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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-002043-WC

DARIO NAVARRO LOPEZ — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-89654

BARDSTOWN BARRELS, INC.; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

KNOPF, JUDGE. Dario Navaro Lopez petitions for review from an opinion of the Workers' Compensation Board (Board) which affirmed an order of the Administrative Law Judge (ALJ) dismissing Lopez's petition to reopen his 1997 workers' compensation claim because Lopez had not met his burden of proving a change of disability resulting from a worsening of impairment due to the 1997 injury. On appeal Lopez contends that the ALJ's decision was erroneous because ALJ Thomas A. Nanney's decision in the original litigation precludes

application of the "natural aging process" as a defense/bar to his claim upon reopening. For the reasons stated below we affirm.

In 1995, Lopez began employment as a cooper for Bardstown Barrels, Inc., in Nelson County, Kentucky. Lopez described his work at Bardstown Barrels as being heavy manual labor. On March 20, 1997, Lopez sustained an injury to his lower back which occurred while he was lifting and moving heavy oak whiskey barrels.

On October 6, 1997, Lopez filed a petition for workers' compensation benefits. The claim was initially assigned to an arbitrator, who rendered a benefit review determination on February 26, 1998, awarding Lopez temporary total disability benefits and concluding that Lopez had not yet reached maximum medical improvement.

Upon a request for de novo review filed by Lopez, the case was assigned to ALJ Nanney. On August 14, 1998, ALJ Nanney issued an opinion concluding that Lopez had sustained a back strain as a result of the work injury; however, the ALJ accepted the conclusion of university medical evaluator[1] Dr. Gregory Gleis that Lopez suffered a 0% impairment rating as a result of the injury. While the ALJ did award temporary total disability benefits through December 1, 1997, based upon Dr. Gleis's

[1] See KRS 342.315.

impairment assessment, ALJ Nanney concluded that Lopez had not suffered any permanent disability as a result of the injury. Lopez was also awarded reasonable and necessary medical expenses resulting from the March 1997 injury.

On May 30, 2000, Lopez filed a motion to reopen his claim pursuant to KRS 342.125. In his motion Lopez stated that the medical condition of his low back had greatly deteriorated and worsened to the point that he was now completely unable to engage in work activity. Lopez also stated that he had been referred to and received care from a neurosurgeon, that the neurosurgeon had requested additional diagnostic studies including an MRI and CT scan and possibly a myelogram, but that the responsible insurance carrier was refusing to approve these procedures.

The ALJ assigned to the case initially held that the motion was contrary to KRS 342.125(3) based upon the 1996 version of the statute. On appeal, the Board reversed the ALJ and held that the motion was not barred by KRS 342.125(3) in light of the 2000 amendments to that statute.[2] The Board thus remanded the matter to the ALJ to address the merits of Lopez's

[2] The 2000 amendments removed the pre-amendment two-year waiting period for filing a motion to reopen.

motion to reopen. In an opinion rendered October 26, 2001, this Court affirmed the Board's decision.[3]

In the meantime Lopez continued to seek treatment for his back pain. Dr. Stephen Glassman, an orthopedic surgeon, diagnosed the pain as resulting from abnormalities at L3-4, and on September 26, 2001, Lopez underwent L3-4 decompression and fusion surgery.

On remand the case was assigned to ALJ James L. Kerr. Proof taking thereafter proceeded, a benefit review conference was held on September 12, 2002, and on September 25, 2002, a formal hearing was held. On December 30, 2002, ALJ Kerr issued an opinion and order dismissing Lopez's claim upon reopening on the basis that he had not met his burden of demonstrating that there had been a worsening of occupational disability as a result of his March 1997 injury. In reaching this decision, ALJ Kerr relied upon the evaluation of Dr. Gleis who, just as he had at the time of the original claim, determined that Lopez had an impairment rating of 0% related to his March 20, 1997, injury. On August 27, 2003, the Board entered an order affirming ALJ Kerr's decision. This appeal followed.

