RENDERED: DECEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001067-WC

RENOVARED ENERGY RESOURCES, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-1830

JEFFERY RILEY; HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

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

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

MILLER, SPECIAL JUDGE. Renovared Energy Resources, Inc., petitions for review of an opinion of the Workers' Compensation Board entered April 24, 2006, which vacated and remanded the opinion and order of the Administrative Law Judge (ALJ)

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

dismissing Jeffery Riley's claim for workers' compensation benefits. Kentucky Revised Statutes (KRS) Chapter 342. The Board's decision remanded the cause to the ALJ with directions for the ALJ to make a finding of fact of whether Riley's post-traumatic stress disorder directly resulted from a work-related event on January 11, 2001, that involved physical trauma. For the reasons stated below, we affirm.

The facts are not in dispute. In January 2001 Jeffery was employed by Renovared as an "oil well pumper," checking oil wells and performing various types of maintenance at the well sites. His father, Albert Riley, was Jeffery's co-worker and immediate supervisor.

On January 11, 2001, Jeffery and a co-worker, Nogale Spencer, were completing the connection of a PVC pipeline running from a new oil well to the storage tanks. Albert was assisting. Albert was using a torch to free an ice plug in the piping. While the pipeline was thawing from the flame of the torch, a tremendous explosion occurred. A gas pocket had collected in the line.

After the explosion, Jeffery could not see his father. He circled around the heat and flames searching for him. Jeffery found him in a growth of bushes or thicket lying face down and on fire, but apparently alive. About this time there was yet another explosion.

In an attempt to save his father's life, Jeffery took off his coat and tried to put out the flames. He attempted to put out the flames three times with the use of his coat, but to no avail. Albert Riley died at the scene. In trying to give aid to his father, Jeffery experienced physical injuries to his neck, scratches and burns to his forehead, and a burn resembling intense sunburn to his cheek. Firemen on the scene gave him a salve and the burns subsequently healed. The physical injuries as a result of the incident all healed and no longer affect him.

As a result of the foregoing, Jeffery filed a claim for workers' compensation benefits, alleging a post-traumatic stress disorder as a result of the January 11, 2001, incident. Following an evidentiary hearing, the ALJ issued an opinion and order determining that Jeffery had not suffered a compensable work-related injury and dismissing the claim.

Upon an appeal of the ALJ's decision, the Board vacated and remanded the cause for a finding by the ALJ of whether Jeffery's post-traumatic stress disorder directly resulted from a "work-related traumatic event" on January 11, 2001.

KRS 342.0011(1) defines "Injury" as follows:

> "Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change

> in the human organism evidenced by objective medical findings. . . . "Injury" . . . . shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.

We are led to believe that since December 12, 1996, the term "injury" refers to the traumatic event or series of events that causes a harmful change rather than to the harmful change, itself. Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564, 566 (Ky. 2001). Therefore, for purposes of the 1996 version of KRS 342.0011(1), a "physical injury" is an event that involves physical trauma and proximately causes a harmful change in the human organism that is evidenced by objective medical findings. Id. An event that involves physical trauma may be viewed as a "physical injury" without regard to whether the harmful change that directly and proximately results is physical, psychological, psychiatric, or stress-related. Id. But in instances where the harmful change is psychological, psychiatric, or stress-related, it must directly result from the physically traumatic event. Id.

In light of the foregoing, the ALJ determined as follows:

> Plaintiff asserts that his experiences, which included the burns and scratches he received in attempting to render aid to this fellow employee, who happened to be his father, amounts to the physical injury from which the post-traumatic distress disorder

developed. He maintains that this is a compensable injury within the statute much the same was as was the injury which was the subject of Lexington-Fayette Urban County Government vs. West, Ky., 52 S.W.3rd 564 (2001). In that case, the Kentucky Supreme Court determined that an assault on a police officer was a physically traumatic event and covered under the statute even though the officer suffered no permanent physical injury and sought only benefits for post-traumatic stress disorder.

On the other hand, defendant/employer states that West does not apply to this matter because, in that case, there was a direct connection between the physical trauma this plaintiff sustained and the development of her post-traumatic stress disorder. Defendant contends that in this case there is no direct causal relationship between the scratches and burns plaintiff received and his post January 11, 2001, stress related condition. Defendant further points out that plaintiff has never claimed any causal relationship direct or otherwise between his physical injuries and a psychological condition which he is asserting as the "harmful change" in the present case.

