RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001418-WC

JOSEPH KOROLUK — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-02-01903

UNITED PARCEL SERVICE; HON. MARCEL SMITH, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: TAYLOR, JUDGE; ROSENBLUM,[1] SENIOR JUDGE; MILLER,[2] SPECIAL JUDGE.

ROSENBLUM, SENIOR JUDGE: Joseph Koroluk petitions for the review of an opinion of the Workers' Compensation Board ("Board"), entered June 9, 2006, affirming the decision of an Administrative Law Judge ("ALJ") to deny him future medical benefits. Finding no error, we affirm.

[1] Senior Judge Paul W. Rosenblum, 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] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

At all times relevant to his case, Koroluk was a pilot for United Parcel Service ("UPS"). On December 13, 2000[3], Koroluk had completed a UPS flight to Dallas. As he exited the plane, Koroluk slipped on the icy stairs and injured his lower back. He returned to work without seeking medical treatment at that time. Koroluk first sought treatment for his lower back injury from Dr. Scott Young on February 7, 2001. Dr. Young referred Koroluk for physical therapy which he attended. On November 15, 2001, Koroluk returned to Dr. Young, again complaining of low back pain and a new complaint of pain of the trapezius and paraspinous muscles that occurred after playing golf. In January 2002, Dr. Young referred Koroluk to another doctor for pain management. Over much of 2002 through 2005, Koroluck received several pain management treatments, including "trigger point injections," massage therapy, physical therapy, an MRI scan, and a bone scan.

On January 24, 2002, prior to the pain management treatments, Dr. Lisa Gill reviewed the medical records of Koroluk at the request of UPS. UPS sought to determine whether the medical treatment Koroluk was receiving was causally related to the injury sustained on December 13, 2000. Dr. Gill

[3] The record, as well as the briefs for both parties, vary as to the date of Koroluk's injury, noting it as December 3, 13, or 20, 2000. Prior to the ALJ's opinion and order, the parties stipulated that the injury occurred on December 13, 2000.

concluded that the treatment was causally related, however determined that no further medical treatment was required, save home exercise and over-the-counter medications, because Koroluk had reached MMI[4]. On December 4, 2004, UPS sought another review of Koroluk's medical records and IME[5] by Dr. Frank Wood. Dr. Wood's evaluation essentially mirrored that of Dr. Gill, although he indicated that continued massage therapy was not warranted because it would not be curative. On July 7, 2005, Koroluk was seen by Dr. Robert Baker as part of a litigation evaluation sought at the behest of his attorney. Dr. Baker concluded that he had reached MMI, did not require surgical intervention, had no discernable impairments at that time, and should continue with home exercise.

On January 3, 2006, based on the above evidence, the ALJ entered judgment denying future medical benefits to Koroluk. He filed a Petition for Reconsideration that was denied on February 2, 2006. Following the denial, Koroluk filed a timely appeal with the Board. On June 9, 2006, the Board affirmed the decision of the ALJ. This appeal followed.

Koroluk avers that the ALJ erred when she found that he was not entitled to future medical benefits. We disagree.

[4] Maximum Medical Improvement.

[5] Independent Medical Evaluation.

An ALJ's determination of whether to award future medical benefits is governed by statute. KRS[6] 342.020(1), in pertinent part, provides that ". . . . the employer shall pay for the cure and relief from the effects of an injury . . . . the medical, surgical, and hospital treatment . . . . as may reasonably be required at the time of the injury and thereafter during disability . . . ." KRS 342.020(1) allows an injured employee to choose his own physician and to have whatever medical treatment is reasonably necessary for the cure and/or relief of his injury. See Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The burden of proving that a treatment is unreasonable is on the employer. National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky.Ct.App. 1991). In Square D Co., our Supreme Court discussed the factors under KRS 342.020(1) that an ALJ must consider when determining the compensability of a medical procedure or treatment:

> While the injured worker must be given great latitude in selecting the physician and treatment appropriate to her case, the worker's freedom of choice is not unfettered . . . . [w]e believe . . . . that [KRS 342.020(3)] relieves an employer of the obligation to pay for treatments or procedures that, regardless of the competence of the treating physician, are shown to be unproductive or outside the type of treatment generally accepted by the medical profession as reasonable in the injured worker's particular case. We also

[6] Kentucky Revised Statutes.

