

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000060-WC

PARKER TRANSFER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-60437

LANNY RILEY;
HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

BARBER, JUDGE: Parker Transfer (hereinafter referred to as "Parker") petitions this Court to review an opinion rendered by the Workers' Compensation Board (hereinafter referred to as "the Board") and entered on December 10, 2003. In the Board's opinion, it affirmed an opinion, order and award entered by Hon. Lloyd R. Edens, Administrative Law Judge (hereinafter referred

to as "ALJ"), in which the ALJ found Lanny Riley, Parker's former employee, permanently and totally disabled.

On review, Parker argues that the ALJ failed to address the issue of whether or not Lanny Riley (hereinafter referred to as "Riley") suffered from a pre-existing active impairment when it concluded that Riley was permanently and totally disabled. Finding that the evidence did not compel a contrary result, this Court affirms both the Board's opinion and the ALJ's award.

Prior to working for Parker, Riley had previously injured his back several times. In the early 1980's, Riley was in a motorcycle accident and injured his back. At that time, he worked as an orderly at a local hospital. In 1981, while working for the hospital, Riley slid out of a chair and injured his back. Later in 1982, while lifting a patient, Riley injured his back yet again. Riley filed a workers' compensation claim regarding these prior work-related injuries. He and that hospital settled these claims by an agreement in which Riley was awarded 33 weeks of temporary total disability benefits.

In October of 1997, Riley began working for Parker as a truck driver. As part of his duties, he was required to retrieve large dumpsters at various industrial sites. On October 16, 1997, after working for Parker for approximately two weeks, Riley injured himself when he fell into a dumpster that

he was preparing to load onto the back of his truck. Riley fell approximately four feet; landed on his back; and immediately experienced severe pain. Riley testified that after the 1997 injury he was unable to return to work due to constant severe back pain.

Riley's claim proceeded to a hearing before the ALJ on March 26, 2003. In an opinion and award entered on May 23, 2003, the ALJ found Riley to be permanently and totally disabled and found that, prior to the 1997, injury, Riley had not suffered from a pre-existing active occupational disability. The ALJ awarded Riley the sum of \$163.33 per week to be paid retroactively from October 17, 1997 and to be continued as long as Riley remained disabled. Parker filed a petition to reconsider and argued that the ALJ failed to address whether Riley suffered from a pre-existing active impairment prior to the 1997 injury. Parker claimed that overwhelming evidence existed that established that Riley did have a pre-existing active impairment. The ALJ denied reconsideration. After the Workers' Compensation Board affirmed, Parker filed a petition for review with this Court.

In its petition for review, Parker argues that KRS 342.730(1)(a) specifically forbids an administrative law judge from considering a nonwork-related injury when determining whether or not an injured employee is partially or totally

disabled. Parker contends that an ALJ must determine that any award for total disability was expressly not based on a pre-existing active nonwork-related impairment. According to Parker, the ALJ merely found that Riley did not have a pre-existing active occupational disability. Parker avers that an individual can have a pre-existing active impairment yet not have a pre-existing occupational disability. Since the ALJ failed to make the statutory required analysis, Parker insists that this Court must reverse and remand for the ALJ to make the proper determination.

Parker also argues that the Board misstated the law regarding the issue of pre-existing active impairment as it relates to total disability, and that the Board failed to make the proper analysis under KRS 342.730(1)(a). Parker argues that Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503 (2001), which the Board cited in its opinion, does not apply to the instant case. According to Parker, the Supreme Court of Kentucky held that a disability that resulted from the arousal of a prior dormant condition by a work-related injury was still compensable under the 1996 Act. According to Parker, the ALJ in the Hill case performed the analysis required by KRS 342.730. Parker claims the ALJ in Hill specifically addressed the issue of whether or not the injured employee had a pre-existing active impairment when said ALJ relied upon the testimony of Dr. Gaw, a

physician who had determined that the injured employee's spondylolisthesis was dormant prior to his work-related injury. In contrast, Parker avers that ALJ in the instant case made no such finding; thus, Parker concludes this Court must reverse the Board's decision.

