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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000075-WC

ALSTOM POWER, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-08-89251

KEVIN WEIR; HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, Alstom Power, Inc. ("Alstom"), appeals the opinion and order of the Workers' Compensation Board (Board) in favor of Appellee, Kevin Weir ("Weir"). Specifically, Alstom challenges whether the Board properly affirmed the ALJ's award of past, present and future medical expenses for Weir's

impingement tendinopathy syndrome. Having reviewed the record in this case, we find that evidence of substance exists in support of the ALJ's decision. Accordingly, we affirm the Board's order.

Background

On September 28, 2007, Weir was injured while welding steel beams into place, which required him to hold the heavy beams over his head for prolonged periods of time. After consulting with several doctors, including Dr. Glen McClung, it was discovered that Weir had suffered a superior labral anterior and posterior ("SLAP") tear in his right shoulder. On April 16, 2008, Dr. McClung repaired the injury during arthroscopic surgery. Thirty-six days later, Dr. McClung cleared Weir for light duty work. Weir returned to Dr. McClung for check-ups on his shoulder and reported at least some pain during June, July and September of 2008. Alstom Power laid Weir off in September 2008. Weir continued to complain of shoulder pain. After undergoing another MRI on his shoulder, it was determined that Weir had not reinjured his shoulder. Weir successfully found employment with another pipefitting company in January of 2009 after being cleared to return to work without restrictions. Weir received temporary total disability benefits for this injury from the date of his surgery until January 6, 2009.

Between 2008 and 2011, Weir worked for several other companies as a pipefitter and continued to experience what he called constant pain, leading him to seek additional treatment. Weir filed an Application for Resolution of Injury

Claim on January 3, 2011, effectively reopening his prior claim. On March 23, 2011, Dr. John Larkin, Alstom's own retained expert, diagnosed Weir with impingement tendinopathy syndrome ("impingement syndrome"), a condition Dr. Larkin deemed to be work-related and to have come into disabling reality concurrently with Weir's SLAP nearly four years prior. Dr. Larkin testified that impingement syndrome was "usually secondary to an overuse type injury, more commonly with overhead activity." He went on to say that, while Weir's continuing work as a pipefitter would cause periodic aggravation of his injury, Weir's ongoing symptoms were related to the underlying SLAP tear injury of 2007. Dr. Larkin assigned Weir a 2% impairment rating due to the shoulder injury.

After a hearing, the ALJ awarded past, present and future medical compensation to Weir for both the SLAP tear and the impingement syndrome, finding both to be work-related and compensable. On appeal, the Board affirmed the findings of the ALJ, stating that it was reasonable for the ALJ to conclude the impingement syndrome was work-related and was brought into disabling reality by the SLAP tear. Alstom now appeals from this finding.

Standard of Review

On appeal, Alstom contends that the Board erred in finding causation between Weir's impingement syndrome and his employment with Alstom. Alstom further contends that the Board's finding that Weir's impingement syndrome resulted from cumulative trauma was in error, as Weir failed to make such a claim and, they contend, Weir was not employed by Alstom at the time his symptoms arose. Accordingly, Alstom disputes the Board's award of compensation for Weir's impingement syndrome.

When reviewing a decision of the Board, we will affirm the Board absent a finding that the Board has misconstrued or overlooked controlling law or has so flagrantly erred in evaluating the evidence that gross injustice has occurred. *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687–88 (Ky. 1992). In order to properly review the Board's decision, we are ultimately required to review the ALJ's underlying opinion. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Where, as here, the ALJ finds in favor of the employee—who bears the burden of proof—we must ask only whether there is "some evidence of substance to support the finding, meaning evidence which would permit [the ALJ] to reasonably find as it did." *Id.* at 643. Substantial evidence is defined as evidence of relevant consequence which would induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chem. Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

Analysis

It is well established that causation is a factual issue to be determined within the sound discretion of an ALJ as fact-finder. *Dravo Lime Co. v. Eakins*, 156 S.W.3d 283 (Ky. 2005). Even having proven the existence of an injury, a Plaintiff is also required to establish causation with regard to each and every element of his claim. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979); *Jones v. Newberg*, 890 S.W.2d 284 (Ky. 1994); *Brown-Foreman Corp. v. Upchurch*, 127 S.W.3d 615 (Ky. 2004). Furthermore, "where the matter being considered involves a question of medical causation that is not obvious to a layperson, it must be established by expert testimony." *Elizabethtown Sportswear v. Stice*, 720 S.W.2d 732 (Ky. App. 1986); *Mengel v. Hawaiian-Tropic Ne. & Cent. Distrib., Inc.*, 618 S.W.2d 184 (Ky. App. 1981). Alstom claims Weir did not meet this burden and that the ALJ and the Board erred in finding causation between Weir's impingement syndrome and his employment with the company due to "a misunderstanding of the evidence of record from Dr. John Larkin." Alstom contends that the Board "fails to recognize" that, prior to Dr. Larkin's 2011 diagnosis of impingement syndrome, Weir had worked for three employers subsequent to his time with Alstom.

