

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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001752-WC

ENERSYS, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-77539

JOSEPH WALTERS; HON.
LAWRENCE SMITH, Administrative
Law Judge; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: The sole issue in this appeal is whether substantial evidence supports an award of workers' compensation benefits to the claimant Joseph Walters. Rejecting the employer's contention that Walters' disability was the result of a pre-existing condition, the Administrative Law Judge (ALJ) concluded that a work-related shoulder injury sustained on

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

August 14, 2004, brought into disabling reality a "dormant neck injury already in evolution," but which had not yet resulted in an active impairment. The Workers' Compensation Board found no error in the ALJ's assessment of the medical evidence and affirmed his conclusion that it showed no pre-existing active impairment. Our review of the record reveals no error in the Board's analysis and we affirm its opinion in this case.

In February 2005, Walters filed an application for resolution of injury claim alleging that on August 14, 2004, he sustained an injury to his neck and shoulder in the course of his employment with appellee Enersys. Walters stated that while stowing away cell plates of batteries, his shirt was caught on a pneumatic hoist which wrenched his arm up above his head and lifted him above the floor until he was able to free himself. He later amended his claim to include an injury date of July 21, 2004.

Enersys resisted Walters' claim on the basis of an active impairment which it alleged pre-existed the August 14th injury. Walters testified that on July 22, 2004, he woke up with a "crick" in his neck and sought treatment from his family physician, Dr. Jamil Farooqui, at the East Bernstadt Medical Center with complaints of neck pain on the right side going into his right shoulder. Although he told clinic staff that the pain started after moving heavy objects, Walters testified that he

did not realize anything had happened to him until the next morning when he woke up with the "crick." Dr. Farooqui, prescribed Flexeril and Ketoprofen and Walters continued to work. Walters again saw Dr. Farooqui on July 30, 2004, with complaints that his neck and shoulder pain was getting worse and that the prescribed medicine was not providing relief. An MRI was scheduled and Walters was told see Dr. Farooqui again in 1-2 weeks. Walters testified that he had no restrictions and was able to do his regular job up until the time of the August 14th injury. He stated that he did not report any injury or incident relating to July 21st because he intended to turn it in to his insurance company and because he believed it would keep down conflict.

After the injury of August 14th, Walters stated that it felt as if his shoulder had been ripped from its socket. He reported that injury and went to Pattie A. Clay Hospital which was located across the street from Enersys. His shoulder was x-rayed and he was released. Walters went to Marymount Hospital in London, Kentucky, the next day and he returned to Dr. Farooqui on August 16, 2004. Dr. Farooqui took Walters off work and referred him to Dr. Henry Tutt for a neurological consultation. Dr. Tutt ultimately performed a fusion at C5-6 and released Walters to return to work on November 15, 2004.

Upon his return, Walters was terminated for "falsification of documents."

As noted by the Board, the ALJ was persuaded that although Walters did have a work injury incident on July 21, 2004, his failure to provide notice required dismissal of any claim related to that incident. Regarding Enersys' claim of a pre-existing active disability, the ALJ concluded that despite Walters' inconsistent statements regarding his neck and shoulder problems prior to August 14, 2004, there was no evidence of pre-existing active impairment prior to that date. The ALJ determined on the basis of objective medical evidence that the August 14th injury brought into "disabling reality a dormant neck injury already in evolution from an earlier work incident."

Following the denial of Enersys' petition for reconsideration, it appealed to the Board alleging that the substantive medical evidence did not support the ALJ's conclusion that the August 14th aroused a dormant non-disabling condition, but rather reveals that Walters had a pre-existing active cervical herniation which ultimately resulted in his need for surgery. After reviewing the medical evidence offered by both parties, the Board was persuaded that the record contained substantial evidence supporting the ALJ's determination:

There was substantial evidence that Walters sustained a harmful change as a result of the incident in August 2004. There was no

evidence that Walters had the radiculopathy into his right arm prior to the August 14 incident. Dr. Farooqui indicated Walters had no neurological findings prior to August 14, 2004. Dr. Farooqui diagnosed musculoskeletal right neck pain and right shoulder pain prior to August 2004 and did not diagnose radiculopathy until after August 14, 2004. Dr. Tutt testified that without radiculopathy, surgery would not be considered. Dr. Tutt, in his December 13, 2004 report, assigned a 25% impairment rating for Cervical DRE Category IV and stated Walters' disc herniation was related to the August 14th work injury. Walters clearly made a prima facie showing of a harmful change as a result of the August 14th injury and of impairment related to that injury. The ALJ could clearly conclude from the evidence of record that at least some portion of Walter's functional impairment rating was related to the August 2004 work injury. The burden then was on Enersys in its affirmative defense of prior active impairment to show that some or all of the impairment existed immediately prior to the August work injury. We believe the evidence falls far short of compelling a finding of a prior active impairment. No doctor offered an opinion as to what functional impairment rating Walters would have had immediately prior to the August 14, 2004 injury. No doctor offered an opinion apportioning the impairment between the August injury and the impairment, if any, that existed immediately before the work injury. As noted by the ALJ, Dr. Tutt's assessment of a 25% impairment rating was undisputed. The ALJ weighed the evidence and found it did not show any pre-existing, active impairment. Again, we note Enersys had the burden of proof on the issue of prior active impairment.

Despite Enersys' insistence to the contrary, a review of the medical evidence supports both the findings of the ALJ

and the Board's analysis of the evidence on appeal. Our role in reviewing an opinion of the Worker's Compensation Board is closely confined by the direction of the Supreme Court of Kentucky in Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992):

The function of further review of the WCB in the Court of Appeals 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.** [Emphasis added.]

Here, the Board carefully summarized and correctly analyzed the conflicting medical evidence offered in this case. The fact that the record may contain evidence which would support a conclusion other than that reached by the ALJ is an insufficient basis for disturbing his decision. Because the ALJ has sole authority to judge the weight and inferences to be drawn from the evidence and because the record contains sufficient evidence to support his decision, we cannot say that the evidence compelled a different result or that any of the factors set out in Western Baptist are present in this case.

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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