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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001073-WC

VENDOME COPPER & BRASS WORKS, INC. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-96796

JAMES SCHEHR; HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE; AND THE WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: Vendome Copper & Brass Works, Inc. (Vendome) seeks review of an order from the Workers' Compensation Board (the Board) affirming the decision of Hon. Lawrence F. Smith, Administrative Law Judge (ALJ), granting James Schehr an award of permanent partial disability benefits based upon a disability

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

rating of 15% enhanced by the 3-multiplier pursuant to KRS 342.730(1)(c)1. For the reasons discussed below, we affirm.

On April 8, 2002, Schehr was working for Vendome when he fell approximately twelve feet from a ladder, landing on his left hip and lower back. He contends that he immediately experienced pain in his back as a result of the fall, and later that same day developed pain in his left shoulder.

Dr. Jeffrey Fadel repaired Schehr's rotator cuff, injured in the fall, on January 10, 2003. For treatment of his low back pain, Schehr presented himself to Dr. David P. Rouben, a board certified orthopedic surgeon. Dr. Rouben interpreted an MRI of Schehr's low back to reveal evidence of a compression fracture at L1 and disc degeneration at T12-L1, as well as further disc degeneration of L5-S1. Dr. Rouben ascribed both the compression fracture and the degeneration at T12-L1 to Schehr's work-related injury. Dr. Rouben further was of the opinion that the best course of treatment included anterior/posterior fusion surgery from T11 through L2.

In June 2003, Vendome's insurance carrier had Dr. Peter Kirsch review Dr. Rouben's findings and recommendation. Dr. Kirsch opined that there was no direct relationship between the proposed surgery and Schehr's work-related injury. As a result, Vendome denied liability for the proposed surgery.

On August 8, 2003, Schehr filed an Application for Resolution of Injury Claim challenging Vendome's refusal to assent to the proposed surgery. Schehr's case was eventually bifurcated, with the issue of the medical necessity and reasonableness of the fusion surgery to be heard separately from the remainder of his claim for benefits.

Following a hearing held on October 11, 2004, the ALJ entered an interlocutory decision finding the proposed surgery to be neither reasonable nor necessary. In his December 7, 2004, decision, the ALJ stated:

> **Is the proposed surgery reasonable and medically necessary?** KRS 342.020(1) requires the employer to pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease. See also Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993) and National Pizza Co. v. Curry, Ky. App., 802 S.W.2d 949 (1991). In Square D. v. Tipton, *supra*, the court stated:
>
> > "that the legislature did not intend to require an employer to pay for medical expenses which result from treatment that does not provide "reasonable benefit" to the injured worker."
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> Defendant argues that the proposed two-level fusion surgery is unreasonable and unnecessary. Defendant points out that

several surgeons including Dr. Rouben's former partner, Dr. Reveal, disagree with him on the character of the injury. Of the seven surgeons who have offered an opinion on the matter, only Dr. Rouben concludes that there is a need for this severely invasive two-level spinal fusion.

On the other hand, Dr. Rouben defends his position by noting that all of the seven surgeons giving an opinion on plaintiff's condition, only he, as treating physician, has followed and examined plaintiff. While acknowledging that the surgery is complicated, lengthy and expensive, Dr. Rouben asserts that he has had no failures in the 40 or 50 surgical procedures of the same type done to date. Added to this is the fact that plaintiff is now willing to try anything to get relief from pain. Accordingly, he argues that the proposed surgery is both reasonable and necessary.

While this ALJ has a profound respect for all highly trained and widely respected physicians who have offered opinions in this matter, I find the report of Dr. Guarnaschelli uniquely credible. First of all, because of his expertise and reputation, plaintiffs as well as defendants seek his counsel, care and advice. Secondly, he was able to examine the plaintiff in 2004, two years after plaintiff's injury. He was, therefore, in a position to offer a fresh assessment of plaintiff's medical condition. Even with the plaintiff's subjective and objective complaints, Dr. Guarnaschelli strongly urged against the type of surgery being proposed by Dr. Rouben. However, despite Dr. Guarnaschelli's warnings, plaintiff continues in his request to have it approved. When, as here, the evidence in conflicting, the ALJ must resolve the conflict. . . . Therefore, this ALJ after examining all the evidence, has extreme reservations about the wisdom of having such

> an invasive and radical procedure performed on the plaintiff, who admittedly continues in his ability to work full time. When combined with Dr. Guarnaschelli's opinion, this ALJ finds that the proposed surgery is neither reasonable nor necessary.

ALJ Opinion (December 7, 2004), pp. 12-14).

Following the ALJ's decision regarding the proposed surgery, the parties turned their attention to the remainder of Schehr's claim for benefits from a permanent partial disability. On September 24, 2005, the ALJ rendered his final decision on the question of impairment:

> Based on plaintiff's testimony and the testimony of his wife, Judy, along with the medical reports I find that plaintiff sustained a work-related injury on April 8, 2002. When comparing the plaintiff's testimony to the opinions relating to permanent impairment that had been offered by the various physicians, I find Dr. Rouben's conclusions on permanent impairment more persuasive. Accordingly, I find the plaintiff has a 15% impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.

ALJ Opinion (September 24, 2005), pp. 4-5.

