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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000711-WC

MIKE SARGENT d/b/a
SARGENT'S RACELAND WHOLESALE TIRE, AS INSURED BY TRAVELERS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-78334

PAUL BELLAMY;
MIKE SARGENT d/b/a
SARGENT'S RACELAND WHOLESALE TIRE,
AS INSURED BY PRAETORIAN INSURANCE
COMPANY; HONORABLE GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND KENTUCKY
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

DIXON, JUDGE: Sargent's Raceland Wholesale Tire ("Sargent"), as insured by Travelers ("Travelers"), seeks review of an order of the Workers' Compensation

Board reversing in part, vacating in part, and remanding an Administrative Law Judge's decision regarding apportionment of medical expenses. After thorough review, we affirm.

The claimant, Paul Bellamy, sustained two work-related back injuries while employed by Sargent. In July 2007, Bellamy injured his back when a tire exploded in front of him. At the time of the first injury, Sargent was insured by Praetorian Insurance Company ("Praetorian"). In July 2009, Bellamy sustained a second back injury and a cervical injury when he lifted a tire for installation on a vehicle. Travelers was the insurance carrier for Sargent at the time of the second injury.

The injury claims were consolidated and a hearing was held in August 2011. The ALJ rendered an opinion, order, and award, which included the following findings as to work-relatedness:

> Having reviewed the evidence of record, the Administrative Law Judge is persuaded by the opinions of Dr. Tibbs, Dr. Snider and Dr. Lowe that plaintiff suffered a permanent lumbar injury in 2007 and a new lumbar injury and a cervical injury in 2009. Despite Travelers' argument that no objective evidence of a cervical injury exists, the opinions of Drs. Tibbs, Snider and Lowe and the cervical and lumbar MRIs lead the Administrative Law Judge to conclude otherwise. Dr. Tibbs identified both cervical and lumbar abnormalities on the MRIs and Dr. Snider and Dr. Lowe each assigned permanent impairment ratings for the lumbar and cervical spine. Based on these factors, it is determined plaintiff suffered a compensable lumbar injury in 2007 and a compensable cervical injury in 2009 along with a new lumbar injury at that time as well.

The ALJ awarded Bellamy permanent partial disability benefits, concluding that he sustained 5% impairment due to the 2007 injury and 18% impairment (5% cervical and 14% lumbar) from the 2009 injury. As to medical expenses, the ALJ found as follows:

> Based on the foregoing findings, it is determined that Travelers is responsible for all medical expenses relating to the cervical injury. Moreover, although the greater impairment rating is attributable to the 2009 incident, the Administrative Law Judge notes that plaintiff's lumbar treatment did not change significantly following the 2009 incident from that following the 2007 incident. In addition, the totality of evidence persuades the Administrative Law Judge that the 2007 injury was the instigating lumbar event for which plaintiff required ongoing treatment and was first entitled to permanent lumbar medical benefits. As such, it is determined [Praetorian] is responsible for medical expenses associated with plaintiff's lumbar condition.

Praetorian filed a petition for reconsideration alleging that Travelers was responsible for the medical expenses related to Bellamy's lumbar condition pursuant to *Derr Construction Co. v. Bennett*, 873 S.W.2d 824 (Ky. 1994). The ALJ denied Praetorian's petition, and Praetorian appealed to the Board. The Board agreed with Praetorian and reversed the medical expenses award.[1] Travelers then filed this petition for review.

When this Court reviews a decision of the Board, we "correct the Board only where the Court perceives the Board has overlooked or misconstrued

[1] The Board also, *sua sponte*, vacated in part the award of PPD benefits for the 2007 injury. The Board instructed the ALJ on remand to use the two multiplier to enhance Bellamy's PPD benefits for the 2007 injury. Praetorian did not appeal the Board's finding on this issue; consequently, we need not address it in this opinion.

controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Travelers argues that the Board misinterpreted the controlling law on apportionment of medical expenses and exceeded the scope of its review.

KRS 342.020(1) states in relevant part:

> In addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury . . . as may reasonably be required at the time of the injury and thereafter during disability . . . .