The Supreme Court again addressed the issue of stress-related injury in McCowan vs. Matsushita Appliance Company, Ky., 95 S.W.3rd 30 (2003). In that case, Ms. McCowan suffered a heart attack after arguing with her supervisor. There the court allowed compensability where a stress-related claimed (sic) resulted in a physical injury, i.e., the heart attack. However, defendant points out that Matsushita is not applicable to the present matter either since plaintiff is not claiming a physical change/injury or disability or impairment as a result of witnessing his father's death.

The Kentucky Court of Appeals recently addressed an issue very similar to this

> matter in Jean Marie Harris vs. The Pantry Inc., Case Number 2002-CA-001327-WC. In that case, plaintiff was working for clerk (sic) at defendant/employer's business when it was robbed at gunpoint. Ms. Harris sustained no physical injury in the robbery but allegedly developed psychiatric and physical problems as a result thereof. The Administrative Law Judge's dismissal of this matter was affirmed by the Workers' Compensation Board, which held that Ms. Harris' claim was a classic "mental-mental" injury that was not compensable under the Act. On appeal, the Court concluded that since Ms. Harris' symptoms included physical symptoms, which were stress-related as well as mental symptoms, it should be remanded to the ALJ for further findings. However, the plaintiff in this matter under present consideration, does not allege any combination of mental/physical impairment. Dr. Cooke, a psychologist, clearly states that plaintiff has a psychological impairment only.
>
> This ALJ, having reviewed the general rule on stress related impairment as set out in KRS 342.0011(1) and the case law interpreting the statutory directives, first finds that plaintiff's post-traumatic stress disorder is clearly work-related. However, I could find no provision in the statute or in case law that allows compensability where, as here, the plaintiff has a mental condition that is directly and exclusively related to his horrible experience of January 11, 2001.

In its review upon appeal, the Board addressed its differences and concerns with the ALJ opinion as follows:

> We begin our analysis by noting there has been no appeal from the finding, at page 9 of the ALJ's decision, that Riley's "post-traumatic stress disorder is clearly work-related." The ALJ nevertheless dismissed

Riley's claim because the ALJ believed the pertinent statutory and case authorities precluded an award for a mental condition "that is directly and exclusively related" to a "horrible experience" such as that Riley experienced on January 11, 2001.

Although the ALJ acknowledged Riley's argument below, which was based on Riley's reading of Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564 (Ky. 2001), the ALJ also acknowledged the employer's narrower reading of that case. In reaching the conclusion that Riley's claim was non-compensable, the ALJ took note, at page 8 of his decision, of the employer's argument "that there is no direct causal relationship between the scratches and burns [Riley] received and his post January 11, 2001, stress-related condition." The ALJ then noted that the employer "points out that plaintiff has never claimed any causal relationship direct or otherwise between his physical injuries and a psychological condition which he is asserting as the 'harmful change' in the present case." The ALJ never directly addressed whether he was deciding the claim based on the employer's assertion that there must be a direct causal relationship between the scratches and burns Riley received and Riley's post January 11, 2002, stress-related condition, or whether he was deciding the claim based on the broader reading of the West case advocated by Riley. In the paragraph immediately preceding that in which the ALJ found Riley's claim to be noncompensable, the ALJ stated:

> [T]he plaintiff in this matter under present consideration . . . does not allege any combination of mental/physical impairment. Dr. Cooke, a psychologist, clearly states that plaintiff has a psychological impairment only.

We are unable to discern from the ALJ's decision whether he was aware he has authority, as fact finder, to make an award based on findings that the event on January 11, 2001 involved physical trauma, and that the post-traumatic stress disorder resulted from that event. Although pertinent law requires that *the event* must involve physical trauma, it does not require that a psychological, psychiatric, or stress-related change in the human organism directly result from a physical change in the human organism.

. . . .

Because it appears the ALJ may have been operating under a material misimpression that Riley's claim was non-compensable as a matter of law, we vacate that portion of the ALJ's decision which finds that Riley's work-related post-traumatic stress disorder was noncompensable. We remand for additional factual findings with regard to whether Riley's post-traumatic stress disorder resulted directly from a physical traumatic event on January 11, 2001.

. . . .

