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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000764-WC
AND
NO. 2004-CA-001877-WC

DOUGLAS W. LANE (DECEASED) AND
PRISCILLA J. LANE (ADMINISTRATRIX) APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-62095

S & S TIRE, INC. #15;
J. KEVIN KING, ADMINISTRATIVE LAW
JUDGE; AND THE WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF AND TACKETT, JUDGES; AND EMBERTON, SENIOR JUDGE.[1]

KNOPF, JUDGE: Priscilla Lane appeals from separate orders[2] of the Workers' Compensation Board denying her claims for death

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] The Board's orders were entered, respectively, March 15, 2004, and August 13, 2004. Lane's appeals have been consolidated for review.

benefits pursuant to KRS 342.750 and for costs, interest, and attorneys fees pursuant to the penalty provisions of KRS 342.040 and KRS 342.310. In March 2001, Priscilla's husband, Douglas Lane, committed suicide. Priscilla contends that Douglas's death was a compensable consequence of a work injury he suffered in July 2000. She also contends that the employer, S & S Tire, Inc., #15, through its compensation carrier, Century Insurance, unreasonably denied Douglas temporary income benefits and medical expenses and thus should be held liable for statutory sanctions. As affirmed by the Board, the Administrative Law Judge (ALJ) found that Douglas's suicide was not the result of the work injury and that the employer/carrier (E/C) had reasonable grounds to contest Douglas's claim for benefits. We affirm.

Priscilla and Douglas began living together in 1999. At that time Douglas was in the final stages of what has been characterized as a tumultuous divorce. The divorce, ending a sixteen-year marriage, became final in January 2000. Priscilla and Douglas were married in December of that year.

Following a series of temporary jobs, Douglas went to work for S & S Tire in April 2000. S & S provides automobile maintenance services, and Douglas was hired as a mechanic. The work required that he regularly lift as much as seventy-five pounds and reach overhead for long periods. On July 28, 2000,

he was hammering when he experienced a sharp pain in his right shoulder. He informed his supervisor of the incident and took the rest of the day off. Thereafter, according to Priscilla, Douglas suffered from worsening pain in his shoulder, neck, and back. Although he returned to work without further absence, he depended on assistance from coworkers to perform heavier tasks, and his productivity declined. By mid-November the pain had become so severe that it compelled him to cease working. His last day of employment was November 13, 2000, and that day, for the first time, his supervisor filed an injury report.

In the meantime, Douglas had been seeking medical treatment. On August 24, 2000, he saw Dr. Ralph Alvarado, who took Douglas's history, prescribed pain medicines, and ordered diagnostic imaging of Douglas's shoulder and back. In October 2000, Dr. Alvarado described an MRI of Douglas's back as "horrendous." It showed a significant degenerative spinal condition and shoulder damage. Dr. Alvarado referred Douglas to a neurosurgeon and an orthopedic surgeon for further diagnosis and treatment. Because Douglas had been unable to obtain insurance coverage, he and Priscilla exhausted their savings to pay medical bills and apparently delayed seeking services because of their inability to pay for them. Eventually Douglas did see specialists, who, in December 2000 and January 2001, opined that the July work-place incident Douglas described

probably made a pre-existing torn rotator cuff worse and aroused the degenerative back condition so as to make it disabling. The specialists agreed that surgery to correct Douglas's shoulder injury should be the first step in his treatment.

By then, however, Douglas's insurance woes had become acute. Soon after the July incident Priscilla learned that Douglas's work-place health insurance would not go into effect until Douglas had been employed for six months, and even then benefits were unlikely because the policy did not cover pre-existing conditions. In early August 2000, she contacted S & S's compensation carrier, Century, and was told, she asserts, that Douglas's claim would be investigated, but in the meantime to submit medial bills to the employer. Accordingly, Priscilla claims, she began turning Douglas's medical bills over to his supervisor. The bills were not paid, however, so in October she contacted Century again and learned that no bills had been submitted. Priscilla then had some of the service providers fax their bills directly to Century. Not until mid-November, when Douglas ceased to work, did he and Priscilla learn that the supervisor had not yet filed an injury report.