Certain basic principles exist in a reopening of a workers' compensation claim. First, the burden of proof falls

[3] See Bardstown Barrels v. Lopez, Ky. App., 59 S.W.3d 480 (2001).

upon the party seeking reopening.[4] Here, that party is Lopez. Consequently, pursuant to the applicable version of KRS 342.125, it was Lopez's burden to prove that the effects of the injury of March 20, 1997, had worsened since ALJ Nanney's opinion of August 14, 1998, so as to cause an increase in vocational disability. In ascertaining whether there has been a change, it was the ALJ's obligation to analyze not only the evidence presented at the time of reopening, but also the evidence presented previously.[5] Here, the comparison is to Lopez's condition at the time of the August 1998 decision with his condition at the time of reopening.

In his August 14, 1998, opinion, ALJ Nanney made the following relevant findings of fact and conclusions of law:

> Addressing first the issue of any permanent disability, this case is clearly governed by the new provisions of KRS 342.730 as enacted on December 12, 1996. As such, the medical school evaluation performed pursuant to KRS 342.315 is entitled to presumptive weight. While I am fully aware that the presumptive weight provided for in this statute is a rebuttable presumption, I do not believe that the evidence in this case rebuts the conclusions of Dr. Gleis. The mere fact that Dr. Whobrey and Dr. Hurt found different impairment ratings under the AMA Guidelines in and of itself is insufficient to rebut the testimony of Dr. Gleis. The plaintiff indicates that Dr. Gleis'

[4] Griffith v. Blair, Ky., 430 S.W.2d 337, 339 (1968).

[5] W. E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453, 455 (1946).

> assessment under the AMA Guidelines is incorrect in that he makes reference to the range of motion. However, Dr. Gleis' final opinion is based upon the lumbosacral DRE Category 1, which calls for a 0% impairment. It is my belief, based upon Dr. Gleis' findings on examination that his conclusion is appropriate under the AMA Guidelines. I further note that Dr. Gleis' opinion is supported by the opinion of Dr. Hargedon who also found a 0% impairment under the AMA Guidelines. Finally, I clearly do not believe that Dr. Whobrey's 20% impairment is consistent with the AMA Guidelines as plaintiff only sustained a back strain. Therefore, having determined that Dr. Gleis' report is persuasive, I find there is no basis for any permanent disability.

For purposes of our review, the significant fact to be gleaned from the foregoing is that in the original review ALJ Nanney accepted Dr. Gleis' assessment that Lopez had a 0% occupational disability rating as a result of his March 20, 1997, work injury.

Moving forward to the reopening, ALJ Kerr's December 30, 2002, opinion contained the following relevant findings of fact and conclusions of law:

> The parties have preserved worsening of condition/change in occupational disability and if so, extent and duration as an issue. The Administrative Law Judge notes that ALJ Nanney found the plaintiff to have a 0% impairment as a result of the March 20, 1997 injury, relying upon the K.R.S. 342.315 evaluation performed by Dr. Gleis. The Administrative Law Judge finds it significant that plaintiff was not working at that time and he has continued not to

