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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001547-WC

JACK COOPER TRANSPORT
COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-73762

THOMAS BUSH; HON. JOSEPH
W. JUSTICE, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS AND STUMBO, JUDGES.

ACREE, CHIEF JUDGE: Appellant Jack Cooper Transport Company, Inc.

appeals from a decision of the Workers' Compensation Board vacating an

Administrative Law Judge's conclusion that Appellee Thomas Bush was not

entitled to future medical benefits for a work-related low back injury. For the reasons that follow, we affirm the Board.

I. Facts and Procedure

Between 2007 and 2009, Bush purportedly suffered several work-related injuries while employed as a truck driver/car hauler for Jack Transport. According to Bush, he injured his left hamstring and low back on July 12, 2007, injured his left foot/heel on October 5, 2007, and injured his right foot on October 11, 2008. On November 6, 2009, Bush again injured his lumbar spine/low back. Bush filed claims with the Board for all of his injuries. Only the November 6, 2009 back injury claim, however, is the subject of this appeal.¹

At the hearing conducted on December 15, 2011, Bush testified² he was in Bradford, Pennsylvania, loading a truck when he sustained the low back injury at issue.³ Bush claimed the injury occurred while he was putting a skid into the tractor-trailer unit; the skid became stuck and jarred Bush's lower back. Bush did not immediately seek medical attention, but continued driving his planned route. He spent the night in Carrollton, Kentucky. Bush went to sleep at 8:30 p.m., and when he awoke Saturday morning he could not move and was scared. After

¹ For that reason, we will only discuss the lay testimony and medical evidence pertaining to the November 6, 2009 low back injury.

² Bush testified both by deposition and live testimony.

³ Bush described his job duties to include loading and unloading motor vehicles onto a truck using 60 to 70 pound skids, strapping down those vehicles – which normally includes climbing a ladder – using a “dogging bar,” and road driving.

crawling to and enduring a hot shower, Bush drove to Louisville, Kentucky. On Monday, he reported his low back injury to his terminal supervisor.

Bush testified his back pain begins just below his belt line, and is unlike any other injury he experienced prior to November 6, 2009. Bush claims his back hurts when he rides in a car for any length of time, and it prevents him from sleeping through the night. Bush also experiences back pain when he sits or stands for extended periods of time. Bush testified his back pain considerably restricts his everyday activities, and he believes his back is getting worse. Bush has not worked since the November 6, 2009 injury.

Dr. Carroll L. Witten, Jr., an orthopedic surgeon, treated Bush on November 9, 2009.⁴ A physical examination revealed muscle spasms on the left low back, tenderness to palpation, and percussion. Dr. Witten diagnosed Bush with mechanical low back pain with sciatica, and prescribed Meloxicam and Hydrocodone. Per Dr. Witten's instructions, Bush underwent an MRI and physical therapy; the therapy brought him some relief. Dr. Witten's impression was that Bush had reached maximum medical improvement for his low back as of March 31, 2010. However, a physical examination by Dr. Witten on February 23, 2011, revealed Bush still suffered from "tenderness to palpation and percussion" in his low back. Dr. Witten opined that Bush could continue in gainful employment, but not as a truck driver or car hauler, with working restrictions of lifting no more than 20 pounds repetitively and 50 pounds occasionally. Regarding future treatment,

⁴ Dr. Witten also treated Bush's other work-related injuries.

Dr. Witten testified Bush may need occasional pain medication and symptomatic treatment for his low back; Dr. Witten also thought Bush would benefit from cortisone epidurals. Dr. Witten did not assess an impairment rating.

Dr. Ronald Fadel, an orthopedic surgeon, evaluated Bush on June 29, 2010. Dr. Fadel noted that Bush had suffered a prior low back injury in 1995. Dr. Fadel diagnosed Bush with a lumbosacral strain superimposed upon pre-existing axial degenerative disease sustained because of the November 6, 2009 injury. Dr. Fadel testified Bush's back injury treatment "has been maximized" and he did "not anticipate any further formal treatment." He expressed the opinion that Bush reached maximum medical improvement in April 2010. Dr. Fadel further stated that Bush's "prognosis for a degree of recovery sufficient to perform his expected work duties is guarded in my view." He assessed a 0% permanent impairment rating, but suggested work restrictions that would limit Bush's lifting duties to no more than 50 pounds occasionally and would avoid repetitive bending, twisting, or stooping.

Dr. Warren Bilkey evaluated Bush on August 30, 2010. A physical examination revealed Bush was still suffering from low back pain with pain radiation in his left lower limb. Dr. Bilkey diagnosed a lumbar strain resulting from the November 6, 2009 injury. Dr. Bilkey concluded that no additional diagnostic or treatment procedures would likely prove helpful. Dr. Bilkey assessed a 5% permanent impairment rating, and recommended Bush avoid carrying or

lifting over 30 pounds, climbing, sitting for more than two hours at a time, and standing over 30 minutes at a time.

