

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000512-WC

PATRICK PROCESSING, LLC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-01663

JAMES E. WHITT;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.
BUCKINGHAM, SENIOR JUDGE: Patrick Processing, LLC, petitions
for review of an opinion of the Workers' Compensation Board
(Board) that affirmed in part and vacated in part and remanded
an opinion and order of an administrative law judge (ALJ)

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 KRS 21.580.

dismissing James E. Whitt's claim for benefits due to an alleged work-related accident. We affirm.

On April 14, 2004, Whitt was working for Patrick Processing as a belt man when he hurt his low back while lifting a wheelbarrow full of rock dust. Although he did not work much the rest of the day, Whitt finished his shift and reported the injury to his supervisor. Whitt testified that he continued to work in pain every day until May 28 when he could no longer work because the pain prevented him from doing so. On May 29, 2004, Whitt sought medical treatment at a hospital emergency room.

Over the next several months, Whitt was treated for pain with pain medication by his family physician, Dr. Brian Francis. Dr. Francis also ordered an MRI. Because Dr. Francis was not in the provider network of Patrick Processing's workers' compensation carrier, the MRI was not approved and Whitt was required to designate a different physician.

On August 12, 2004, Whitt again reported to a hospital emergency room and was treated and discharged with a diagnosis of low back pain. Dr. Timothy Wagner, a Board-certified orthopedic surgeon, saw Whitt on September 1, 2004, for an independent medical examination at the request of Patrick Processing. Further, following an examination on September 16, 2004, by a physician, Dr. Sai P. Gutti, who was in the carrier's provider network, an MRI was arranged.

Before having the MRI, Whitt was involved in a motor vehicle accident on October 2, 2004. He was transported to a hospital by ambulance. At the hospital, Whitt complained of pain in his neck, head, and right hand. An MRI was performed on October 12, 2004. It revealed bulging at L4-L5 as well as a disk herniation to the right of L5-S1.

Dr. Wagner opined that he did not believe Whitt's disk herniation was related to the work-related incident. Rather, he stated that the condition was due to the natural process of Whitt's degenerating disk at L5-S1, which had occurred since his initial evaluation and was worsened by the motor vehicle accident. Dr. Wagner specifically stated that he believed Whitt's work-related injury was only a strain to the lower back and that the disk herniation was not related to that injury.

Dr. Anbu Nadar, a Board-certified orthopedic surgeon, performed an independent medical examination at the request of Whitt's attorney. Dr. Nadar diagnosed Whitt as having a lumbosacral strain with radiculopathy and herniation at L5-S1. Dr. Nadar opined that Whitt's condition was due to the April 2004 work-related injury.

Whitt's claim for workers' compensation benefits was heard by an ALJ. Whitt argued that the disk herniation predated the motor vehicle accident and was simply undiscovered until later. He pointed to medical evidence that his radicular

complaints existed prior to the vehicle accident. On the other hand, Patrick Processing argued that "(t)he medical evidence of record establishes that the Plaintiff suffered a low back strain as a result of the work-related injury." It further argued that the disk herniation was attributable only to the vehicle accident. It did not present any argument with respect to income or medical benefits claimed for the time period between May 28, 2004, Whitt's last day of work, and October 4, 2004, the date of the vehicle accident.

The ALJ was not convinced that Whitt suffered a herniated disk at the time of the April 2004 work-related injury. The ALJ found the testimony of Dr. Wagner that the herniated disk was the result of the vehicle accident to be credible. Therefore, the ALJ dismissed Whitt's claim for benefits. Significantly, the ALJ did not mention Whitt's low back strain.

Whitt appealed to the Workers' Compensation Board. The Board found "uncontradicted evidence" that Whitt had suffered an injury on April 14, 2004. Thus, it concluded that Whitt was entitled to income and medical benefits commensurate with any disability resulting from the injury. The Board emphasized that "the ALJ's finding that any permanent injury to his back is due to the MVA does not rule out an award of income and medical benefits for the interim period, May 28, 2004,

through October 1, 2004, when he was unable to work and undergoing medical treatment." The Board also noted that even Dr. Wagner had acknowledged that Whitt had suffered a low back strain in April 2004.

Further, the Board stated as follows:

We believe there is an incongruity between the foregoing findings and the ALJ's dismissal of Whitt's claim outright. The parties specifically preserved the issues of extent and duration of disability, overpayment of TTD benefits, AWW and correct TTD rate, and entitlement to medical benefits. The ALJ did not rule on any of these particular issues, having dismissed Whitt's claim in its entirety. We agree with Whitt, however, that some additional explanation is needed to make the jump from the ALJ's finding that Whitt failed to prove that the herniated disk was work-related and that Whitt failed to prove he suffered a work-related injury. There is substantial evidence to support the ALJ's conclusion that Whitt's herniated disk was due to the October 2, 2004, MVA and we do not disturb that finding.

Citing *Robertson v. United Parcel Service*, 64 S.W.3d 284 (Ky. 2001), the Board noted it had "consistently held that, following the December 12, 1996, amendments to the Workers' Compensation Act that it is possible for a claimant to submit evidence of a temporary injury for which TTD and temporary medical benefits may be paid and yet fail in his burden to prove a permanent harmful change to the human organism for which permanent benefits are appropriate."

Further, the Board noted that an ALJ had the authority to reject uncontradicted testimony so long as a sufficient explanation of its reasons for doing so was given. See *Commonwealth v. Workers' Compensation Board*, 697 S.W.2d 540, 541 (Ky.App. 1985). Finding that there was uncontradicted evidence that Whitt had suffered a work-related injury on April 14, 2004, the Board concluded that the case should be remanded to the ALJ since the ALJ's opinion "lacks sufficient explanation for his refusal to award even temporary income or medical benefits up to that point." The Board instructed the ALJ to "either issue an award commensurate with the evidence or to explain his reason for rejecting same." This petition for review by Patrick Processing followed.

Patrick Processing argues to this court that the Board exceeded its authority in its review of the ALJ's decision. Noting that the burden of proof was on Whitt to convince the Board that the evidence compelled an award in his favor, Patrick Processing contends that Whitt could not meet that burden because Dr. Wagner's testimony supported the ALJ's decision.

Patrick Processing overlooks the fact that there was uncontradicted evidence that Whitt suffered a work-related back injury, an injury unrelated to the herniated disk. Even Dr. Wagner acknowledged that fact in his testimony. We agree with the Board that in light of the uncontradicted evidence of the

work-related back injury, the ALJ could not reject Whitt's claim in that regard without giving a sufficient explanation of his reasons for doing so. See *Commonwealth v. Workers' Compensation Board, supra*. The Board acted properly in remanding the case to the ALJ to issue an award or to explain his reasons for not doing so.

The Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEES:

Dennis James Keenan
South Williamson, Kentucky