work. Further, plaintiff testified to constant pain since the injury, including at the time of decision by ALJ Nanney, and both before and after surgery performed on September 26, 2001. Plaintiff has continued to testify that he is physically unable to work. Medically, the Administrative Law Judge notes the testimony of Dr. Nazar, plaintiff's treating physician who observed on September 11, 2000 that plaintiff's condition had not changed since his initial evaluation. Admittedly, this is prior to plaintiff's 2001 surgery but the Administrative Law Judge cannot conclude that plaintiff's surgery in 2001 was the result of his March 20, 1997 injury. The Administrative Law Judge has considered the testimony of the physicians testifying on behalf of the plaintiff, but instead finds the testimony of Dr. Gleis, the physician of whom ALJ Nanney relied, to be probative and credible. Dr. Gleis stated that the plaintiff retains the same impairment rating of 0% related to the March 20, 1997 injury and that his L3-4 lumbar fusion and decompression were not secondary to his work-related injury. Perhaps the Administrative Law Judge is most troubled by what appears to [be] symptom magnification upon plaintiff's behalf has [sic] found by various physicians. For example, Dr. Shields stated that he had difficulty matching plaintiff's clinical picture to the myleographic defect as of February 24, 2001. He continued to question the correlation between plaintiff's symptoms and diagnostic tests through at least April 24, 2001. While Dr. Glassman, a Spanish speaker, eventually performed surgery, his office note of May 21, 2001 states that plaintiff is "histrionic." Overall, it appears to the undersigned that plaintiff had very little wrong with him at the time of Judge Nanney's decision and despite a complicated medical course, continues to have little wrong with him as caused by the work-related injury. Accordingly, the Administrative Law Judge

> concludes that the plaintiff has not met his burden of proof of a worsening of conditioning/increase in occupational disability and his claim upon reopening must be dismissed.

Hence ALJ Kerr determined that, upon reopening, Lopez retained a 0% occupational disability rating. In summary, ALJ Nanney, relying upon Dr. Gleis' assessment, concluded that Lopez had a 0% occupational disability rating, and, upon reopening, ALJ Kerr, again relying upon Dr. Gleis' assessment, concluded that Lopez had a 0% occupational disability rating.

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.[6] The ALJ has the discretion to choose whom and what to believe.[7] 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.[8] Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate

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

[7] Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 422 (1997).

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

basis for reversal on appeal.[9] In instances where the medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ.[10]

Where the decision of the fact-finder is in opposition to the party with the burden of proof, that party bears the additional burden on appeal of showing that the evidence was so overwhelming it compelled a finding in his favor and that no reasonable person could have failed to be persuaded.[11] In such cases, the issue on appeal is whether the evidence compels a finding in his favor.[12] To be compelling, evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ.[13]

In this case, the expert medical witnesses presented conflicting medical opinions regarding Lopez's occupational disability rating. Lopez presented medical testimony that there had been a worsening of his occupational disability since the original decision; however, Dr. Gleis determined that there had

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[9] McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

[10] Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977).

[11] Mosely v. Ford Motor Co., Ky. App., 968 S.W.2d 675, 678 (1998).

[12] Paramount Foods at 419; Daniel v. Armco Steel Co., L.P., Ky. App., 913 S.W.2d 797, 800 (1995).

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

not. In such cases, it is the function of the ALJ to resolve the conflict in the opinions.[14] In light of Dr. Gleis' medical opinion that there had not been a worsening of Lopez' occupational disability, and because Lopez must show a worsening of his occupational disability in order to reopen his case, we are not persuaded that the evidence is so overwhelming as to compel a decision in favor of Lopez.

With regard to Lopez's contentions that the ALJ's decision was erroneous because ALJ Nanney's decision in the original litigation precludes application of the "natural aging process" as a defense/bar to his claim upon reopening, we agree with the Board:

> Lopez interprets the ALJ's decision on reopening as a dismissal of his claim based on the exclusion for the natural aging process set out in KRS 342.0011(1). Reasoning that a negative finding with respect to the applicability of that exclusion was implicit in ALJ Nanney's finding of a work-related injury, Lopez argues that the doctrine of *res judicata* applies to this issue, which may not be reconsidered by ALJ Kerr.
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> . . . .
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> Lopez argues that ALJ Kerr erred by addressing the issue of the natural aging process and reaching a conclusion disparate from ALJ Nanney's. This argument fails for a multitude of reasons. ALJ Nanney's finding of a work-related injury is not tantamount to his rejection of Dr. Gleis'

[14] Pruitt v. Bugg Brothers, supra.

opinions with respect to the effects of the natural aging process. The work-related arousal of a pre-existing dormant condition related to the natural aging process is a compensable event for which benefits may be awarded. McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854 (2001). Of course, ALJ Nanney never directly addressed the issue of the "natural aging process," nor did ALJ Kerr in his decision on reopening. Just as an outright rejection of Dr. Gleis' opinion with respect to the natural aging process cannot be inferred from ALJ Nanney's finding of a work-related injury, a whole-hearted acceptance of that opinion cannot be inferred from ALJ Kerr's dismissal of the claim on reopening.