In *Derr Construction*, the Kentucky Supreme Court explained:

> KRS 342.120(4) [now KRS 342.120(6)] specifically exempts the employer from paying income benefits for prior, active disability or for disability resulting from the arousal of a previously dormant condition. However, KRS 342.020 contains no such exemption regarding medical benefits. Liability for medical expenses requires only that an injury was caused by work and that medical treatment was necessitated by the injury.
> * * *
> In the instant case the ALJ determined that claimant had sustained a work-related cumulative trauma injury while working for his employer, a determination that was supported by substantial evidence. The ALJ also determined that claimant's arthritic condition, to which the last employment contributed, was caused by the cumulative trauma of his many years of iron work. Regardless of whether future knee implant surgery had been recognized as an eventuality before the incident of October, 1989, there was testimony that the incident had hastened the date on which the surgery would be required. Therefore, although it might seem harsh on the facts of this case to impose liability for future medical expenses necessitated by claimant's arthritic condition on

> this employer, it has been determined that work done for the employer contributed, at least to some degree, both to the condition and to claimant's resulting disability. Under such circumstances, where work has caused the disabling condition, the resulting medical expenses ought to be borne by the workers' compensation system.

Derr Construction Co., 873 S.W.2d at 827.

Travelers asserts that *Derr Construction* merely sets forth a "general rule," and the ALJ in this case was vested with the discretion to weigh the evidence and conclude that the circumstances warranted apportionment of medical expenses to Praetorian for the lumbar injury. In support of its argument, Travelers cites evidence in the record to support the ALJ's conclusion that Bellamy's course of treatment for his lumbar condition remained substantially the same following his 2009 injury.

Since the decision in *Derr Construction*, two published opinions have addressed the apportionment of medical expenses where more than one employer or insurance carrier was involved. In *Phoenix Mfg. Co. v. Johnson*, 69 S.W.3d 64, 66 (Ky. 2001), the ALJ approved a settlement agreement between two insurance carriers to split equally all future medical expenses. The Kentucky Supreme Court found that apportionment was proper in light of the carriers' specific settlement agreement and concluded that the principles of *Derr Construction* did not supersede it. *Id*. at 68-69.

In *Sears Roebuck & Co. v. Dennis*, 131 S.W.3d 351, 353 (Ky. App. 2004), the claimant initially suffered a back injury while employed by Radio Shack.

Later, while employed by Sears, the claimant re-injured his back and sustained a psychological injury. *Id*. On review, this Court quoted the reasoning of the Board, as follows:

> While it is true in general that the last employer would be responsible for medical expenses, there are occasions where medical expenses can be clearly distinguished as resulting from distinct and separate events and body parts. Here, expert testimony indicates the physical injury to [claimant's] low back at Sears did not result in any structural change nor did it result in additional impairment. There was evidence upon which the ALJ could reasonably conclude the injury at Sears produced only temporary effects. In such a situation it is proper to award medical benefits during the temporary period payable by the employer responsible for the temporary aggravation and, once the individual returns to his baseline condition, to require the employer responsible for the earlier injury to resume medical payments. This is what the ALJ's order on reconsideration specifies. Since the ALJ found the psychological condition was related to the injury at Sears, she appropriately made Sears responsible for the medical benefits related to the psychological condition.

Id. at 356. The Court determined that apportioning medical expenses to Radio Shack for the back condition was appropriate because the evidence established that the claimant's back injury at Sears was a temporary aggravation of symptoms rather than a permanent structural change. *Id*. Noting the ALJ's finding that the claimant "suffered distinct injuries affecting different parts of his body with each employer[,]" the Court concluded that KRS 342.020 did not preclude the apportionment of medical expenses between two different employers/insurers "when the circumstances so warrant." *Id*.

Unlike the claimant in *Sears*, Bellamy clearly sustained a new lumbar injury, rather than a temporary aggravation of symptoms. Although Travelers minimizes the severity of the second lumbar injury, substantial evidence supported the ALJ's finding that Bellamy's initial lumbar injury resulted in 5% impairment, and his subsequent lumbar injury in 2009 resulted in an additional 14% impairment. Based on these findings, it was inconsistent for the ALJ to apportion liability to Praetorian merely because Bellamy's lumbar treatment regimen did not change significantly or because the 2007 injury was the "instigating lumbar event."[2]

Although Bellamy had an active lumbar impairment following the 2007 accident, substantial evidence established that he sustained a disabling lumbar injury during the course of his work for Sargent (as insured by Travelers) in 2009, which required him to continue his medical treatment for lumbar pain. We conclude the principles enunciated in *Derr Construction* are controlling, and Travelers is liable for Bellamy's lumbar-related medical expenses.

After careful consideration, we agree with the Board's conclusion that the ALJ erred by apportioning liability to Praetorian; accordingly, we are satisfied that the Board did not misconstrue the legal authorities or exceed the scope of its review.

For the reasons stated herein, we affirm the decision of the Workers' Compensation Board.

[2] The ALJ's opinion indicates Bellamy relied on Loracet, Flexeril, and Motrin 800 for pain management. In January 2010, Bellamy complained of increased lumbar pain. In March 2011, Bellamy's family physician increased his Loracet dosage to three pills per day.

ALL CONCUR.

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