

RENDERED: DECEMBER 12, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001435-WC

COOK'S FAMILY FOODS/
CONAGRA FOODS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-00738

JENNIFER JOBE AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
REVERSING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT, AND WINE, JUDGES.

LAMBERT, JUDGE: Cook's Family Foods appeals the Workers' Compensation Board's opinion vacating and remanding the decision of the ALJ. After careful review, we reverse the opinion entered by the Workers' Compensation Board.

Jennifer Jobe (hereinafter “Jobe”) was hired at Cook’s Family Foods (hereinafter “Cook’s”) in May 2004. On August 9, 2004, Jobe claims that she was injured while lifting and placing hams on the assembly belt. According to Jobe, the injury occurred as she was holding a group of hams back with one arm while lifting and turning individual hams with the other arm. After the injury Jobe was able to continue the remainder of her shift. The following day Jobe reported the injury to her manager and was immediately referred to her family physician, Dr. Hunt, for evaluation.

Dr. Hunt’s office prescribed pain medication and assigned work restrictions. Cook’s accommodated Jobe’s restrictions from the time of her injury through the date of her subsequent resignation several weeks later in September. On September 1, 2004, Jobe underwent a physical therapy evaluation, and a report prepared in conjunction with the evaluation stated that Jobe exhibited a decreased range of motion and was placed on a four-week home strengthening program. An MRI dated November 10, 2004, revealed mild endplate and disc degenerative changes with mild disc bulging at the L4-5 level.

On March 1, 2005, Jobe began treating with Dr. Bhasin, a neurologist. At her initial visit, Jobe stated that her pain was predominately centered in her lower back and did not radiate into her lower extremities bilaterally, although it radiated into her right hip. Dr. Bhasin believed that Jobe’s symptoms of pain radiating into her right hip could signify a symptomatic radiculopathy. He

suggested an EMG nerve conduction study to discern this possibility and prescribed Neurontin.

At Jobe's follow up with Dr. Bhasin on April 6, 2005, Dr. Bhasin noted that Jobe was doing well on Neurontin and that her complaints of pain had subsided but had not completely remitted. Dr. Bhasin recommended that weight loss would help Jobe significantly and recommended gentle physical therapy. On April 11, 2005, Dr. Bhasin prepared a report interpreting the results of the nerve conduction study he had previously ordered. His report stated, "[e]ssentially a normal study. There is no evidence of neuropathy that is seen. The decreased amplitude on the left tibia given normal f-wave response is of unclear significance."

Jobe began physical therapy in July 2005. On July 20, 2005, Jobe complained that physical therapy had worsened her condition, and Dr. Bhasin advised her to cease physical therapy. On August 17, 2005, Jobe complained that the pain in her lower back was radiating down her left lower extremity. She and Dr. Bhasin discussed epidural steroid injections, and Dr. Bhasin stated that he would make arrangements for these.

In his report dated September 28, 2005, Dr. Bhasin noted that he had asked Jobe not to ride her motorcycle since the bumpy ride could exacerbate her lower back pain, particularly after epidural steroid injections. He noted that despite his recommendation, Jobe continued to ride her motorcycle, claiming that it

did not increase her pain. He also noted that the epidural steroids had helped her pain somewhat but that the pain persisted.

At a follow up on December 1, 2005, Jobe indicated that she was doing “remarkably well” after the epidural steroids and that she was weaning herself off the Lorcet that had been previously prescribed. On March 1, 2006, Jobe continued to complain of lower back pain with bilateral numbness and tingling radiating down to the lower extremities. At that time, Dr. Bhasin recommended another MRI and a repeat EMG nerve conduction study to discern any underlying chronic or superimposed acute radiculopathy. The second MRI was conducted on March 2, 2006.

On March 24, 2006, Jobe treated with Dr. Bhasin and stated that she was doing “reasonably better than before.” At the same visit, she reported muscular spasm type complaints but did not explain what caused the change in her pain. She also stated that she was having nerve conduction studies done.

In May 2006 Jobe accepted a job transfer with Cingular Wireless (now AT&T) to a call center in Florida, where she continues to reside. Several weeks after moving to Florida, Jobe sought treatment with a general practitioner, Dr. Devane, without any communications with Cook’s. Dr. Devane referred Jobe to other medical providers for treatment of her lupus and asthma and ordered an MRI of her spine. Ultimately, Dr. Devane referred Jobe to Dr. Scharf. On July 25, 2006, unbeknownst to Cook’s, Jobe underwent lumbar fusion surgery performed by Dr. Scharf. Jobe was off work for approximately two months following her

surgery, returning around September 28, 2006. Jobe continued to treat with Dr. Scharf after her surgery.

Jobe maintains that the surgery resolved the numbness in her legs but states that she still suffers from low back pain. She takes Lorcet for the pain. She is no longer able to do dishes or use a mop but continues to ride her motorcycle.

Dr. McCormick evaluated Jobe on February 9, 2007, and determined that the fusion surgery performed by Dr. Scharf was not likely attributable to the injury suffered at Cook's. Dr. McCormick explained:

[w]ith regard to the work causation, the only thing I can reasonably conclude is that she may have had a strain injury from performing an unaccustomed activity if she has not been previously working in that placer position and if it was physical in nature as she described. Reports from Work Place Health contemporaneous with the time at which she had these symptoms were describing pain with decreased range of motion. Later in their evaluations after several months, she was reported to have essentially full motions. Her back pain complaints became chronic in nature. There were never any true radiculopathy symptoms. She underwent a surgical procedure for degenerative changes in the discs.