> believe that such decisions should be made by the ALJs based on the particular facts and circumstances of each case, so long as there is substantial evidence to support the decision.

Id. at 309-310. In this case, we are of the opinion that the ALJ's decision was based upon substantial evidence.

In its opinion that the ALJ's decision was supported by substantial evidence, the Board stated:

> We believe the ALJ's finding that Koroluk's injury had resolved is supported by substantial evidence. Dr. Young's first treatment note on February 7, 2001 mentions only a low back condition. He recorded a history that Koroluk strained his left lower back after slipping about two months earlier. Dr. Young was the first doctor to see Koroluk after the December 13, 2000 injury. Based upon the record in this claim, an ALJ could reasonably find the low back condition was the only injury sustained in the December 13, 2000 incident. The record does not compel a finding that any condition other than the low back was the result of the December 13, 2000 injury.
>
> Substantial evidence supports the ALJ's finding that the injury resolved. Dr. Young's March 5, 2001 record includes the assessment of low back pain resolved with normal activity tolerance. He repeated the assessment in his June 20, 2001 note. Since there is substantial evidence supporting the ALJ's finding that Koroluk's condition resolved, we may not conclude otherwise.
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> We believe Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001) is dispositive on the question of whether Koroluk is entitled to future medical benefits. In Robertson, the injured worker was employed as a hod carrier for a masonry

company, and concurrently as a driver for UPS. Robertson alleged he injured his low back while working for UPS. He missed only two days of work for UPS but was unable to return to his masonry job for several months and sought workers' compensation benefits. The ALJ determined Robertson failed to prove more than a temporary exacerbation and that he sustained no permanent disability as a result of his injury. Therefore, he was entitled to only the medical expenses UPS had paid for treatment for a temporary flare-up of his symptoms. The Supreme Court noted the ALJ had concluded that Robertson suffered a work-related injury but that its effect was only transient. It resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Supreme Court stated, "Thus, the claimant was not entitled to income benefits for permanent, partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident." Id. at 286.

Since the rendition of Robertson, this Board has consistently held that it is possible for an injured worker to establish a temporary injury for which temporary total disability benefits and temporary medical benefits may be paid but, yet, fail in the burden of proving a permanent harmful change in the human organism for which permanent benefits are authorized. Here, as noted above, Dr. Young diagnoses low back pain resolved with normal activity tolerance. The record clearly contains substantial evidence supporting a conclusion that Koroluk suffered only a temporary injury and did not sustain a permanent harmful change. The ALJ's finding that Koroluk sustained a work-related injury does not necessarily mandate an award for medical expenses to infinity. Based upon the record in this

> claim, we believe that the ALJ was authorized to conclude that no award for ongoing medical expenses was either appropriate or necessary. Although Koroluk finds it significant that the ALJ did not find a temporary exacerbation of a pre-existing condition, we do not. A temporary exacerbation of a pre-existing condition is, after all, a temporary injury. A temporary injury does not entitle an injured worker to future medical benefits after the time at which the condition is resolved.

We agree with the Board's detailed analysis. In this case, Koroluk returned to work and, in fact, did not miss any work immediately following the injury. Further, substantial evidence was presented from several doctors that Koroluk's injury had resolved and that additional medical treatments were unnecessary. There was also substantial evidence, as noted in the Board's opinion, that Koroluck's low back injury was the only injury he sustained in the December 13, 2000, incident.

It is well settled that "the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record." Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 331 (Ky. 1997). Where the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. See Square D. Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993)(citing Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). Here, the ALJ stated that she was "persuaded by the medical evidence that any

injury [Koroluk] suffered . . . . was not permanent and has resolved." Additionally, the ALJ found that "there is no medical treatment that is reasonable or necessary for the treatment, cure, or relief of the work injury, which has resolved." Based on the evidence presented, we believe the ALJ had substantial evidence to conclude that Koroluck was not entitled to receive future medical benefits. Because there is substantial evidence to support the ALJ's findings, we must affirm the Board's decision.

For the foregoing reasons, the June 9, 2006, decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Wayne C. Daub
Louisville, Kentucky

BRIEF FOR APPELLEE:

James G. Fogle
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