

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001941-WC

OWENSBORO BODY SHOP, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-65355

TIMOTHY DAUGHERTY; HON. MARCEL
SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND DIXON, JUDGES; GRAVES¹, SENIOR JUDGE.

CLAYTON, JUDGE: Owensboro Body Shop (OBS) petitions for review from an order of the Workers' Compensation Board (Board) reversing the opinion of the administrative law judge (ALJ).

FACTUAL SUMMARY

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

The Appellee, Timothy Daugherty, was an employee of OBS. For most of his working life, Daugherty has been employed as an automobile painter. He is left-hand dominant and his work requires him to hold a paint gun. His job is to get the surface ready for painting. This involves using an orbital sander which requires him to put the whole weight of his hand on the device since it fits inside his palm. He would also sand, tape, wash, mask and paint the objects. When he found it too difficult, Daugherty left OBS and began working for West Side Wrecker Service. In that job, he drives a roll back and makes less wages than he did at OBS.

Daugherty contends that he injured his left wrist on December 5, 2003. He went to an immediate care facility and was referred to Dr. Michael Kavolus who diagnosed a ganglion cyst which was too small to remove. An MRI of his left wrist which was performed on January 6, 2004, indicated a 4mm possible ganglion cyst between the trapezoid and capitate bones immediately proximal to the middle finger MCP joint. It also revealed that the marrow signal in the scaphoid bone was heterogeneous with scattered bright areas on fat sat images. Daugherty continued to work and to perform his regular job duties. After the retirement of Dr. Kavolus, KESA, the workers' compensation carrier on the claim, had Daugherty seek further medical treatment from Dr. James Carothers. Dr. Carothers then sent him to Dr. David Boles, who, in turn, sent him to Dr. Thomas Wolff in Louisville.

Dr. Wolff told Daugherty he would need a vascular bone graft, however, KESA did not approve the procedure and he did not have it done. Daugherty has testified that he continues to have severe problems with his hands. It was Dr. Carothers who diagnosed a problem with his scaphoid on October 14, 2005. He made this diagnosis based upon the change in MRI between Daugherty's visits to Dr. Kavolus and his visit to Dr. Carothers.

On November 18, 2005, Dr. Rodrigo Moreno prepared a medical report in which he concluded that Daugherty's work was not the cause of his pathology, but it did aggravate it. He set forth in his opinion that Daugherty's wrist problem was due to the loss of blood supply to the bone and concluded that his prognosis for surgical intervention was good with maximum results to be seen six months after surgery.

Dr. Moreno concluded that Daugherty's job aggravated his current conditions leading to the need for surgical intervention and that he would retain permanent restrictions following surgery. Dr. Moreno also diagnosed Daugherty as having Preiser's disease.

The ALJ found Daugherty's complaints to be non-compensable based upon the following:

The first issue is causation/work relatedness. I am most persuaded by the opinions expressed by Dr. Moreno. They are supported by objective medical findings. Preiser's disease, an avascular necrosis, developed with time. The condition is a diminished

blood flow to the scaphoid bone. The bone died.
Plaintiff's job activities could aggravate the condition.

Dr. Moreno said, "In my medical opinion, his job has aggravated his current condition leading to the need for surgical intervention. His work has contributed to his bone degeneration."

Plaintiff argues that this situation is akin to degenerative disk disease. I am persuaded by plaintiff's description of his work activities. The activities are certainly the type that would aggravate such a condition. However, in order to be compensable, a condition must be caused or at least aroused into disabling reality by the work activity. Review of the medical evidence going back over the years demonstrates that plaintiff had an active, non-work-related condition of his wrist which was aggravated, but neither caused nor aroused, by work activity.

Decision of the Board, p. 14.