After first unsuccessfully moving for reconsideration, Vendome appealed the ALJ's decision to the Board. Vendome argued that the ALJ's decision was not supported by substantial evidence in that his decision as to impairment was inconsistent with his prior interlocutory order questioning Dr. Rouben's

proposed course of treatment. The Board affirmed, however, holding:

> It is clear that ALJ Smith's initial ruling of December 7, 2004, regarding the unreasonableness of the fusion surgery recommended by Dr. Rouben was interlocutory and not a final decision on the merits; thus, neither res judicata nor collateral estoppel applies. Our courts have consistently concluded that an appeal from an interlocutory order is not sustainable. . . . The rationale behind this well established rule of law is that during the pendency of a controversy, the ALJ as fact-finder retains jurisdiction and may change, reverse, modify, amend or vacate any prior order or ruling. . . . For that reason, the ALJ was not bound by any aspect of his earlier interlocutory ruling in rendering the final decision on the merits of Schehr's claim.
>
> That having been said, we find no inconsistency between the ALJ's interlocutory order of December 7, 2004, and his later decision rendered September 24, 2005, conclusively resolving the remaining issues of Schehr's case. While the ALJ in the interlocutory order indicated he was not persuaded by Dr. Rouben's testimony that the proposed fusion surgery was reasonable and necessary, he at no time made a finding that Schehr's thoracolumbar complaints were unrelated to his fall from the ladder at work. The actual grounds cited by the ALJ for denying the compensability of the surgery were Dr. Gaurnaschelli's [sic] admonishments against the procedure; the fact that the respondent was working at the time the interlocutory ruling was made; and his conviction that the proposed treatment was costly, invasive and radical. The ALJ did not take issue with Dr. Rouben's characterization of Schehr's "right-sided scoliotic deformity secondary to the

> compression fracture at L1" as a recent development causally related to the April 8, 2002, trauma – or for that matter, Dr. Guarnaschelli's opinion that the L1 fracture was a pre-existing condition aggravated by the work-related fall and, thus the precipitating cause of Schehr's contemporaneous mid-back complaints.
>
> Likewise, we find nothing in the ALJ's September 24, 2005, final decision indicating that he rejected Dr. Rouben's thoracolumbar diagnosis or cast off Schehr's L1 compression fracture as nonwork-related. Instead, we read the ALJ's ruling as indicating that he implicitly found the entirety of Dr. Rouben's 15% impairment rating to be secondary to the events of April 8, 2002, and, therefore, compensable. Since the opinions expressed by both Dr. Rouben and Dr. Guarnaschelli support a finding in Schehr's favor that his thoracolumbar complaints relative to the compression fracture at L1 are work-related, we find no merit in Vendome's charge that the award granted by the ALJ is not supported by substantial evidence. As set out above, the ALJ is free to pick and choose from the evidence those conclusions and inferences that he as fact-finder determines to be most credible. Where the ruling by an ALJ is supported by substantial evidence, it may not be disturbed by this Board on appeal.

Board's Opinion Affirming, p. 15-16. This appeal followed.

As the finder of fact, the ALJ has the sole discretion to determine the character, quality and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). In carrying out his duties, the ALJ is free to reject any

testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977); *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky. App. 2000). The ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997); *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky. App. 1995). When there is conflicting evidence, he is to choose which witnesses and evidence to believe. *Pruitt v. Bugg Brothers*, 547 S.W.2d 123 (Ky. 1977).

In reviewing the ALJ's decision, the Board must decide whether the evidence compelled a result contrary to that reached by the ALJ. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985). Evidence that is merely contrary to the ALJ's decision is not adequate to require reversal on appeal. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

Our purpose in reviewing the decisions of the Board "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." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). In so reviewing the Board's decision in this matter, we agree that the ALJ's decision is supported by substantial evidence. As a result, we conclude that the Board committed no error.

The Board is correct in stating that when the ALJ rendered his final decision he was not bound by any of the findings in his interlocutory opinion. The ALJ was free to follow his prior order or, if he so chose, to reverse or modify it as necessary. *Union Light, Heat & Power Co. v. Public Service Comm'n*, 271 S.W.2d 361 (Ky. 1954); *Western Craft Paper Group v. Dep't for Natural Resources and Env'l Protection*, 632 S.W.2d 454 (Ky. App. 1982).

Regardless, we agree with the Board that there was no inconsistency between the ALJ's interlocutory opinion and his final decision. Despite his holding against the fusion surgery, the ALJ did not disagree with Dr. Rouben's opinion that Schehr's back pain was the result of a secondary condition causally related to Schehr's work-related injury. In fact, Dr. Guarnaschelli, who disagreed with the necessity of the fusion

surgery, opined that although Schehr's compression fracture was pre-existing, it was the aggravation of that condition in the work-related fall that precipitated Schehr's back pain.

Additionally, in rendering his final decision the ALJ carefully reviewed all of the conflicting evidence before concluding that Dr. Rouben's impairment rating was the most persuasive. Under these circumstances, we do not believe that the ALJ's decision lacks substantial supporting evidence. Thus, we can find no error in the Board's decision affirming the ALJ's opinion and award.

For the foregoing reasons, the Board's final judgment is affirmed.

ALL CONCUR.

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