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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001613-WC

MICHAEL REYNOLDS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 03-WC-91900

MAXIM/CARLISLE CONSTRUCTION;
HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

BARBER, JUDGE: Appellant, Michael Reynolds (Reynolds), petitions for review of a decision of the Workers' Compensation Board (WCB) that affirmed a determination by the Administrative Law Judge (ALJ) that his back injury on November 3, 2003 while employed at Appellee, Maxim/Carlisle Construction Company, (Carlisle) was not a separate and distinct injury pursuant to

KRS 342.0011(1).[1] The ALJ found that his back injury was a temporary exacerbation of a pre-existing condition from an injury that occurred December 24, 2001.[2] Therefore, the ALJ found the claim related to the original back injury was time barred and Carlisle was liable for medical expenses related to the November 3, 2003 injury until December 24, 2003. We affirm.

Reynolds began working for Carlisle in 1998. Carlisle builds roads and performs excavation for building sites. Reynolds served as a field mechanic with responsibilities for repair and maintenance of heavy equipment such as track hoes, track loaders, dozers, scrapers, compactors, and graders. At the time of the hearing, Reynolds still worked as a field mechanic full-time for Carlisle.[3]

On January 3, 2002, Reynolds experienced pain throughout his back while attempting to lift an eighty pound hydraulic test kit from his tool box with his right hand. He finished his shift and reported the injury to his supervisor the following day. Reynolds first sought treatment for his back pain, including physical therapy and epidural injections, with

[1] Reynolds had other injuries listed in his claim, but his appeal is limited to the November 3, 2003 back injury.

[2] The record reflects that Reynolds' first back injury occurred on January 3, 2002. An injury did occur on December 24, 2001, but it was a left elbow injury. Reynolds did not appeal this finding in his appeal to the WCB or to our court.

[3] Reynolds worked 50-55 hours per week on average.

little relief at St. Elizabeth Medical Center and Christ Hospital. Later, Reynolds sought relief from a chiropractor, Mark G. Schweitzer, D.C., on July 10, 2003. Reynolds responded well to Dr. Schweitzer's treatment.[4] Initially, Reynolds saw Dr. Schweitzer about twice a week, but later decreased the frequency of treatment to approximately once a week.[5] To Reynolds' credit, he did not miss a day of work as a result of his January 2002 injury.

Unfortunately, Reynolds suffered another episode with his back on November 3, 2003, while he was alone and attempted to manipulate a 250 pound hydraulic cylinder. At the time of the November 3, 2003 episode, Reynolds was still under the care of Dr. Schweitzer and coincidentally had an appointment with him that day.[6] Reynolds was still being treated by Dr. Schweitzer at the time of the hearing, but the frequency had decreased to only once every two weeks.

The final hearing was held January 25, 2005 before ALJ Donna H. Terry. The ALJ issued her opinion and award on March 8, 2005. The ALJ found that the January 3, 2002 low back injury

[4] In his deposition, Dr. Schweitzer states that Reynolds was placed in the prone antigravity position, received flexion distraction technique, as well as sideline sacroiliac manipulation on nearly every visit. He also administered electrical stimulation, ice, and heat during the early stages of Reynolds' treatment.

[5] Reynolds had decreased to about once a week on his chiropractic visits prior to his November 3, 2003 injury.

[6] Dr. Schweitzer testified in his November 11, 2004 deposition that he provided the same treatment November 3, 2003, as he had on prior visits.

was time barred pursuant to KRS 342.185. The ALJ further found that the November 3, 2003 injury was not a separate injury pursuant to KRS 342.0011(1) causing a harmful change or significant difference in symptomatology, but was a temporary exacerbation of the December 24, 2001 injury. As such, Reynolds was entitled to payment of related medical expenses, including reasonable and necessary chiropractic treatment, up to and including December 24, 2003. Reynolds appealed to the WCB April 6, 2005. The WCB issued an opinion July 8, 2005, affirming the ALJ award. Following this affirmation, Reynolds appealed to our court. Reynolds' sole argument is that the ALJ erred in not finding his November 3, 2003 back injury as a separate and distinct injury entitling him to medical and permanent partial disability benefits.

Reynolds argues that the medical evidence supports a finding that his November 3, 2003 back injury was a separate and distinct injury under KRS 342.0011(1). Reynolds relies upon the testimony and medical reports of Dr. Schweitzer, the only medical witness presented in his claim.

