

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002396-WC

SKF ROLLER BEARING INDUSTRY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-00706

GREGORIO A. PAGULAYAN;
HONORABLE A. THOMAS DAVIS II,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART
AND
REVERSING IN PART

** ** * ** * ** *

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

DIXON, JUDGE: SKF Roller Bearing Industry, Inc. ("SKF") appeals from an opinion of the Workers' Compensation Board ("Board") vacating in part, reversing in part, and remanding an order of an Administrative Law Judge ("ALJ") in favor of SKF's former employee, Gregorio Pagulayan ("Pagulayan"). We affirm in part and reverse in part.

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.

Pagulayan was born in the Philippines on October 12, 1960. He completed high school in the Philippines before moving to the United States in 1981. In 1988, Pagulayan began working for SKF in Radcliff, Kentucky.

On September 22, 2003, Pagulayan experienced pain in his back while attaching a dock plate to a tractor-trailer. The next day, he reported the injury to his supervisor and sought medical treatment at WorkWell. A physician at WorkWell, Dr. Michael Newkirk, diagnosed Pagulayan with low back strain and placed him on work restrictions. After a follow-up visit, Dr. Newkirk referred Pagulayan to physical therapy for his back pain. Shortly thereafter, Pagulayan began experiencing loss of balance and difficulty walking, causing him to fall at home and hit his head. Dr. Noel Reloj, a neurologist, examined Pagulayan and referred him to a neurosurgeon, Dr. Gregory Nazar. Dr. Nazar evaluated Pagulayan on November 14, 2003, and assessed advanced cervical myelopathy with spinal cord compression. Dr. Nazar noted the cervical symptoms manifested after Pagulayan began physical therapy. Pagulayan underwent a cervical discectomy the following day.

Dr. Ellen Ballard conducted an independent medical evaluation (IME) of Pagulayan on March 11, 2004. She concluded Pagulayan's back injury was at maximum medical improvement and noted his cervical complaints were referred to Dr. Nazar.

On June 30, 2004, Dr. John Guarnaschelli conducted an IME of Pagulayan. Dr. Guarnaschelli concluded the cervical injury was related to Pagulayan's work injury. In a follow-up letter on September 29, 2004, Dr. Guarnaschelli clarified cervical injuries can occur with or without trauma. He emphasized that he relied on the accuracy of the medical history related to him by Pagulayan.

In bifurcated proceedings, the ALJ first heard evidence relating to causation and work-relatedness. Pagulayan testified at the hearing, and the ALJ considered the medical evidence of record. In an opinion and order rendered December 13, 2004, the ALJ concluded the low back injury was work-related. As to Pagulayan's cervical injury, the ALJ determined:

The circumstances of the derived neck injury, though nearly contemporaneous with the lumbar injury are more questionable in regard to work-relatedness. [Pagulayan] was not convincing in relating the number of times he fell on his head or the circumstances of his falls. He did not know when the fall or falls took place. He did not report the falls to his employer. He did not recall when he began having trouble walking. The ALJ is persuaded that there was nothing in his physical therapy that awakened the cervical condition. Mr. Pagulayan had a history of other physical problems that could have caused a fall. [Pagulayan] cannot put together a logical rationale for a work-related cervical injury. * * * [Pagulayan] cannot meet the burden of proof on the neck injury. The claim for this injury should be dismissed.

The remaining issues were resolved in an opinion rendered April 30, 2007. The ALJ awarded permanent partial disability benefits to Pagulayan for the back injury. The ALJ also held that SKF was entitled to credit for disability benefits voluntarily paid to Pagulayan.

On appeal, the Board vacated the ALJ's opinion on work-relatedness of the neck injury and remanded for further findings. The Board also reversed the ALJ's determination that SKF was entitled to credit for disability payments. This petition for review followed.

When this Court reviews a decision of the Board, our function "is to correct the Board only where [we] perceive[] 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).

I. Causation: Cervical Injury

The Board concluded that the ALJ’s findings on the issue of causation were insufficient. After reviewing the record, we agree that the medical evidence warrants remand for additional findings of fact.

SKF argues that substantial evidence supported the ALJ’s dismissal of the cervical claim. SKF primarily relies on the report of Dr. Guarnaschelli and argues that medical records from Pagulayan’s family physician showed he experienced neck pain and dizziness three years before the work injury.

“It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). We recognize that it is within the broad discretion of the ALJ “to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof.” *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

Here, the ALJ’s findings failed to address the medical evidence regarding the cervical injury. Instead, the ALJ emphasized that Pagulayan’s testimony lacked credibility and noted that Pagulayan had complained of neck pain three years earlier. “There are . . . situations in which the [fact-finder] may ignore medical testimony and rely on lay testimony and its own expertise. But when the question is one properly within the province of medical experts, the [fact-finder] is not justified in disregarding the medical evidence.” *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184, 187 (Ky. App. 1981).

The ALJ's findings of fact on the issue of causation were brief and speculative. We agree with the Board that remanding the issue to the ALJ for additional findings of fact is appropriate under the circumstances.

II. Credit to SKF

SKF next argues that the Board erred by reversing the ALJ on the issue of credit allowed for voluntary payments to Pagulayan from October 2003 through December 2003.

Pagulayan continued working immediately after the injury. However, he did not work from October 9, 2003 through October 15, 2003. Thereafter, he worked for approximately two weeks, until October 28, 2003. He has not worked since that date. SKF paid Pagulayan his full salary from October 2003 through December 2003.

KRS 342.730(6) provides an offset of benefits payable to employees where an employer-funded disability plan pays benefits for the same injury. SKF contends the salary was not paid pursuant to a disability plan; rather, SKF voluntarily paid Pagulayan while he was off work due to the back injury.

SKF relies on *Triangle Insulation and Sheet Metal Co. v. Stratmeyer*, 782 S.W.2d 628, 630 (Ky. 1990), for the proposition that an employer is allowed a dollar for dollar credit for past temporary total disability ("TTD") benefits where the employer voluntarily pays an injured employee prior to a workers' compensation award.

In *Stratmeyer*, the Court noted:

It is important to encourage employers to make voluntary payments to injured employees. Employers are not obligated to pay benefits until a claim has been litigated and an award entered. Such payments are voluntary. The circumstances involved in each specific case must be carefully evaluated so that the employee is not unduly harmed and the employer is encouraged to make voluntary payments.

Id. Paul Price, vice president of SKF, testified at the administrative hearing. The testimony showed that SKF voluntarily paid Pagulayan's regular salary through December 31, 2003. Thereafter, on January 1, 2004, SKF's disability insurance carrier began paying short-term disability benefits to Pagulayan. We conclude that, consistent with *Stratemeyer*, SKF is entitled to a credit against the past TTD benefits it owes, as calculated on remand,² as long as future benefits are not affected. See *Id.* Consequently, the decision of the Board, as to credit for October 2003 through December 2003 only, is reversed, and the ALJ's opinion on that issue is reinstated.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed in part and reversed in part.

ALL CONCUR.

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² In the initial award and order, the ALJ failed to calculate the amount of TTD benefits awarded. The Board remanded for proper calculation.