Once the report was filed and bills submitted, Century's representative began to investigate the claim. Apparently she had Douglas complete and return a questionnaire, and she obtained a report from Dr. Alvarado. The doctor's

report made no mention of the alleged July work-place injury. Instead it stated that Douglas had given a history of a 1995 automobile accident, after which his back and shoulder symptoms had arisen. For a time, a doctor in Michigan had prescribed pain medications, but since moving to Kentucky (the record does not indicate when that was) Douglas had relied on over-the-counter remedies. Based on this report and on the S & S supervisor's assertion that Douglas had told him of a pre-existing shoulder problem, Century concluded that Douglas's condition was not work related and so denied his claim. It notified Douglas of the decision by letter dated December 4, 2000.

Immediately, Priscilla contacted both Dr. Alvarado and Century. She complained to Dr. Alvarado that he had apparently misunderstood Douglas's history and asked him to include in a new report Douglas's account of his July injury. Dr. Alvarado, however, who had discontinued Douglas's care, reiterated, in a letter "to whom it may concern," that Douglas had reported the 1995 accident. Priscilla told Century's representative that Dr. Alvarado's report was inaccurate and asked her to reconsider the claim. The representative refused, however, and said that the decision was final. Even after Priscilla submitted the specialists' reports stating that Douglas's symptoms and diagnostic images were consistent with his claim of a recent

exacerbation of pre-existing conditions, Century's representative refused to investigate further.

Apparently Douglas unsuccessfully sought unemployment benefits, but did obtain health insurance for December 2000 under a policy his father purchased. That insurance, however, lapsed after the one month. Without insurance and without an income, Douglas found himself in dire straits. According to Priscilla, he suffered constant pain, which made it difficult for him to sleep and eventually made it difficult for him to dress or bathe without her assistance. By about the middle of February 2001, he had exhausted his prescriptions of pain medicine. On February 26, he was denied pain medicine at an urgent care facility because he could not pay the $75.00 fee. His failure to pay child support had resulted in an order to appear in court on March 1. On February 28, Priscilla obtained prescriptions for Lortab, a pain medicine, and Klonopin, a sleep aid, for an injury she had suffered at work. The next day, the day of Douglas's court appearance, she did not waken until 2:00 p.m. Douglas was asleep, and she could not rouse him. Hoping to explain the difficulties they were having, she decided to go to court in his stead. At the courthouse, the county attorney accused her of being intoxicated, and she was jailed for the night.

About eight that night, Douglas's daughter visited his house and let him know what had happened to Priscilla. Upon her return home the next afternoon, Priscilla found Douglas's body lying on their bed. He had shot himself with a rifle. Pills later found in the sheets suggested that he had probably taken Priscilla's medicines as well.

In March 2002, Priscilla filed a claim for either death or survivor's benefits under the Workers' Compensation Act. By order entered in September 2003, the ALJ found that Douglas had suffered a work-related injury in July 2000 and would have suffered a permanent partial disability as a result. He awarded past due medical expenses, past due temporary total disability benefits, and survivor's permanent disability benefits. He denied Priscilla's claim for death benefits, however, and found that she had not met her burden of proving that Douglas's death was a proximate result of his injury. As noted above, the Workers' Compensation Board affirmed that ruling. It is from the Board's affirmance that Priscilla has appealed.

As Priscilla notes, suicide is compensable under KRS 342.750 "if (1) the employee sustained an injury which itself arose in the course of and resulted from covered employment; (2) without that injury the employee would not have developed a mental disorder of such a degree as to impair the employee's

normal and rational judgment; and (3) without that mental disorder, the employee would not have committed suicide."[3] Severe depression is a mental disorder for the purposes of this rule.[4] "If, however, a mental condition resulting in a suicide is proximately caused by non-work-related injuries or personal problems, . . . KRS 342.610(3) bars the claim."[5] KRS 342.610(3) provides in pertinent part that "[l]iability for compensation shall not apply where . . . death to the employee was proximately caused . . . by his willful intention to . . . kill himself."

Both parties submitted so-called psychological autopsies, prepared by psychiatrists, attempting to identify the causes of Douglas's suicide. Both experts believed that Douglas had suffered from a severe depression for at least the last month of his life. Although acknowledging that Douglas had apparently had back problems before; that he had recently been through a bitter divorce; and that, during the breakdown of his marriage, he had lost his best friend to suicide, Priscilla's expert opined that Douglas had become suicidally depressed only

[3] Advance Aluminum Company v. Leslie, 869 S.W.2d 39, 41 (Ky. 1994)(citing Wells v. Harrell, 714 S.W.2d 498 (Ky.App. 1986).

