

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000672-WC

ST. ELIZABETH HEALTHCARE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-70625

WILLIAM GENTER; HON.
WILLIAM J. RUDLOFF, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

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

TAYLOR, JUDGE: St. Elizabeth Healthcare petitions this Court to review an opinion of the Workers' Compensation Board (Board) entered March 15, 2013, affirming a decision of the Administrative Law Judge (ALJ) to award William Genter temporary total disability (TTD) benefits, permanent total disability (PTD)

benefits, and medical benefits for a work-related injury. For the reasons stated, we vacate and remand.

On September 9, 2011, Genter was employed as a registered nurse for St. Elizabeth Healthcare (St. Elizabeth) when he injured his back while moving a patient. Genter reported the back injury to St. Elizabeth by completing an incident report that day. Genter did not immediately return to work due to a previously scheduled vacation. Upon his return on September 20, 2011, Genter experienced neck pain near the end of his first shift. Genter sought medical treatment for this pain on September 26, 2011, and was referred to an orthopedic surgeon. Genter subsequently underwent anterior cervical discectomy and fusion at C5-C7 and cervical decompression at C5-C7 and C6-C7 bilaterally.

Genter filed a claim for workers' compensation benefits related to his injury of September 9, 2011. During the hearing before the ALJ, the uncontroverted evidence demonstrated that Genter had a history of chronic back, neck, and shoulder pain that predated the September 9, 2011, work injury. By opinion and order rendered October 9, 2012, the ALJ determined that Genter suffered a work-related injury to his back, neck, and shoulder on September 9, 2011. The ALJ further found Genter gave adequate and timely notice of his injuries to St. Elizabeth. The ALJ awarded Genter TTD benefits, PTD benefits, and medical benefits.

St. Elizabeth subsequently filed a motion requesting the ALJ to reconsider its October 9, 2012, opinion and order. Relevant herein, St. Elizabeth

requested that the ALJ make a specific finding of fact regarding whether Genter had a preexisting active condition per *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). The ALJ denied St. Elizabeth's motion by opinion and order rendered November 8, 2012. The ALJ did not make any additional finding of fact regarding whether Genter had a preexisting active condition. St. Elizabeth then sought review by the Board; the Board affirmed the ALJ's award, thus precipitating our review.

As an appellate court, we will only reverse the Board's opinion if it has overlooked or misconstrued the law or flagrantly erred in its evaluation of the evidence causing gross injustice. *W. Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992). To do so, we must necessarily review the ALJ's opinion. *Abbott Laboratories v. Smith*, 205 S.W.3d 249 (Ky. App. 2006). It is within the sole province of the ALJ as fact-finder to weigh the credibility of witnesses and determine the weight of evidence. *Id.* Moreover, this Court reviews issues of law *de novo*. *Com., ex rel. Stumbo v. Ky. Pub. Serv. Comm'n*, 243 S.W.3d 374 (Ky. App. 2007).

St. Elizabeth initially contends that the ALJ erred by determining that Genter gave proper notice of his work-related injury. Specifically, St. Elizabeth asserts that the notice given by Genter on September 9, 2011, only identified an injury to Genter's back and did not identify any injury to his neck or shoulder. St. Elizabeth claims it did not receive notice of the neck or shoulder injury until October 24, 2011, and that such notice was untimely. On the other hand, Genter asserts he did

not immediately recognize that his neck and shoulder had been injured in the September 9, 2011, incident and that he gave notice to St. Elizabeth of those injuries as soon as he recognized the injuries were related to the incident on September 9, 2011.

Kentucky Revised Statutes (KRS) 342.185 addresses the notice requirement for a workers' compensation claim. Subsection (1) specifically mandates:

[N]o proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof[.]

KRS 342.185(1). Kentucky law also recognizes that not every injury manifests itself immediately following the work-related incident. *Smith v. Cardinal Const. Co.*, 13 S.W.3d 623 (Ky. 2000) (citing *Reliance Diecasting v. Freeman*, 471 S.W.2d 311 (Ky. 1971)). For example, an employee may immediately notify an employer of a work-related incident, but the injury from the incident may not be immediately apparent. Under those circumstances, the employee is not required to give notice until the injury manifests itself as compensable. *Id.* Simply put, the law does not require the impossible, and a claimant need only give notice as soon as practicable upon manifestation of the injury. *Cardinal Const. Co.*, 13 S.W.3d 623.