Despite Parker's insistence, this Court finds Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503 (2001) to be directly on point. In Hill, employee, a coal miner, suffered a work-related injury to his back in 1998. Prior to the 1998 injury, employee had injured his back numerous times but had always recovered and returned to work. However, after the 1998 injury, employee never recovered and was not able to return to work. The ALJ found that the employee was permanently and totally disabled. The Board reversed regarding an issue of notice and remanded for the ALJ to consider what effect, if any, the employee's pre-existing spondylolisthesis had on the extent to which the employee's disability was compensable. Regarding the issue of pre-existing condition, this Court adopted the Board's reasoning. Both employee and employer appealed to the Supreme Court. Id. at 505.

Like in the instant case, the employer in Hill cited KRS 342.730(1)(a) and argued that the employee had an impairment due to a pre-existing spondylolisthesis, and that the ALJ should have excluded this impairment when he determined employee was

totally disabled. Id. at 508. The Supreme Court noted that the ALJ in Hill had determined that the injured employee did not have a pre-existing active occupational disability, the same determination made by the ALJ in the instant case, despite the existence of spondylolisthesis. Id. at 509. The ALJ pointed out that the employee continued to perform physically demanding manual labor and routinely ran up to 20 miles per week prior to the last work-related injury. Furthermore, the ALJ relied on Dr. Gaw's testimony in which he noted that the employee had several flare-ups over the years but had always recovered and returned to work until the last injury occurred. Id.

The Supreme Court reinstated the ALJ's decision and stated:

Having reviewed the evidence and the ALJ's findings, we are persuaded that there is no indication that nonwork-related impairment was considered when the ALJ determined that the claimant was totally disabled and entitled to an award under KRS 342.730(1)(a). Furthermore, although the decision was made without the benefit of our subsequent interpretations of the 1996 Act, there was substantial evidence that work-related harmful changes, by themselves, were sufficient to cause an AMA impairment and to render the claimant unable to perform any work. Under those circumstances, the ALJ's refusal to exclude prior, active disability on these facts should not have been disturbed on appeal. Id.

In light of the Supreme Court's opinion in Hill, this Court concludes that the ALJ in the instant case was not

required by KRS 342.730(1)(a) to specifically address whether or not Riley had a pre-existing active impairment. The ALJ relied upon Dr. Norworthy's opinion and Riley's testimony as the basis for finding that Riley was permanently and totally disabled. Dr. Norsworthy opined that Riley had a twenty-four percent impairment; placed several work restrictions on Riley; and concluded that Riley would have difficulty concentrating at any job due to severe back pain. Riley testified that since the 1997 injury he had suffered from severe low back pain, and that this pain had seriously curtailed his physical activities to such a point that he spent ninety percent of his time in a recliner. He also testified that he often felt dazed and found it difficult to concentrate on any task for a long period of time.

In determining that Riley had no pre-existing active occupational disability, the ALJ considered Dr. Gleis' report and Riley's testimony. Riley testified that he had worked at various jobs between 1984 and 1997. he testified that he had previously worked as a truck driver for at least two other employers. Moreover, he testified that he did not have any back pain immediately before the 1997 injury. Dr. Gleis' report corroborated Riley's testimony since it indicated that Riley had not sought any treatment for back pain between 1984 and 1997.

As the Board noted in its opinion, substantial evidence existed in the record to support a finding that Riley suffered from no pre-existing active impairment. The Board noted that Dr. Guarnaschelli opined that Riley's pain was caused by a dormant, nondisabling condition that was aroused to disabling reality by the 1997 accident. It noted that Dr. Eggers opined that Riley had a twenty-four percent impairment but made no reference to any pre-existing active impairment. This Court notes that Dr. Norsworthy also made no mention that Riley suffered from any pre-existing active impairment when he opined that Riley was 24 percent impaired. Furthermore, Dr. Quader opined that Riley's back pain was caused by a pre-existing spondylolisthesis that was aroused into disabling reality by the 1997 injury. Once more, no mention was made of a pre-existing active impairment. Like in Hill, there existed substantial evidence in the record to support that Riley's 1997 injury by itself warranted an AMA impairment and that it rendered Riley unable to perform any work. Id. Given the Supreme Court's holding in Hill and the evidence contained in the record, the ALJ's refusal to address whether Riley had a pre-existing active impairment does not justify disturbing the ALJ's decision upon review.

Thus, this Court affirms both the Board's opinion and the ALJ's award.

ALL CONCUR.

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