[4] Altes v. Petrocelli Electric Company, 704 N.Y.S.2d 372 (N.Y.App. 2000).

[5] Advance Aluminum Company v. Leslie, 869 S.W.2d at 41.

toward the end of his life as a result of his chronic pain and inability to work.

The E/C's expert, on the other hand, testified that without more knowledge of Douglas's history it was impossible to say with meaningful certainty which of the several burdens Douglas bore had been substantially responsible for his death. He admitted that Douglas's pain and financial straits would have contributed to his depression, but he would not admit that one could say how great that contribution had been. He noted that Douglas had apparently been prescribed an antidepressant during his divorce. The circumstances of the divorce and his friend's suicide could well have been the substantial sources of Douglas's depression, this doctor testified. And Douglas's final impulse to shoot himself could have arisen from drug intoxication and Priscilla's absence rather than his pain and unemployment.

The ALJ relied expressly on this latter expert's report and testimony in finding that Priscilla had failed to prove that the workplace injury was the proximate cause of Douglas's death. Priscilla contends that the expert based his opinion on the mistaken belief that "proximate cause" means "only cause." In fact, however, she argues, she was obliged to prove only that the injury was a factor substantially contributing to the death, not that it was the sole or even the

primary cause.[6] Citing Cepero v. Fabricated Metals Corporation,[7] she insists that the expert's incorrect assumption so tainted his opinion as to render it unreliable. She argues further that the expert essentially conceded that the injury was indeed a substantially contributing factor.

We do not agree with Priscilla's characterization of the expert's report and testimony. It is true that at one point in his report he stated that the injury "by itself" cannot be said to have caused the suicide. And it is true that during an intense cross-examination he momentarily agreed with the questioner that Douglas's injury was a substantial cause of his depression. The totality of the report and testimony, however, make it clear that the expert believed that one could not say which of Douglas's problems, either alone or in combination, were substantial causes of his death and which were merely conditions. As the Board noted, the ALJ's reliance upon this testimony, during which the substantial-cause standard was referred to several times, indicates clearly enough that he was aware of that standard and applied it. In light of that evidence, the ALJ's finding that Douglas's injury had not been shown to be a proximate cause of his death cannot be

[6] *See* Pathways, Inc. v. Hammons, 113 S.W.3d 85 (Ky. 2003) (discussing standards for determining legal cause).

[7] 132 S.W.3d 839 (Ky. 2004).

characterized as a flagrant error, and therefore may not be disturbed on appeal.[8]

Priscilla also contends that the ALJ erred by refusing to enhance by two-tenths the multiplier applied to her award. She is entitled to the enhancement, she maintains, both because Douglas had only a ninth-grade education and because he had obtained his GED. She relies on KRS 342.730(1)(c)3, which provides in pertinent part as follows:

> Recognizing that limited education and advancing age impact an employee's post-injury earning capacity, an education and age factor, when applicable, shall be added to the income benefit multiplier set forth in paragraph (c)1 of this subsection. If at the time of injury, the employee has less than eight (8) years of formal education, the multiplier shall be increased by four-tenths (0.4); if the employee had less than twelve (12) years of education or a high school General Education Development diploma, the multiplier shall be increased by two-tenths (0.2).

Because Douglas had obtained his GED, the ALJ ruled that he was not eligible for the two-tenths increase. Priscilla maintains that the ALJ (and the Board) misconstrued subsection (c)3. Under that statute, she argues, one is entitled to the

[8] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). (The function of this Court's review of the Board, our Supreme Court has held, "is to correct the Board 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.").

two-tenths increase either if one has more that eight but less than twelve years of schooling or if one has a GED. Douglas satisfied both conditions and so on the basis of either was entitled to the increase. The Board and the ALJ read the statute as providing that one is not eligible for the increase if one has at least twelve years of schooling or the GED equivalent. Because Douglas had his GED he was not eligible.

Although grammatically, as Priscilla points out, the statute admits of either reading, we are convinced that the ALJ's and Board's reading better comports with the ordinary understanding of a GED as the legal equivalent of a twelfth-grade education.