The claimant bears the burden of proof and the risk of non-persuasion before the fact-finder with regard to every element of a workers' compensation claim. Magic Coal Company v. Fox, 19 S.W.3d 88, 96 (Ky. 2000). In order for that burden to be sustained, no less than substantial evidence of each element

of the claim must be introduced. Id. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the mind of reasonable people. Id. Although substantial evidence is sufficient to support an essential finding of fact, it will not necessarily require a favorable ruling, even in instances where the contrary evidence is less than substantial. Id. Only evidence which is so overwhelming that no reasonable person would fail to be persuaded by it will compel a particular finding. Id. Therefore, since Reynolds was unsuccessful in his burden of proof, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky. 1984).

Compelling evidence is defined as evidence so overwhelming that no reasonable person could reach the conclusion of the ALJ. Webster County Coal Corp. v. Lee, 125 S.W.3d 310, 316 (Ky.App. 2003). The ALJ has the sole authority to determine the weight, credibility, and substance of the evidence and to draw reasonable inferences from the evidence. Transportation Cabinet v. Poe, 69 S.W.3d 60, 62 (Ky. 2001), see also KRS 342.285. The ALJ has the discretion to choose whom and what to believe. Id., (citing Pruitt v. Bugg Brothers, 547 S.W.2d 123, 125 (Ky. 1977)). The ALJ, as fact-finder, may

reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 929 (Ky. 2002), (citing Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 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. Whittaker v. Rowland, 998 S.W.2d 479, 482 (Ky. 1999).

The medical evidence related to Reynolds' back injury submitted in this matter was solely from Dr. Schweitzer and consisted of a medical report,[7] a letter with Reynolds' impairment rating,[8] and a transcript of Dr. Schweitzer's deposition.[9] The ALJ stated the following in her Opinion and Award:

> The most troubling and contested issue is the compensability of Mr. Reynolds' back condition. Mr. Reynolds is a credible witness and the Administrative Law Judge finds that he did report the November 3, 2003 incident to one of his two supervisors on the following day. However, the effect of that incident has been vigorously contested.

[7] Workers Compensation Form 107.

[8] The letter was prepared October 4, 2004 and gave Reynolds an 8% permanent impairment rating.

[9] The deposition was taken November 11, 2004.

Under KRS 342.0011(1), an employee bears the burden of proving that an incident is the proximate cause of a harmful change in the human organism evidenced by objective medical findings. In this case, Mr. Reynolds was undergoing active chiropractic treatment for back symptoms which waxed and waned depending on his job duties. To his credit, Mr. Reynolds is an industrious worker who continued to perform his regular job, including lifting, bending, and twisting on a regular basis, the very type of activities which could be expected to exacerbate his already-active back complaints. On November 3, 2003, Mr. Reynolds reported to Dr. Schweitzer that he had experienced "bad days" on Monday, Tuesday, and Wednesday of that week while pulling a cylinder and received the same type of treatment which had been rendered on each of his previous visits. Subsequent chiropractic notes showed improvement in flexibility and pain level and Dr. Schweitzer indicated that Mr. Reynolds currently has about the same residual symptoms as before the November 3, 2003 incident and that his condition has returned to baseline. Dr. Schweitzer testified that he would probably have assessed the same impairment rating before and after November 3, 2003 and that the type of treatment did not change before or after that date.

Based upon the foregoing, the Administrative Law Judge finds that the incident which caused the harmful change in Mr. Reynolds' low back occurred on December 24, 2001 and that he sustained temporary exacerbations of that injury thereafter with various work activities. However, he had not been released from chiropractic care prior to November 3, 2003 and he continued to receive the same type of treatment for similar symptoms both before and after the November 3, 2003 incident. While Dr. Schweitzer's full treatment notes were not filed herein, his deposition testimony

> establishes that by December 12, 2003, Mr. Reynolds reported significant improvement and his symptoms and range of motion had dramatically improved. Thereafter, the symptoms appear to have waxed and waned on a similar basis as in the past.
>
> While Mr. Reynolds is entitled to payment of medical expenses for the cure and relief of a work injury, he failed to file a claim to assert entitlement to benefits arising from that injury within two years following the significant injury which occurred on December 24, 2001 and Carlisle Construction has no liability for payment of medical expenses arising from the effects of the chronic December 24, 2001 back injury after December 24, 2003. Therefore, Mr. Reynolds shall be entitled to payment for reasonable and necessary chiropractic treatment by Dr. Schweitzer up to and including December 24, 2003 but Carlisle Construction shall have no liability for payment of treatment thereafter. The November 3, 2003 incident was not a separate injury pursuant to KRS 342.0011(1) causing a harmful change or significant difference in symptomatology but was rather a temporary exacerbation of the December 24, 2001 injury and does not trigger an additional two years of benefits.