The Board found that the ALJ's findings were not based on any factual consideration such as credibility or weight to be attributed to the evidence, but on a misconceived notion that an aggravation of a pre-existing active non work-related condition cannot constitute an injury. The Board further found:

After carefully scrutinizing the evidence and the ALJ's findings and holding, we conclude that the ALJ erred as a matter of law in dismissing Daugherty's claim as being noncompensable. Simply state, the ALJ erred as a matter of law in her finding that a work-related injury that aggravates an active non work-related condition can not be compensable. *See Robertson v. United Parcel Service*, [64 S.W.3d 284 (Ky. 2001)]. See also KRS 342.0011(1). . . . [T]he ALJ found Dr. Moreno's opinion to be persuasive. It is undisputed that pursuant to Dr. Moreno's testimony and reports, Daugherty's job

aggravated the Preiser's disease. To this extent, it is undisputed that based on Dr. Moreno's medical report that the work-related incident resulted in at least a flare-up of symptoms of Daugherty's non work-related Preiser's disease. Based on Dr. Moreno's testimony on which the ALJ relied, it is clear the evidence produced a harmful change as a result of the repetitive work activity causing a flare-up of symptoms of a pre-existing non work-related condition. To this extent, Dr. Moreno's testimony points to the fact that Daugherty suffered a work-related injury and that the ALJ erred as a matter of law in dismissing the claim in its entirety.

Id. at pp. 18-19.

DISCUSSION

As a reviewing Court, we must decide, in light of the record, whether the evidence is "so overwhelming, . . . as to have compelled a finding in . . . favor" of the appellant. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). When this Court reviews a decision of the Board, our function "is to correct the Board only where the the [sic] 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).

"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).

First, Appellant contends that the Board substituted its judgment for that of the ALJ. We disagree. This Court agrees that it is the task of the ALJ to weigh the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). She must weigh the evidence, draw inferences and determine whether witnesses are credible. *Magic Coal Co.*, 19 S.W.3d at 88. In this case, the Board used the ALJ's findings, but applied the law for a different result. The Board found that the evidence as weighed and found by the ALJ supported the conclusion that Daugherty's non work-related condition was aggravated by his work. While the ALJ found that his claim was non-compensable based on this same conclusion, the Board found that it was not.

Second, Appellant contends that Daugherty's appeal to the Board should have been dismissed for his failure to file a petition for reconsideration with the ALJ. KRS 342.281 is statutorily similar to Kentucky Rules of Civil Procedure (CR) 52.04 in that it requires issues be raised in a petition for reconsideration in order to preserve patent error or omissions of fact for judicial review.

OBS contends that Daugherty's failure to file a petition for reconsideration with the ALJ is fatal to his appeal pursuant to *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334 (Ky. 1985) and *Halls Hardwood Floor Company v. Stapleton*, 16 S.W.3d 327 (Ky. App. 2000). OBS also raised this issue before the

Board, which held that issues of law could be directly appealed without filing a petition for reconsideration. This Court agrees with the Board. Under *Brasch-Barry General Contractors v. Jones*, 175 S.W.3d 81 (Ky. 2005), issues of law may be directly appealed to the Board. While OBS argues that the ALJ's determination that Daugherty's condition was not caused nor "aroused" by work activity, it is clear that the Board found it was compensable as a matter of law since it was aggravated by such activity. Thus, the Board was correct in finding Daugherty was not required to file a petition for reconsideration with the ALJ.

Appellant's third contention is that there was substantial evidence to support the ultimate decision reached by the ALJ. An Appellate Court should determine whether, in light of the record in its entirety, the evidence compels a finding in favor of the Appellant. *Wolf Creek Collieries*, 673 S.W.2d at 735. An Appellate Court should only reverse a decision of the Board when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused a gross injustice. *Western Baptist Hospital*, 827 S.W.2d at 687-88.

In the present case, the testimony presented to the ALJ through Dr. Moreno and Daugherty was that his work activities aggravated his non work-related injury. The Board used the same facts as those found by the ALJ, however, the Board determined that the ALJ had erred as a matter of law in determining

Daugherty's injury was non-compensable. This Court agrees and will not disturb the Board's finding.

Finally, Appellant contends that Daugherty's condition is not compensable. As set forth above, the ALJ determined that Daugherty's injury was not compensable as a matter of law. The Board, on the other hand, found that it was. Simply put, the Board was correct in its determination that a work-related injury which aggravates an active non work-related injury is compensable. *See Robertson*, 64 SW3d at 284 and KRS 342.0011(1).

This Court will affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel J. Bach
Henderson, Kentucky

BRIEF FOR APPELLEE:

M. Michele Cecil
Daniel Caslin
Owensboro, Kentucky