

RENDERED: DECEMBER 21, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001146-WC

ABS GLOBAL, INC. D/B/A GENUS PLC
D/B/A PIC NORTH AMERICA

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-00501

KIMBERLY NICOLE DRAPER;
HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: ABS Global, Inc. D/B/A Genus PLC D/B/A PIC North

America ("ABS") appeals from an Opinion of the Workers' Compensation Board

affirming an Opinion and Award on remand rendered by Hon. Joseph W. Justice,

Administrative Law Judge (“ALJ”). The Board affirmed the ALJ’s determination that Kimberly Draper was entitled to permanent partial disability benefits (“PPD”) and medical benefits for a work-related cervical injury. ABS contends that Judge Justice erred in concluding that Draper’s cervical condition was causally related to her employment with ABS, and that ABS cannot be held responsible for any disability attributable to medical treatment that it was unaware of. We find no error, and accordingly affirm the Opinion of the Board.

In 2005, Draper began her employment as a herdsman for ABS’s pig farrowing operation. Draper’s primary job duty included placing piglets on a cart, after which they would be given tags and shots, and then moved on to another area of the facility. Draper also used a power washer to clean the area, and she would feed the pigs by pushing a cart weighing 150 to 175 pounds and using a food scoop. The record indicates that these duties included lifting and pushing heavy items, and lifting her arms above her head when power washing.

In September or October of 2008, Draper gradually began to experience neck pain and migraine headaches. When the pain first developed, she did not attribute it to her employment. In January, 2009, Draper was treated several times by a chiropractor, but the pain only worsened. She then went to see her family physician, Dr. John Adams, who ordered an MRI scan. After reviewing the results of the scan, Dr. Adams referred Draper to Dr. Taleghani who recommended physical therapy.

In February, 2009, Draper began to experience pain which radiated down her arm and into her fingers. Dr. Taleghani recommended trying to resolve the neck pain before addressing the radiating arm pain, and Draper continued with physical therapy for about three months. While lifting weights during physical therapy on May 15, 2009, Draper felt and heard an audible popping sound in her neck, and the pain became severe. After leaving physical therapy, Draper sought treatment that same day at the Northwest Hospital emergency room in Springfield, Kentucky. It was later determined that Draper had a ruptured cervical disc, the injury appearing to have occurred or worsened during the physical therapy session.

On June 3, 2009, Dr. Taleghani performed a cervical discectomy and fusion on Draper. In December, 2009, Dr. Taleghani expressly related Draper's right ulnar nerve entrapment to her employment with ABS, but did not offer an opinion as to whether the cervical condition was work-related. After more physical therapy and a work-hardening program, Dr. Taleghani released Draper to return to light duty work at ABS on September 21, 2010. After a few days back at work, Draper experienced another migraine, and within a matter of weeks, the right upper extremity pain and cervical spine soreness began to return.

Thereafter, Draper filed a Form 101 Application seeking workers' compensation benefits. By way of an Order rendered December 20, 2010, the ALJ determined that Draper's ulnar nerve injury claim was compensable under the Act, and awarded temporary total disability benefits, permanent partial disability benefits and medical benefits. As to the cervical injury, the ALJ determined that

Draper did not demonstrate a causal connection between her employment and the cervical condition. Specifically, the ALJ found the testimony of defense evaluator Dr. Timothy Kriss to be more persuasive than the medical opinion of Dr. Taleghani. Draper's Petition for Reconsideration was overruled, and she appealed to the Board.

On August 12, 2011, the Board remanded the matter back to the ALJ for the entry of additional findings of fact to support his dismissal of Draper's cervical injury claim. On remand, ALJ Justice reversed his opinion as it related to the cervical injury upon concluding that the medical evidence and expert opinions of Drs. Taleghani and Kriss supported a determination that Draper's cervical injury resulted from her employment. In so doing, the ALJ found the cervical injury to be fully compensable. ABS's Petition for Reconsideration was denied, and ABS appealed to the Board.

In an Opinion Affirming rendered June 4, 2012, the Board sustained ALJ Justice's finding that Draper's cervical injury was causally connected to her employment with ABS. The Board found in relevant part that there was sufficient evidence in the record to support ALJ Justice's determination that Draper's cervical pathology was work-related. It also rejected ABS's claim that ABS could not be held responsible for the apparent injury Draper suffered during physical therapy as it was not aware that Draper was alleging a work-related condition or undergoing physical therapy and thus had no control or direction over the treatment. This appeal followed.