It is nonetheless clear that neither ALJ Nanney, nor ALJ Kerr, found the abnormalities at the L3-4 level of Lopez's spine to be proximately caused by the work injury at issue. ALJ Nanney expressly rejected the opinions of Dr. Whobrey, who gave a percentage rating based upon instability at the L3-4 level, noting that Lopez "only sustained a back strain." ALJ Kerr concluded that Lopez's surgery was not necessitated by that work-related back strain. In other words, even if the doctrine of *res judicata* applied in this instance, we find no inconsistency between the opinion and award of ALJ Nanney in the original litigation and the opinion of ALJ Kerr on reopening. That being said, we are careful to note that we do not believe the doctrine of *res judicata* has any application here.

Res judicata, or claim preclusion, and collateral estoppel, or issue preclusion, are companion doctrines that both have some application to workers' compensation claims. See W. E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (1946) and Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681

> (1972). Basic to both doctrines, however, is the concept of identity. For purposes of this discussion, it is collateral estoppel and identity of issues that is relevant. Whether a claimant has experienced a change of disability as shown by a worsening or improvement of impairment since the date of an original award or order – the standard for reopening pursuant to KRS 342.125(1)(d) – can never be the proper subject of either claim or issue preclusion. The reopening standard is defined in terms of change, which runs counter to the concept of identity inherent in the preclusion doctrines.
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> In other words, even if ALJ Nanney's decision could properly be summarized as rejecting Dr. Gleis' opinion with respect to the natural aging process, that would not preclude ALJ Kerr from determining that the surgical procedure performed after rendition of the original opinion and award was not necessitated by the work injury. *Res judicata* could not operate to mandate a determination by ALJ Kerr one way or the other with respect to an operation and related impairment that did not occur until some three years after the opinion by ALJ Nanney. By its very nature, the reopening of a claim on those grounds set out in KRS 342.125(1)(d) contemplates a change in circumstances for which one party or the other is entitled to have the extent and duration of the claimant's condition reconsidered. *Cf.* Central City v. Anderson, Ky. App., 521 S.W.2d 246 (1975).

For the forgoing reasons the decision of the Workers' Compensation Board is affirmed.

DYCHE, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I respectfully dissent from the well-written majority opinion, which correctly notes the heavy burden of proof incumbent upon Mr. Lopez to produce compelling evidence in order to refute the adverse decision of the ALJ. I believe that the record does contain such compelling evidence and that it was erroneously disregarded by the second ALJ in dismissing the motion to reopen.

At the time of the 1998 decision, the diagnosis of Dr. Gleis of back strain with a 0% impairment rating was the evidence that ALJ Nanney elected to believe over contrary findings of the other physicians, Dr. Whobrey (who assessed a vastly divergent impairment rating of 20%) and Dr. Hurt (assigning a 10% rating). As properly noted by the majority opinion, it was the function of the ALJ to resolve the contradiction among the medical opinions and in so doing to exercise his prerogative to pick and choose among the conflicting items of evidence and to determine that which he found credible. Arguably, ALJ Nanney reached a fair assessment of Lopez's condition based on the evidence before him in 1998. As noted in the appellant's brief, the diagnostic studies in existence at that time were "rather limited." (Appellant's brief, p. 1). Nonetheless, despite a limited award, ALJ Nanney specifically found that Lopez had sustained a compensable work injury.