By Opinion, Award, and Order rendered February 21, 2012, the ALJ dismissed Bush's claim for permanent partial disability benefits for his low back injury.⁵ On petition for reconsideration, the ALJ also denied Bush's request for an award of reasonable and necessary future medical benefits pertaining to his low back injury.

On appeal, the Board reversed the ALJ's finding that Bush was not entitled to future medical benefits. The Board set out the following rationale for its decision:

We agree the ALJ erred in dismissing Bush's low back claim in its entirety based on a finding Bush had "0% WPI of the low back." The ALJ did not adequately address Bush's claim for medical benefits. . . . [KRS Chapter 342] does not require the claimant to have permanent injury and/or disability to be eligible for medical benefits. . . . Furthermore, workers suffering temporary injuries may be entitled to medical benefits pursuant to KRS 342.020. An injured worker is entitled to an award of medical benefits "at the time of injury and thereafter during disability" in the absence of a permanent injury or disability. KRS 342.020(1); Combs v. Kentucky River District Health Dept., 194 S.W.3d 823 (Ky. App. 2006). . . . In FEI Installation, Inc. v. Williams, supra, the Supreme Court instructed that KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award.

⁵ The ALJ also dismissed Bush's claim for permanent partial disability benefits and future medical benefits for his 2008 right foot injury, but awarded Bush permanent partial disability benefits for his 2007 hamstring injury, and both temporary total disability and, thereafter, permanent partial disability benefits for his 2007 left foot injury.

In the case *sub judice*, the medical evidence unquestionably establishes Bush sustained a low back injury as a result of his work at Jack Cooper, which produced at least a temporary condition. Although Dr. Bilkey alone assessed a permanent impairment rating as a result of Bush's work at Jack Cooper, the medical evidence introduced on behalf of Jack Cooper does not contradict a finding of a work injury. Dr. Fadel's letter establishes a diagnosis of lumbosacral sprain superimposed upon pre-existing axial degenerative disc disease as a result of the November 6, 2009 injury. In addition, Dr. Fadel noted Bush's prognosis was guarded and set forth specific work restrictions. Although Dr. Fadel stated the restrictions involved considerable overlap since much of Bush's subjective assertions are related to previous injuries, he assessed these restrictions in response to a specific inquiry as to the restrictions to be imposed as a result of the November 6, 2009 injury. Dr. Witten's testimony and records support the need for future medical care.

As the medical evidence establishes Bush sustained an injury as defined by the Act, possibly entitling him to medical benefits, the ALJ erred in completely dismissing the low back injury claim. In the opinion, award, and order, the ALJ did not discuss Bush's entitlement to future medical benefits due to his low back injury, and his March 27, 2012, order contains an erroneous statement of law regarding a claimant's entitlement to medical benefits in the absence of a functional impairment rating. Therefore, this matter must be remanded to the ALJ for additional findings of fact regarding Bush's entitlement to future medical benefits due to his low back injury.

(R. at 997-1001). From this order, Bush promptly appealed.

II. Standard of Review

Our task when reviewing a decision of the Board "is to correct the Board only where the 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

The Board “shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact” because the ALJ is deemed the sole arbitrator of fact in workers’ compensation cases. KRS 342.285; *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 316 (Ky. 2007). Despite this, it is the Board’s and, in turn, this Court’s function to review the ALJ’s decision to determine whether the decision was erroneous as a matter of law. *See* KRS 342.285(2)(c) – (e).

III. Analysis

Jack Transport argues the Board erroneously disturbed the ALJ’s decision to deny Bush future medical benefits for his low back injury. Jack Transport proffers that the Board usurped the role of the ALJ when it substituted its judgment for that of the ALJ despite substantial evidence in the record supporting the ALJ’s finding that Bush was not entitled to future medical benefits. Jack Transport further maintains the Board erred when it vacated the ALJ’s decision and directed the ALJ to produce additional findings. We are not persuaded.

The Board perceived – and we agree – that the ALJ was laboring under an erroneous interpretation of the law when it stated in its order denying Bush’s petition for reconsideration that:

the undersigned Administrative Law Judge found on pages 22 and 23 of his Opinion and Award that [Bush] had a 0% whole person impairment to the low back and further found that there was no permanent injury to the lumbar spine or low back, **and therefore**, there is no award of future medical treatment or future medical benefits under KRS 342 for [Bush] for the low back or the lumbar spine.

(R. at 907) (emphasis added). This language reveals the ALJ believed Bush was not entitled to future medical treatment *because* the ALJ had previously found no permanent low back impairment and declined to assign a permanent rating. This is incorrect.

It has long been the law in this Commonwealth that the absence of a permanent impairment rating does not preclude an award of future medical benefits. *Cavin v. Lake Construction Co.*, 451 S.W.2d 159, 161-62 (Ky. 1970) (“We do not believe it is necessarily inconsistent for the [B]oard to award payment of medical expenses without finding some extent of disability. It is not impossible for a non-disabling injury to require medical attention.”); *Combs v. Kentucky River Dist. Health Dep’t*, 194 S.W.3d 823, 826-27 (Ky. App. 2006). By its plain language, Kentucky Revised Statute (KRS) 342.020 entitles a claimant to medical benefits “for so long as the employee is disabled regardless of the duration of the employee’s income benefits.” KRS 342.020(1); *Mullins v. Mike Catron*

Construction/Catron Interior Systems, Inc., 237 S.W.3d 561, 563 (Ky. App. 2007).

