

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2006-CA-000590-WC

PREFERRED INDUSTRIES, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-04-98145

ROGER MCDONALD; HON. W. BRUCE  
COWDEN, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE: Preferred Industries, Inc., has petitioned for review of the February 17, 2006, opinion of the Workers' Compensation Board, which affirmed in part, vacated in part, and remanded the matter to the Administrative Law Judge for further proceedings in accordance with its opinion. The Board vacated the portion of the ALJ's opinion, order and award granting Roger McDonald an award of future medical benefits for his psychiatric/psychological impairment. In that we believe the

Board's opinion vacating and remanding on this issue was necessary to permit the ALJ to either correct his findings of fact or to deny the award of future medical benefits, we affirm.

McDonald injured his back on December 20, 2003, while he was lifting a fourteen-foot pipe weighing between 200 and 300 pounds. When the initial medical treatment of chiropractic care and physical therapy provided little relief, McDonald underwent back surgery on May 26, 2004. He subsequently returned to work for a new employer, worked seven days, and then quit, claiming he could no longer perform the job. He has not worked since that time. According to the ALJ's opinion, since then he has been referred to pain management and been seen for psychological issues, including depression, because he cannot work.

The medical evidence was summarized by the ALJ as follows:

4. Medical evidence consists of the following: The Administrative Law Judge recognizes a report from Sharon Inman from Four Rivers Behavioral Health in which the Plaintiff was seen on January 14, 2005 for symptoms of depression which are the result of the Plaintiff's inability to work and the Plaintiff's chronic pain. The Administrative Law Judge also recognizes a disability status report from Dr. Theodore Davies dated July 28, 2004 in which Dr. Davies diagnosed lumbago and degeneration of the lumbar intervertebral disc and that the Plaintiff would be off work until the next visit on August 25, 2004.

5. The Administrative Law Judge also recognizes the medical report from Dr. Theodore Davies dated March 23, 2005. Dr. Davies noted that an MRI scan showed disc protrusion at the L4-L5 level which was to the left. Because the Plaintiff had failed conservative treatment the Plaintiff was given a choice of surgical intervention which was carried [out] on May 26, 2004 which consisted of a lumbar hemilaminectomy and discectomy at L4-L5 on the left side. In surgery it was revealed that the Plaintiff had a displaced disc with a rupture fragment which was found and removed at that time. Dr. Davies diagnosed lumbar disc displacement and lumbar radiculopathy. He further opined that the injury was the cause of the Plaintiff's symptoms and that the Plaintiff's work which required bending and lifting aggravated the lumbar disc degeneration and specifically this event. He put the Plaintiff's whole body impairment at 10% and opined that the Plaintiff did not have an active impairment prior to the injury. Dr. Davies further noted that the Plaintiff described his work activities and opined that the Plaintiff is presently not able to perform the activities of his job and that he should avoid any heavy lifting, repetitive bending, lifting or twisting motions with regard to his lower back or operate heavy vibratory equipment or work in extremes of cold and cold and dampness. He furthermore opined that the Plaintiff does not retain the physical capacity to return to the type of work that he did before. He put the Plaintiff's lifting restrictions up to 20 pounds on an occasional basis and frequent lifting of less than 10 pounds with occasionally less than 10 pounds. He further opined that the Plaintiff could stand and walk a total of 4-6 hours a day and sit a total of 2-4 hours a day. He further stressed that pushing and pulling would be limited though they are not tested and that the Plaintiff should avoid continuous or repetitive use of foot pedals.

With regards to specific work limitations, the Plaintiff should also avoid heavy lifting, repetitive bending, lifting and twisting activities of the lower back.