In this case, Genter reported that he suffered a work-related injury to his back while moving a patient. Genter reported the injury to his back on the day of the incident, September 9, 2011. Although Genter did not immediately know the

extent of his injuries, he did immediately report the incident to St. Elizabeth. And, when the injury to his neck and shoulder later became apparent, Genter reported those injuries to St. Elizabeth as well. We believe it is reasonable that the injury to Genter's neck and shoulder did not manifest itself until sometime after the original work-related incident occurred and that such injury was properly reported. Under the circumstances presented, we are of the opinion that the ALJ properly concluded that Genter gave adequate and timely notice of his injury to St. Elizabeth.

St. Elizabeth next contends that the Board incorrectly concluded St. Elizabeth waived the issue of whether Genter had a preexisting active condition. St. Elizabeth asserts that the Board erroneously concluded that because "St. Elizabeth failed to list pre-existing active as a contested issue in the August 3, 2012[,] BRC [benefit review conference]" the issue was waived. St. Elizabeth Brief at 13. And, St. Elizabeth contends that if the preexisting condition issue was not waived, then the ALJ erred by failing to make a specific finding of fact regarding whether Genter's preexisting condition was active or dormant when the work-related injury occurred on September 9, 2011.

At the outset, we note that evidence was introduced at the hearing regarding Genter's history of chronic back, neck, and shoulder pain. Genter and his treating physician both acknowledged that Genter's pain predated the work-related injury of September 9, 2011. And, in St. Elizabeth's motion to reconsider, it specifically requested a finding of fact regarding whether Genter had a preexisting active condition.

It is well-established that where evidence has been presented upon a particular issue and the issue is tried without objection by the opposing party, such issue is considered “tried by express or implied consent of the parties.” *Divita v. Hopple Plastics*, 858 S.W.2d 214, 216 (Ky. App. 1993) (citations omitted). In this case, both parties presented evidence regarding Genter’s preexisting condition. Genter’s treating physician averred that the preexisting condition was dormant; conversely, the independent medical examiner opined that the preexisting condition was active. Thus, the issue of Genter’s preexisting condition was clearly tried by consent of the parties and was not waived. *See id.* Furthermore, St. Elizabeth specifically requested that the ALJ make a finding of fact regarding whether the preexisting condition was active or dormant. Under these circumstances, we do not believe St. Elizabeth waived the preexisting condition issue and further believe the ALJ was required to make specific findings of fact regarding whether Genter’s back, neck, and shoulder condition constituted a preexisting active or dormant condition. *See Arnold v. Toyota Motor Mfg.*, 375 S.W.3d 56 (Ky. 2012); *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). Pursuant to KRS 342.275 and KRS 342.285, the ALJ has a statutory mandate to make findings of fact and provide an evidentiary basis for those findings. *Arnold*, 375 S.W.3d 56. Upon remand, the ALJ shall reconsider the evidence and make a specific finding of fact on the issue of whether Genter’s preexisting back, neck, and shoulder condition was active or dormant at the time of the work-related injury on September 9, 2011.

For the foregoing reasons, the opinion of the Workers' Compensation Board is vacated and this case is remanded for proceedings consistent with this opinion.

ACREE, CHIEF JUDGE, CONCURS.

COMBS, JUDGE, CONCURS BY SEPARATE OPINION.

COMBS, CONCURRING: Contrary to appellant's contention at oral argument, the Opinion of the Workers' Compensation Board is far from being "wholly devoid of substance." The majority opinion properly affirms on all points but one – namely, the absence of a specific finding by both the ALJ and the Board as to the issue of a pre-existing condition.

The evidence presented to the ALJ clearly revealed that Genter's back, shoulder, and neck pain predated the work-injury date of September 9, 2011. As was his prerogative, the ALJ elected to believe that the injury at issue nonetheless merited an award of TTD, PTD, and medical benefits.

The only element missing was a specific finding as to the dormant or active status of the pre-existing portion of the pain. I would emphasize that this opinion is narrowly tailored to address and to clarify that sole issue – whose answer is implied but not express – as required by *Arnold, supra*.

BRIEF FOR APPELLANT:

R. Stephen Burke
Crestview Hills, Kentucky

BRIEF FOR APPELLEE,
WILLIAM GENTER:

C. Ed Massey
Erlanger, Kentucky