Dr. Larkin's and Weir's respective testimonies are largely dispositive of the issue of causation. In his deposition, Dr. Larkin testified that, according to Dr. McClung's records, Weir reported "decreased" pain on June 16, 2008, that it was "much better" on July 28, 2008, but "mild pain" on September 8, 2008, around the time Alstom laid him off. Alstom's own "Chronology of Events" demonstrates

that Weir continued to report varying degrees of pain during and beyond his employment with Alstom. According to Dr. Larkin, these reports of pain are very commonly seen as soon as the second six weeks after the type of surgery Weir underwent in April 2008.

In addition to Dr. Larkin's medical testimony, Weir himself testified in his deposition, "[b]efore the surgery, there was a great deal of pain, but I had my strength. Post-surgery, I've never seemed to regain strength." When asked if his pain improved after surgery, Weir responded, "It was for a little while . . . there was a honeymoon phase." Weir's testimony alone establishes that he continued to experience symptoms soon after his surgery and while he was still employed with Alstom. The continuation of these symptoms eventually led Dr. Larkin to diagnose Weir with impingement syndrome.

Therefore, we have to disagree with Alstom when it states "there is no evidence whatsoever that [Weir] was suffering from impingement syndrome at the time of his employment with [Alstom]." It is evident that Dr. Larkin's testimony reasonably convinced the ALJ that Weir's impingement syndrome was the direct result of, and became symptomatic concurrently with, the 2007 SLAP tear. It is also evident that the ALJ came to this conclusion not because he failed to realize Weir's subsequent employment history, but in spite of it. Testimony from Alstom's own medical expert tying causation to an injury which was suffered during Weir's employment with Alstom Power is compelling, and the mere fact that Weir was subsequently employed by at least three other companies where he

did the same work is insufficient to show even a "misunderstanding" on the part of the Board, let alone reversible error.

There exists in the record substantial and persuasive testimony by a medical expert, Dr. Larkin, that Weir's impingement syndrome became symptomatic at the same time as his 2007 SLAP tear injury, during Weir's employment with Alstom. There is also medical testimony from Weir and Dr. Larkin that Weir's symptoms never completely subsided between his injury in 2007 and his diagnosis of impingement syndrome in 2011. This being the case, we find there to be substantial evidence supporting the ALJ and the Board's decisions regarding causation.

Alstom also contends that the Board "failed to recognize" the fact that Weir never made a claim for a cumulative trauma injury and that the ALJ then exceeded the scope of the matter by crafting a new theory of liability by finding that Weir's injury resulted from cumulative trauma. We agree.

In his Opinion, the ALJ states:

> . . . [T]he deposition of Dr. Larkin was taken on April 13, 2011, and this was the first mention that one of the Plaintiff's conditions might be impingement syndrome caused by cumulative trauma. Further, Dr. Larkin was the Defendant's expert and there is no evidence that the Plaintiff was aware, prior to April 13, 2001 [sic], that one of his diagnosis was impingement syndrome caused by cumulative trauma. Finally, although not originally listed as a contested issue on the BRC Order the issue of work-relatedness of the impingement syndrome caused by cumulative trauma was added by Agreed Order dated June 30, 2011, and fully briefed by the parties. It is further clear

> that the parties were contemplative [sic] its inclusion as a contested issue at least no later than the Final Hearing.

The ALJ correctly states that Dr. Larkin's testimony in April of 2011 was the first mention of Weir's injury being the result of the "cumulative effects" of years of heavy, overhead lifting. Weir could not possibly have known this when he filed his Application for Resolution of Injury three months prior to Dr. Larkin's diagnosis. However, Dr. Larkin at no time used the term "cumulative trauma," and the ALJ seems to have inserted that term into his opinion based upon Dr. Larkin's testimony to the "cumulative effect" of Weir's years of strenuous work. The ALJ was further mistaken in stating that the issue had been "fully briefed," as Alstom's brief unequivocally states, "[a]s a point of clarification, the only claim presented for the ALJ's decision is the claim for an injury that occurred on September 28, 2007. This is not a repetitive trauma claim . . . ." The ALJ is also mistaken in stating that the Agreed Order of June 30 added the issue of cumulative trauma to those issues under consideration. Rather, the parties stipulated only to "1) Benefits pursuant to KRS 342.730/Extent and Duration; 2) Causation/work-relatedness of the Plaintiff's right should impingement syndrome; and 3) Whether Plaintiff is entitled to future medical benefits for this ongoing right shoulder complaints."

While the ALJ's use of the term "cumulative trauma" was indeed erroneous, our above ruling regarding causation renders this issue moot and the error harmless. While a separate claim for cumulative trauma was not made, there exists in the record substantial medical testimony which establishes that Weir's

injury resulted from the "cumulative effects" of overuse and repetitive overhead lifting, a consequence of Weir's line of work. Most importantly, Dr. Larkin concluded that Weir's impingement syndrome came into disabling reality concurrently with, and as a direct result of, the SLAP tear. The erroneous mention of the term "cumulative trauma" factored little, if at all, into the ALJ's ultimate finding of causation. It did not change the fact that, whether the result of cumulative trauma or not, Weir's impingement syndrome was proven by medical testimony to be the result of the SLAP tear suffered while Weir was employed by Alstom. Therefore, the ALJ's finding of causation, which he arrived at independently of the erroneous mention of cumulative trauma, was correct, rendering moot any resulting error.

We conclude that evidence of substance exists to support the finding of the ALJ and the Board. The finding of the Workers' Compensation Board is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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