Reynolds argues there was compelling evidence related to Dr. Schweitzer which requires reversal. Reynolds points out that Dr. Schweitzer opined in his Form 107 and deposition that Reynolds sustained a new and distinct injury on November 3, 2003. He also argues that the ALJ should not have substituted her judgment for that of the uncontradicted medical expert relying upon Mengel v. Hawaiian-Tropic, 618 S.W.2d 184 (Ky.App. 1981). We believe that Mengel is distinguishable from the

instant matter. In Mengel, there was a complete disregard for the medical evidence related to causation. In the present case, Dr. Schweitzer provided opinions in his deposition which would support the findings of the ALJ.[10] Therefore, we do not

[10] For example, in his November 11, 2004 deposition, Dr. Schweitzer testified as follows:

> Q. . . . Are you saying that at this point he's back to the baseline he was before the November 2003 incident?
>
> A. For the most part, I think that I would agree that currently he's at about the same baseline that he was before the November 2003 exacerbation.
>
> Q. Okay. But did he have an increase, a temporary flare-up in his pain, which is consistent with his history for many years?
>
> A. Well, there's two different arenas that I have to treat this patient in. One is the patient himself, and I have to gear a treatment plan based on what he presents me with. But then I also have to establish a correspondence with a third party payor explaining why, why should someone with a sprain or strain or herniated disc that progressed to this point all of a sudden have an increase in treatment frequency and all of a – why is this continuing to go on. So you evidence to them why. And probably the most significant of the reinjuries during that time was that November 3 incident. So I'm describing to them that the treatments that followed the November 3rd incident were primarily – maybe 90 percent of what I was treating was what – the symptomatology that resulted from that more recent or most recent injury.
>
> Q. And Doctor Schweitzer, in individuals who have chronic low back pain and especially that continue to do manual labor – and you noted in one of your notes that it spoke a lot of this gentleman's character that he continued to work – that's kind of the nature of the beast, isn't it? I mean, they're going to have activities, episodes, things that happen to them at work going to flare-up their pain, they're going to need more medication, they're going to just need a window of more concentrated treatment; then they return, your hope is, back to where they were before that and they go on; and then maybe six months or a year later they have another incident and it's the same thing, we have a flare-up, have to give more medication, more treatment. That's just consistent with the nature of the problem that this gentleman has, isn't it?
>
> A. A person with his back condition might be expected to follow in a course like that. It's certainly reasonable.
>
> . . .

find that Mengel is dispositive in this appeal as argued by Reynolds.

As stated earlier, in order for this court to reverse the findings of the ALJ unfavorable to the claimant and upon which he had the burden of proof, the test is whether the evidence compelled a finding in his favor. Following a review of the evidence presented by Reynolds, we are unpersuaded that it is of a nature that is compelling. While the evidence may have been used to support a finding for Reynolds, the ALJ chose not to do so. This is not sufficient to warrant a reversal. Further, we believe Dr. Schweitzer's testimony qualifies as substantial evidence sufficient to support the ALJ determination that the November 3, 2003 incident was a temporary exacerbation of a prior injury rather than a separate and distinct injury as defined by KRS 342.0011(1).[11]

Based on the foregoing, the decision of the WCB is affirmed.

ALL CONCUR.

> Q. Okay. And I shouldn't have interrupted you, but going back then to where I was before, I understand the 8 percent, the basis for your determination of that. But again, that would have been the same impairment before November of 2003, that is a long-standing impairment?
>
> A. If I were to base – if I would have done a similar impairment opinion but on the visit prior to the November 2003 visit, it would probably look similar to that.

[11] The ALJ also found that a claim related to the January 3, 2002 back injury was time barred pursuant to KRS 342.185.

BRIEF FOR APPELLANT:

Larry Hicks
Edgewood, Kentucky

BRIEF FOR APPELLEE:

Ronald J. Pohl
Lexington, Kentucky