A “disability exists for the purposes of KRS 342.020(1) for so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating, permanent disability rating, or permanent income benefits.” *Williams*, 214 S.W.3d at 319.

Our Supreme Court recently re-affirmed its interpretation of KRS 342.020(1) in *Kroger v. Ligon*, 338 S.W.3d 269 (Ky. 2011). In that case, the claimant sustained a work-related shoulder injury requiring surgery. Multiple physicians testified the claimant had reached maximum medical improvement and needed no further treatment at that time. The ALJ dismissed the claimant’s request for permanent income and medical benefits. The Board subsequently vacated the ALJ’s finding that the claimant was not entitled to future medical benefit for his work-related shoulder injury.

The Supreme Court affirmed the Board, explaining, “a worker who reaches maximum medical improvement with no permanent impairment rating” may still be entitled to future medical benefits under KRS 342.020(1) provided the “injury causes impairment” and there is competent evidence that the worker may well be in need of future medical care. *Id.* at 273. As used in KRS Chapter 342, an “impairment demonstrates a harmful change in the human organism and ‘disability,’ regardless of whether the impairment and resulting disability are severe enough to warrant a permanent impairment rating or permanent income benefits.” *Id.* at 273-74 (citing *Williams*, 214 S.W.3d at 318). The Supreme Court

concluded that “evidence that [the claimant] required no medical treatment as of the date he reached MMI or the date that his claim was heard was an improper basis to deny future medical benefits.” *Id.* at 274.

Here, the ALJ declined to award Bush future medical benefits without explanation except to point out that the ALJ had previously found Bush did not sustain a permanent injury to his low back and assigned a 0% whole person impairment. The lack of a permanent impairment rating is an inadequate basis upon which to deny future medical benefits. *Kroger*, 338 S.W.3d at 273 (explaining KRS 342.020(1) entitles a worker “to reasonable and necessary medical treatment ‘at the time of the injury and thereafter during disability,’ without regard to the duration of income benefits.” (quoting KRS 342.020(1))). The ALJ’s interpretation of KRS 342.020(1) runs contrary to established precedent and cannot withstand scrutiny. We do not perceive the Board misconstrued controlling authority when it vacated the ALJ’s finding concerning Bush’s entitlement to future medical benefits absent an impairment rating.

Jack Transport further claims *Kroger* is factually distinguishable and not controlling. Instead, Jack Transport argues the facts here lend themselves to the reasoning of *Mullins v. Mike Catron Construction/Catron Interior Systems, Inc.*, 237 S.W.3d 561 (Ky. App. 2007), in which this Court pointed out our Supreme Court has not held that medical benefits must be awarded in all cases, and affirmed an ALJ’s decision to deny future medical benefits to a worker who

suffered a temporary aggravation of a pre-existing condition. We do not agree that this case is governed by *Mullins*.

In *Mullins*, the claimant sustained a work-related low back injury. The ALJ concluded Mullins had no permanent impairment as a result of his injury and declined to award future medical benefits. This Court affirmed the ALJ's decision, explaining "there is evidence that Mullins will not require future medical treatment for any effects of his work-related injury." *Id.* at 563.

Mullins represents a "narrow class of cases" in which the claimant wholly "failed to show the need for future medical treatment after the date he reached" maximum medical improvement. *Kroger*, 338 S.W.3d at 274 (interpreting *Mullins*). Here, unlike the claimant in *Mullins*, Bush presented ample evidence demonstrating his potential need for future medical treatment. All of Bush's treating and evaluating physicians assessed work restrictions, indicating Bush's low back disability was ongoing. Dr. Witten opined Bush may need additional, *albeit* sporadic, pain management and symptomatic treatment for his low back, including possible cortisone epidurals. Further, Bush testified he continues to experience pain in his low back which affects his every day activities, and he believes his back is deteriorating.⁶

⁶ We pause to emphasize neither the Board's order nor this opinion should be construed as requiring the ALJ, on remand, to award Bush future medical benefits. As pointed out by the Board, the ALJ has failed to adequately address Bush's claim for future medical benefits, and it is the ALJ's duty to assess the evidence and render an opinion, based on the medical evidence presented, whether Bush is entitled to future medical benefits as a result of his work-related back injury of November 6, 2009.

Moreover, unlike the record in *Mullins*, there is no evidence here that Bush sustained a temporary exacerbation of a pre-existing condition. While Dr. Fadel pointed out Bush had incurred a prior low back injury, he issued no finding that Bush's current back pain was merely an aggravation or worsening of that prior affliction. Instead, as referenced, all the medical evidence revealed Bush suffered an independent low back injury resulting from the November 6, 2009 incident.

IV. Conclusion

The Board's August 9, 2012 Opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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