The degenerative changes noted in the MRI report included descriptions of facet hypertrophy and end plate osteophytes, as well as degenerative changes in the discs with disc desiccation. Dr. McCormick also noted, “[c]hanges like these do not reflect any acute process or acute injury nor can they be attributed to a work activity in which she is employed by that employer over a period of some four months.” Finally, Dr. McCormick concluded:

[i]t is my opinion that it is possible she could have suffered a strain/sprain as a result of an unaccustomed work activity. However, by December 2005, she was demonstrating essentially full motion, but persistent back pain complaints. I cannot ascribe the degenerative changes that resulted in Dr. Scharf performing a surgical procedure as being work related.

On March 27, 2006, Dr. Scharf provided a brief supplement to his earlier reports and specifically addressed the report prepared by Dr. McCormick. Dr. Scharf conceded that Dr. McCormick had provided a complete and extensive report and stated that “[i]t is true that he [sic] degenerative changes in Ms. Jobe’s back is [sic] not work related. However, the injury that she sustained in August 2004 caused a permanent aggravation of her preexisting condition, which in my opinion necessitated surgery.”

A formal hearing was held on September 20, 2007, in Lexington, Kentucky. At the time of the hearing, Jobe was still employed with AT&T and that employment was within her work restrictions. On November 15, 2007, the ALJ entered her award, finding that Jobe suffered a permanent impairment of eight percent resulting from the August 9, 2004, work injury. With regard to liability for Jobe’s medical expenses, the ALJ found that the surgery performed by Dr. Scharf was not related to the work injury, and as such Cook’s was not responsible for the disputed medical expenses tendered by Jobe for the first time at the formal hearing. Finally, the ALJ ruled that because the fusion surgery was not related to the work injury, that Cook’s was not responsible for paying TTD benefits during the time period that Jobe was recovering from the surgery.

On November 28, 2007, Jobe filed a petition for reconsideration, which was denied. On March 12, 2008, Jobe filed her notice of appeal to the Workers' Compensation Board (hereinafter "the Board"). On June 26, 2008, the Board issued its opinion vacating and remanding the ALJ's opinion. The Board ruled that Dr. Scharf's determination that the work injury had aggravated pre-existing degenerative changes had not been rebutted by any evidence on behalf of Cook's, and that the ALJ could not therefore conclude that the injury was not attributable to the work accident. The Board remanded the issue to the ALJ for further findings as to why the medical evidence from Dr. Scharf was ignored.

Secondly, the Board found that the ALJ had failed to address the compensability of the contested medical bills, including the applicability of 803 KAR 25:096 to these medical bills and remanded the case to the ALJ for further consideration on this issue as well. This appeal followed.

KRS 342.285 provides that an Administrative Law Judge is the finder of fact and prohibits the Board from substituting its judgment for that of the Administrative Law Judge with regard to the weight of the evidence on questions of fact. *Purchase Transp. Services v. Estate of Wilson*, 39 S.W.3d 816, 817 (Ky. 2001). A finding of fact is erroneous as a matter of law and may be disturbed on appeal *only* if it is so unreasonable under the evidence that a contrary finding is compelled. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986)(emphasis added). "If the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined

whether or not the administrative agency has applied the correct rule of law to the facts so found.” *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n*, 437 S.W.2d 775, 778 (Ky. 1969).

In the instant case, Cook’s argues that the Board improperly substituted its own judgment for that of the ALJ in concluding that Dr. Sharf’s opinion was uncontradicted. Cook’s further argues that it was error for the Board to conclude that the ALJ did not consider the compensability of certain medical expenses, given the ALJ’s conclusion that the pertinent surgery was not related to the work injury. After careful review, we agree with Cook’s.

This is a case of conflicting medical conclusions. Dr. Scharf concluded that the surgery was necessary, given that the work injury aggravated a pre-existing condition. Dr. McCormick concluded that the surgery was not necessitated by the work injury. Instead, the work injury resulted in a sprain, and Jobe was exhibiting a full range of motion several months later. It is the Administrative Law Judge’s responsibility to consider all the evidence and testimony, to judge the credibility of such evidence and testimony, and to make findings of fact and conclusions of law based on that evidence. Simply because the ALJ in the instant case found Dr. McCormick’s testimony to be more credible does not allow the Board to vacate and remand for further findings or to substitute its own judgment regarding the weight of the evidence. We do not find the ALJ’s decision to be flagrantly against the weight of the evidence and instead find that it

is supported by the evidence, specifically by Dr. McCormick's reports and medical conclusions. The Board's decision to the contrary was an abuse of discretion.

The Board's subsequent finding that the ALJ ignored the compensability of medical expenses is also in error, given that the ALJ concluded that those expenses were related to the surgery, and as the surgery was not related to the work injury, Cook's was not responsible for paying such expenses.

Accordingly, we reverse the decision of the Workers' Compensation Board.

ALL CONCUR.

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BRIEF FOR APPELLEE
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