As noted above, the ALJ ultimately decided that Douglas had suffered a workplace injury and was entitled to benefits for temporary total disability and medical expenses. Priscilla contends that the E/C's delay in providing those benefits was unreasonable and so should be penalized under KRS 342.040 and KRS 342.310. Those statutes provide that penalties in the form of interest, costs, and attorney fees may be assessed against an E/C that, without reasonable grounds or foundation, denies or delays the payment of income benefits or contests a claim for such benefits.[9] The ALJ ruled that the

[9] The Travelers Indemnity Company v. Reker, 100 S.W.3d 756 (Ky. 2003).

delay in this case was not unreasonable because the E/C had meritorious grounds for contending that Douglas had not suffered a workplace injury and that his condition was not work related. In particular, the ALJ noted Dr. Alvarado's report and letter, which indicate that, at least as far as Dr. Alvarado understood, Douglas himself attributed his shoulder and neck problems to a 1995 auto accident, not to a workplace injury.

Priscilla maintains that the E/C's reliance on Dr. Alvarado's report was unreasonable because that report was inconsistent with Douglas's on-going claims for medical benefits, with sworn statements by co-workers who witnessed an apparent workplace incident, with the account of a workplace injury Douglas gave to the other doctors who examined him, and with the imaging results that indicated that Douglas may indeed have suffered a recent exacerbation of his underlying back and shoulder problems. It was this evidence that ultimately persuaded the ALJ that Douglas was entitled to benefits. Priscilla contends that the E/C either knew of this evidence or would have known of it had it conducted a reasonable investigation, and that in light of this evidence the refusal to provide benefits was unreasonable.

We disagree. As the Board noted, Douglas's evidence did not clearly establish the existence of a workplace injury, and there was substantial evidence to the contrary. A different

ALJ, therefore, could have found in favor of the E/C. Because the E/C's defense was thus meritorious, it cannot be deemed unreasonable.[10]

Finally, the ALJ declined to address Priscilla's argument that Century's agent did not conduct an adequate investigation. The ALJ cited KRS 342.267, which authorizes the commissioner of the department of workers' claims to sanction carriers and others that engage in unfair claims settlement practices, and stated "the extent of the carrier's investigation is a matter for investigation by the Commissioner . . . not for the Administrative Law Judge [under either KRS 342.040 and KRS 342.310]." Priscilla maintains that the ALJ erred by failing to consider whether Century's agent adequately investigated Douglas's claim.

Although we agree with the ALJ that a carrier's failure to investigate, standing alone, is a practice for the Commissioner to sanction, not the ALJ, we also agree with Priscilla that the extent of a carrier's investigation bears materially on the reasonableness of its decision to deny benefits and contest a claim. The carrier has a duty to make a

[10] Peabody Coal Company v. Goforth, 857 S.W.2d 167 (Ky. 1993); Kendrick v. Bailey Vault Company, Inc., 944 S.W.2d 147 (Ky.App. 1997).

reasonably thorough investigation.[11] If such an investigation would have disclosed facts rendering the decision to deny benefits unreasonable, knowledge of those facts may be attributed to the carrier and sanctions imposed under KRS 342.040 or KRS 342.310. To the extent, if any, that the Board and the ALJ held otherwise, they erred. The error was harmless, however, for as noted above, even attributing to the E/C all of the information Priscilla contends it failed to discover, the decision to deny benefits and contest the claim was not unreasonable.

We are convinced, in summary, that the ALJ and the Board addressed this very sad case fairly and without reversible error. Substantial evidence supported the ALJ's finding that Douglas's suicide was not work related; KRS 342.730(1)(c)3 does not entitle GED holders to an increased benefits multiplier; and, though one may wish that our health-care system could have served Douglas better and more promptly, the employer and its carrier are not to be sanctioned for contesting a doubtful claim. Accordingly, we affirm the March 15, 2004, and August 13, 2004, orders of the Workers' Compensation Board.

ALL CONCUR.

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[11] 803 KAR 25:240 § 4; Crittenden Orange Blossom Fruit v. Stone, 492 So. 2d 1106 (Fla.App. 1986); Jones v. Arnold, 371 So.2d 1258 (La.App. 1979).

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