In the claim presently on appeal, there is evidence from the claimant that he suffered scratches and a burn when he ran to his father immediately after the explosion and attempted to save his father, who was on fire as a result of the explosion. Moreover, although Dr. Cooke stated at page 5 of his November 8, 2002 report that "[t]his is a gentleman who did not suffer a work related injury," Dr. Cook also acknowledged at page 2 of that report that "Mr. Riley said he himself was not physically injured, except for a burn on his head, which did not require medical treatment." Hence, there is evidence from which the ALJ might conclude, as fact finder, that Riley's post-traumatic stress

> disorder directly resulted from a work-related event on January 11, 2001, that involved physical trauma.

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).

As the discussion in the ALJ and Board decisions reflect, this case clearly implicates the LFUCG v. West line of cases. See also Coleman v. Emily Enterprises, Inc., 58 S.W.3d 459 (Ky. 2001); McCowan v. Matsushita Appliance Co., 95 S.W.3d 30 (Ky. 2002); and Kubajak v. Lexington-Fayette Urban County Government, 180 S.W.3d 454 (Ky. 2005).

Central to these type of cases is a determination of whether or not the claimant suffered a "physically traumatic event."[3] West at 566 – 567. Though this is clearly a West-type case, the ALJ failed to make a finding of whether or not Jeffery had suffered from a "physically traumatic event," and, if so, whether Jeffery's post-traumatic stress disorder was a direct or proximate cause of the event. See Coleman, 58 S.W.3d at 462

[3] We note that West and its progeny do not succinctly define "a physically traumatic event." We will not chance to offer a definition.

(Direct cause and proximate cause are synonymous for purposes of KRS 342.0011(1)). As such, fundamental findings crucial to the resolution of a West-type case, such as the present, were not made. As the ALJ is exclusively vested with the authority to make findings of fact in a worker's compensation case, see Transportation Cabinet v. Poe, 69 S.W.3d 60, 62 (Ky. 2001) (As fact finder, the ALJ has the sole authority to determine the weight, credibility, and substance of the evidence and to draw reasonable inferences from it; the ALJ has the discretion to choose whom and what to believe) the Board properly remanded the matter to the ALJ for findings on these issues. We accordingly may not disturb its decision. Western Baptist, supra.

Finally, we will not depart this matter without noting that the Board merely remanded the cause to the ALJ for the purpose of making findings necessary to resolve the case and, depending upon the outcome of those findings, to make an award to Jeffery if appropriate. As such, this appeal is quintessentially interlocutory as Renovared's administrative remedies had not been exhausted. As such, absent the rule as stated in Davis v. Island Creek Coal Company, 969 S.W.2d 712 (Ky. 1998) (Board decision remanding to ALJ with authority for ALJ to make different award upon remand is divestiture of vested right and therefore final and appealable) this matter would not properly be before us. Renovared may prevail upon remand, and

the present appeal will then prove to have been a waste of time and resources. And regardless of who prevails, it is likely that the matter will again be before this court through the appeals process which, again, demonstrates the wastefulness which may result from application of the Davis rule.

Davis spoke in terms of authorizing an appeal when vested rights have been uprooted. Patently unsound. Vested rights are relevant only insofar as they go to show that the decision of the Board is final. It does not necessarily follow that either the fixing or uprooting of vested rights midway in the administrative proceeding renders the administrative action final and appealable. Moreover, it may be said that rights are never fixed until the administrative process is complete. In any event, the rule is, and always has been, that where jurisdiction is originally vested in an administrative agency an appeal may not be prosecuted from the agency body until the administrative process is complete –- exhausted. Administrative bodies, of which the Workers' Compensation Board is a classic example, are creatures of the executive branch. Traditionally, the judicial branch may not be called upon to review actions of these bodies until their review is complete or reached a stage of finality.

Formerly, the first stop in an appeal to the judicial branch was the circuit court. Now it is the Court of Appeals,

wherefrom an appeal may be taken as a matter of right to the Supreme Court under the one-appeal entitlement of our Constitution. Kentucky Constitution § 115.

Perhaps the Supreme Court will review Davis toward the ends of alleviating the burden of multiple appeals not only to this Court but to the Supreme Court.

For the foregoing reason the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Carl M. Brashear Lexington, Kentucky	Tim Wilson Lexington, Kentucky