nonwork-related injury. Dr. Tibbs's believed the November 9, 1998 work-related injury caused the nerve root impingement that ultimately led to Burden's back surgery.

Furthermore Dr. Tibbs nowhere testified that Burden had any functional impairment under the Guides prior to his November 9, 1998 work injury. Thus, ALJ Riggs was soundly within his authority to find that the pre-existing condition was dormant and non-disabling and subsequently aroused into disabling reality by his 1989 work injury. McNutt Construction Co. v. Scott, Ky., 40 S.W.3d 854 (2001); Transportation Cabinet v. Guffy, Ky., 42 S.W.3d 618 (2001). . . .

Having reviewed the medical records and deposition testimony provided by Dr. Tibbs, the medical witness primarily relied upon by the ALJ, we are persuaded that there is substantial evidence in the record to support the award of PPD benefits.

For the foregoing reasons the Board's opinion is affirmed in part and vacated in part and this case is remanded for additional proceedings consistent with this opinion.

HUDDLESTON, JUDGE, CONCURS.

BARBER, JUDGE, CONCURS IN PART AND DISSENTS IN PART, AND FILES SEPARATE OPINION.

BARBER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I would affirm the ALJ and Board on both issues.

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