6. The Administrative Law Judge also recognizes the medical report of Dr. Ellen Ballard introduced by the Defendant/Employer dated May 31, 2005. Dr. Ballard believed that the Plaintiff's complaints of pain in the Plaintiff's back and pain in the left leg may be related to the reported work injury of December 20, 2003 but the Plaintiff was not consistent with his history. Dr. Ballard indicated that the Plaintiff returned to work and was doing some other labor and the Plaintiff indicated that he was never able to return to work and his present symptoms of complaints were out of proportion to the findings on examination and a review of testing. In Dr. Ballard's opinion, the Plaintiff's restrictions would be no constant, repetitive bending and stooping and a 50 pound weight limit. She furthermore noted that the Plaintiff could return to the type of work that he performed at the time of the alleged injury provided that he is able to accommodate the restrictions as indicated. She did not believe that the Plaintiff required any additional medical treatment and believed that the Plaintiff demonstrated multiple Waddell's signs. These included pain with axial loading, pain with leg rolling and decreased sensation over the entire left leg in a non-dermatomal fashion and inconsistency with straight leg raising.

Based upon these medical reports in the record, the ALJ accepted Dr. Davies' 10% impairment rating as to the back injury, found that McDonald did not retain the physical capacity to return to the type of work that he had performed at the time of the injury, and imposed the 3 times multiplier pursuant to

KRS 342.730(1)(c)(1). As to McDonald's psychological injury claim, the ALJ found:

10. In addition, the Plaintiff alleges in his Form 101 that the Plaintiff is in need of counseling as a result of the injury in question. The Plaintiff testified that he has suffered from depression as a result of the work injury and has been referred to pain management although the Plaintiff is not interested in pursuing pain management. In addition, the Administrative Law Judge cites to the medical report of Sharon Inman dated January 14, 2005 in which the Plaintiff was seen for symptoms of depression that are a direct result of the Plaintiff['s] inability to work and his chronic pain. The Defendant/Employer argues that since there is no permanent impairment rating assessed for this psychiatric condition that the Plaintiff is not entitled to medicals to treat same.

11. From this medical report it appears that the Plaintiff's depression can be indirectly related to the Plaintiff's chronic pain emanating from the work injury and therefore the Plaintiff has sustained his burden of so showing. Although there has been no permanent rating that has been rendered in this case as a result of the Plaintiff's depression and no income benefits can be derived from this condition, the Administrative Law Judge will find that inasmuch as the Plaintiff has sustained his burden of so showing that the depression can be related to the Plaintiff's chronic pain which therefore indirectly related to the injury that medical expenses to treat the Plaintiff shall be the responsibility of the Defendant/Employer and/or its insurance carrier in this case. (Emphasis added.)

Based upon these findings, the ALJ awarded McDonald compensation for his back injury and ordered Preferred or its

insurance carrier to pay for the "cure and/or relief from the effects of the work injury such surgical, medical and hospital treatment . . . as may reasonably be needed to treat [McDonald's] injury and thereafter during disability."

Preferred filed a petition for reconsideration, arguing that the ALJ erroneously awarded medical benefits for McDonald's "alleged psychological condition" since the ALJ had found that the psychological condition was only an "indirect" result of his physical injury. Preferred's motion was denied, and it appealed to the Board.

On appeal, the Board stated that the "issue on appeal involves the ALJ's award of medical benefits pursuant to KRS 342.020 for secondary psychological overlay despite the fact that no psychiatric/psychological impairment rating was submitted by [McDonald] as evidence." As an alternative theory of error, Preferred argued that KRS 342.020 and Coleman v. Emily Enterprises, Inc., 58 S.W.3d 459 (Ky. 2001), clearly mandate that to be compensable, a psychological, psychiatric or stress-related injury must be a direct result of a physically traumatic event.