ABS now argues that the Board erred in sustaining the ALJ's determination that Draper's cervical condition was work-related and therefore compensable. It contends that ALJ Justice exceeded his authority on remand by rejecting the testimony of Dr. Kriss, upon which he had relied in his first Opinion. The focus of its argument is that ALJ Justice's determination that Draper's cervical condition was causally related to her employment was not supported by substantial evidence. ABS also contends that it cannot be held responsible for any disability attributable to medical treatment of which it was not aware. That is to say, it maintains that even if Draper's physical therapy was somehow necessitated by her employment with ABS, the cervical injury of May 15, 2009, still should not be regarded as a compensable work-related event. In sum, ABS seeks an Opinion reversing ALJ Justice's December 12, 2011 Opinion, Order and Award on Remand.

As to the first issue, we are not persuaded that ALJ Justice exceeded the scope of his authority on remand by finding the testimony and medical evidence of Drs. Taleghani and Kriss to support a finding of causality. The Board remanded the matter to ALJ Justice because

nowhere in the order denying in pertinent part the Petition for Reconsideration did the ALJ address Draper's request for additional findings in regard to Dr. Kriss' opinion concerning the possible causal relationship between Draper's work, her muscular aches and pains to her neck, the May 2009 physical therapy session, the cervical disc herniation and the need for cervical surgery.

As such, on remand ALJ Justice was directed to reconsider the work-relatedness of Draper's cervical conditions, if any, and the degree to which Dr. Kriss's testimony affected that determination. This is precisely what he did. The ALJ's first Opinion was vacated by the Board, rendering it void. *Skelton v. Roberts*, 673 S.W.2d 733 (Ky. App. 1984). Additionally, when this issue was appealed to the Board, it expressly noted that ALJ Justice did not exceed the scope of his authority by reconsidering the issue of causality on remand. We therefore find no error on the limited issue of whether ALJ Justice erred in reconsidering the import of Dr. Kriss's testimony and its effect, if any, on the finding of work-relatedness.

We also find no error on the second and related issue, wherein ABS maintains that there is no substantial evidence to support ALJ Justice's determination that Draper's cervical condition was causally related to her employment with ABS. In reaching the conclusion that Draper's cervical condition was causally related to her employment with ABS, ALJ Justice found the testimony of Dr. Taleghani supported such a finding, and to a lesser extent Dr. Kriss's opinion supported a finding of causality. Dr. Taleghani testified on August 17, 2010, that Draper's neck condition was work-related. This testimony, which was given by Draper's treating physician and surgeon, constitutes substantial evidence in support of the ALJ's finding of causation. If anything, Dr. Kriss's testimony may bolster that finding, as he opined that her cervical disc was injured during physical therapy, which itself resulted from her employment. Additionally,

Dr. Barlow assessed a 10% impairment, which he related to “her job-related activities[.]”

Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367 (Ky. 1971). The possibility of drawing two inconsistent conclusions from this evidence does not prevent the finding from being supported by substantial evidence. *Id.* Additionally, it is the exclusive province of the trier of fact, in this case ALJ Justice, to judge the credibility of the witnesses and the weight of the evidence. *Dravo Lime Co., Inc. v. Eakins*, 156 S.W.3d 283 (Ky. 2005). When these factors are considered, we cannot conclude that the Board erred in determining that ALJ Justice’s finding of causality was supported by substantial evidence.

ABS’s final argument is that it cannot be held responsible for any disability attributable to medical treatment of which it was unaware. Directing our attention to *Transport Associates v. Butler*, 892 S.W.2d 296 (Ky. 1995), it maintains that even if Draper’s physical therapy was related to her employment with ABS, the cervical injury she suffered during the physical therapy session on May 15, 2009, nevertheless should not be regarded as a compensable work-related event. Citing *Elizabethtown Sportswear v. Stice*, 720 S.W.2d 732 (Ky. App. 1986), the Board rejected this argument on two grounds. First, on the date the physical therapy was administered, no medical expert had yet connected Draper’s neck injury to her employment. As such, there was nothing about which ABS could have been

informed. Second, there was no basis for concluding that the physical therapy was unreasonable, unnecessary or not appropriate. In addition, the Board determined that regardless of whether an employer participates in the selection of medical treatment, it is liable for disability due to the aggravation of a work-related injury as a result of the medical treatment. *Transport Associates* at 299. This conclusion is supported by the record and the law, and we find no error.

For the foregoing reasons, we affirm the Opinion of the Workers' Compensation Board.

ALL CONCUR.

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