Compounding the heavy burden of proof borne by Lopez is his inability to communicate in English, a fact which also frustrated his medical diagnosis until medical treatment was rendered in 2000 by Dr. Steven Glassman, the only treating physician who was fluent in Spanish. Not only was the language barrier an impediment to initial medical diagnosis; but it also served as a basis for Dr. Gleis to question his credibility, charging him with "symptom magnification," or, as the saying goes, literally adding insult to an obviously painful injury.

I agree with appellant's very fine analysis of McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854 (2001), and its precedential impact on this case. ALJ Nanney based his decision solely on the diagnosis of work-related back strain and made a modest award accordingly, never addressing the "natural aging process" of the pre-existing degenerative changes also noted in the report of Dr. Gleis. Appellant is correct in arguing that McNutt, decided in 2001, would require compensation for an injury that aroused into disabling reality a dormant, degenerative condition attributable to the natural aging process.

Medical evidence amassed between the 1998 opinion of ALJ Nanney and the 2002 opinion of ALJ Kerr clearly and compellingly verified diagnoses originally rejected by ALJ Nanney. The record reveals that on December 3, 1997, Dr. Vickie

Whobrey diagnosed "a chronic lumbar strain with bilateral fractures of the pars interarticularis at L3." (Brief of Appellee Bardstown Barrels, p. 4.) On April 10, 1998, Dr. James Hurt also diagnosed degenerative disk disease at L3-4. As early as 1997, an MRI revealed "evidence of a loss of disk height at L3 disk level with a diffuse annular disk bulge." (Same brief, p. 7.) We cannot say that ALJ Nanney erred at the time in disregarding this body of evidence in favor of that reported by Dr. Gleis.

We must conclude, however, that the later medical evidence clearly revealed the erroneous conclusion of Dr. Gleis. Those early diagnoses of implication of L3-4 were confirmed by subsequent medical testing: "A repeat MRI done on June 2, 2000 revealed evidence of disk degeneration and bulge at the L3-4 interspace with the development of a left pericentral annular tear." (Same brief, p. 7.) A CT scan of February 7, 2001, revealed "evidence of a diffuse post lateral disk bulge protrusion at the L3-4 interspace…." (Id.)

Still uncertain of the overall clinical match-up between symptoms and test results, Dr. Christopher Shields referred Lopez to Dr. Steven Glassman, an orthopedic surgeon who spoke Spanish. Dr. Glassman and Dr. Shields performed surgery on L3-4 on September 26, 2001.

Incredibly, this subsequent medical history was rejected upon re-opening. The medical testing and surgery intervening between the 1998 and 2002 opinions compels a consideration of whether the degenerative back condition suffered by Lopez was exacerbated into painful reality by his injury. The evidence rejected by ALJ Nanney in 1998 was subsequently validated but still erroneously rejected by ALJ Kerr in 2002, who, in all good faith, believed he was bound by the doctrine of issue preclusion.

I believe that ALJ Kerr was at liberty to consider this case in light of McNutt, supra, which also intervened time-wise between the two opinions in this case. ALJ Kerr penned an excellent analysis of *res judicata* and collateral estoppel –- a summary worthy of hornbook quality. However, the fact is that ALJ Nanney found a work-related injury that he did not analyze in terms of the natural aging process and its impact on a pre-existing degenerative condition. After subsequent testing, diagnosis, and surgery confirmed what ALJ Nanney overlooked and omitted, ALJ Kerr was not barred from addressing this issue. Indeed, compelling evidence **required** that he do so pursuant to McNutt:

> Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the

> harmful change; hence, the harmful change comes within the definition of injury.

Id. at 859. The McNutt court then stated its conclusion:

> that disability which results from the arousal of a prior, dormant condition by a work-related injury **remains compensable** under the 1996 Act….

Id. (Emphasis added.)

I agree with Appellant's prayer for relief and consequently would remand this case to an ALJ for consideration of the arousal of degenerative changes caused by his work-related injury.

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