Upon reviewing the arguments raised in light of the record and applicable law, the Board held that the ALJ's decision to award future medical was not in line with his specific finding that the depression was indirectly related to

his injury. Therefore, the Board vacated the ALJ's decision on that issue and remanded for further findings. In effect, the Board said that if the ALJ's findings were correct, then the psychological injury was a direct result of the back injury and future medical expenses should be paid. Specifically, the Board stated:

Despite the malapropos use of the term "indirectly," the ALJ appears to otherwise describe a line of causation - from original injury to chronic pain and loss of employment to depression - that is unbroken. The record contains no evidence that McDonald suffers from physical pain as a result of any source other than the December 23, 2003, injury. Under such circumstances, the general rule is that all of the injurious consequences that flow from a work-related physical injury and that are not attributable to an unrelated cause are compensable. Beech Creek Coal Co. v. Cox, 314 Ky. 743, 237 S.W.2d 56 (1951). Hence, when reviewed in context, we believe the ALJ's ruling more than likely establishes a finding of proximate causation as opposed to remote causation.

That having been said, authority requires an ALJ in rendering a decision to make sufficient findings of fact and rulings of law to adequately apprise the parties and this Board of the basis of his decision in order to permit meaningful appellate [review]. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky.App. 1988); Shields v. Pittsburg & Midway Coal Mining Co., 634 S.W.2d 440 (Ky.App. 1982). Preferred Industries is correct that from the actual language used in the opinion and award concerning the cause of the respondent's depression, we cannot be certain the ALJ applied the correct standard. In instances

where the harmful change is psychological, psychiatric, or stress-related, it must "directly" result from a physically traumatic event. Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564 (Ky. 2001). Therefore, we vacate the ALJ's award of psychiatric/psychological medical benefits and remand this matter for further findings and analysis with regard to application of the proximate causation standard. All other aspects of the ALJ's decision are affirmed.

The Board then went on to discuss that future medical expenses are compensable based upon Coleman v. Emily Enterprises, Inc., supra, and then added the following paragraph, which Preferred now argues is a mandate for the ALJ to award future medical expenses to McDonald:

In the case at bar, depending on the ALJ's ruling on remand with regard to direct/proximate causation, we find sufficient evidence of substantial probative value to support an award of psychiatric/psychological medical benefits. As already pointed out by the ALJ below, the medical report of Sharon Inman and [McDonald's] own testimony are adequate to sustain such an award. The fact that there is no corresponding impairment rating directly attributable to McDonald's depression contained in the record is not controlling.

This petition for review followed.

On petition for review, Preferred argues that the ALJ's finding that the psychological overlay was not directly related to the back injury is controlling and that the Board



substituted its judgment for that of the ALJ.<sup>1</sup> While it is clear that the ALJ did state that there was only an indirect relationship between the physical injury and the resulting psychological condition, as pointed out by the Board, his other findings clearly show a direct causal path from the injury to his psychological problems. The reports of Dr. Davies and Sharon Inman are sufficient evidence of the direct connection. If the ALJ relied upon these reports, which it appears he did, then his finding of only an indirect relationship is clearly erroneous. However, if the ALJ's determination that the relationship was only indirectly shown is correct, then to grant future medicals is legally incorrect. Since the ALJ's opinion is either factually incorrect or legally incorrect, the Board had no alternative but to vacate it and remand for further findings and analysis, as it did. It is well established that the function of this Court in reviewing 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 that the Board correctly determined that the ALJ made errors in assessing the evidence or

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<sup>1</sup> McDonald did not file an appellate brief in the matter. That may be because he had stated previously that he would not seek psychological treatment.

misconstrued controlling statutes, it was bound to vacate and remand so that the ALJ could correct his error and issue a new opinion which, if appealed, could be properly reviewed. As such, we find no error in the Board's opinion.

As to Preferred's argument that this case should be held in abeyance pending the Supreme Court of Kentucky's decision in United Parcel Service v. Montgomery, et al., appeal No. 2005-SC-000791, we agree with the Board that the cases are distinguishable and therefore there is no basis to hold this case in abeyance.

For the foregoing reasons, we affirm the opinion of the Board entered February 17, 2006.

ALL CONCUR.

BRIEF FOR APPELLANT:

No brief for appellees.

Samuel J. Bach  
Henderson, Kentucky