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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000550-WC

TRANSERVICE LOGISTICS, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-98912 & WC-10-93949

MICHAEL ZINK; THE KROGER
COMPANY; HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD — APPELLEES

NO. 2013-CA-000680-WC

MICHAEL ZINK — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-98912 & WC-10-93949

TRANSERVICE LOGISTICS, INC.;
THE KROGER COMPANY; HON. CHRIS
DAVIS, ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

ACREE, CHIEF JUDGE: Transervice Logistics, Inc., appeals from an order of the Workers' Compensation Board which affirmed an Administrative Law Judge's (ALJ) order finding Michael Zink suffered three work-related injuries to his right thumb and wrist, and awarding him permanent partial disability benefits and future medical expenses. Zink filed a protective cross-appeal. We affirm.

I. Factual Background

Zink began working as a truck driver for The Kroger Company in 2002. His job responsibilities included hooking and unhooking trailers, unloading products, and occasionally rearranging products on the trailer. He was also required to use a power jack on occasion.

In 2005, Zink was involved in a non work-related motor vehicle accident. He injured his right wrist and thumb. A magnetic resonance imaging (MRI) revealed mild osteoarthritis along the base of the first metacarpal bone and first metacarpal phalangeal (MP) joint space. Zink's treating physician, Dr.

Waquar Aziz, performed a metacarpophalangeal (MCP) joint effusion which reduced, but did not eliminate, Zink's pain. Zink was able to resume working as a truck driver without restriction. However, in October, 2006, Zink returned to Dr. Aziz complaining of mild discomfort. An x-ray revealed the screw used in the fusion had become displaced.

Zink's first work-related injury occurred on December 30, 2006. While stacking pallets on his trailer, Zink's right thumb became lodged in a pallet causing him to be jerked. Zink injured his thumb and pulled his back. Zink returned to Dr. Aziz, who performed a second fusion surgery in January 2007. Though the surgery did not fully alleviate his pain, Zink returned to work in April 2007 without medical-imposed limitations. However, Zink elected to avoid opening trailer doors and requested assistance from co-workers for other duties.

Zink also complained of persistent wrist pain. Dr. Aziz diagnosed Zink with DeQuervain's tenosysnovitis of the right wrist. On February 5, 2008, Dr. Aziz performed a right first dorsal compartment decompression and tenosynovectomy of the extensor pollicis longus and abduction pollicis brevis. Zink was cleared to return to work on March 3, 2008.

Dr. Aziz billed Zink's workers' compensation carriers for both surgeries, explaining he would not have done so if he did not believe the injuries were work related. Importantly, Dr. Aziz testified a significant change in the condition of Zink's thumb occurred between October 2006 and January 2007. Dr.

Aziz declined, however, to issue an impairment rating, preferring instead to defer to Dr. Warren Bilkey.

Dr. Bilkey first examined Zink on August 20, 2007. He found limited range of motion of the thumb and wrist, and diagnosed a right thumb traumatic injury status post open reduction and internal fixation surgical repair with ankylosis of the thumb MP joint. Dr. Bilkey linked Zink's thumb injuries to the December 2006 work incident. He recommended surgery, which occurred on February 3, 2008. On April 30, 2008, Dr. Bilkey placed Zink on maximum medical improvement (MMI) and assigned a 10% impairment rating due to wrist and elbow complaints, a 7% impairment rating due to limited motion of the thumb, and a 20% impairment rating for loss of pinch strength, for a combined 20% whole body impairment rating.

Transervice purchased the truck routes from Kroger in or about 2008, and Zink transitioned from being a Kroger employee to being an employee of Transervice.

Zink's second work-related injury occurred on July 6, 2009. As he was entering his employer's dispatch room to deliver paperwork, the door swung backwards, striking Zink's right thumb and pushing it backwards. Zink reported having severe pain, loss of sensation in his thumb and wrist, and swelling of the anterior thumb. He sought treatment with Dr. Bilkey, who diagnosed a hyperextension injury to Zink's right thumb; Zink was released to return to work without restriction. However, Zink testified his pain increased, and never abated,

following the July 2009 injury. Zink requested further medical treatment in November 2009, which was denied by the workers' compensation carrier.

Zink's third work-related injury occurred on December 6, 2009. Zink was using a crank to "dolly up," when it began "jumping cogs," causing Zink to fall forward onto his right hand. His hand and wrist swelled. Zink sought treatment at a local emergency room. He was later examined by several medical professionals, including Dr. Mark Barrett and Dr. Bilkey.

Dr. Barrett examined Zink on December 28, 2009. Dr. Barrett diagnosed right hand and shoulder pain resulting from the December 2009 injury, and restricted Zink from working until January 18, 2010. In the course of his treatment of Zink, Dr. Barrett was asked to render an opinion concerning the cause and compensability of Zink's injuries. Dr. Barrett opined that the December 2006 injury caused a temporary exacerbation of Zink's pre-existing right hand problem, and Zink returned to his pre-December 2006 baseline after the January 2007 surgery. Dr. Barrett issued conflicting opinions as to the 2009 injuries. Initially, Dr. Barrett stated that 2009 injuries did not result in a permanent work-related condition. In June 2011, Dr. Barrett altered his opinion appreciably; he indicated that the December 2009, but not the July 2009, resulted in a harmful change to the human organism. Dr. Barrett ultimately concluded that Zink's treating physician was in a superior position to determine the effects of the work injuries and, therefore, he would defer to Dr. Aziz's opinions.

Dr. Bilkey evaluated Zink on September 29, 2011. He diagnosed decreased sensation over the entire thumb, hypersensitivity over the dorsum of the thumb, palm, and wrist, and third digit MCP joint tenderness. Dr. Bilkey assigned a 12% impairment rating to the December 2006 injury, a 4% impairment rating to the July 2009 injury, and an 8% impairment rating to the December 2009 injury.

Dr. Thomas Gabriel conducted an independent medical examination (IME) on June 30, 2008, and again on June 17, 2009. Dr. Gabriel opined that the second fusion surgery in 2007 was inevitable and not the product of the December 2006 injury. Dr. Gabriel also testified that, in his opinion, the December 2006 incident did not cause a harmful change to the human organism or hasten the need for additional surgery. He disagreed with Dr. Bilkey's impairment rating.

At Transervice's request, Dr. Richard DuBou performed an IME and medical records review on March 2, 2010, September 18, 2011, and December 15, 2011. Dr. DuBou attributed all of Zink's right thumb injuries to the non work-related motor vehicle accident in 2005. In Dr. DuBou's opinion, the first fusion's failure, not the December 2006 work-related injury, necessitated the second fusion surgery. Dr. DuBou further opined that both 2009 injuries were: (a) temporary exacerbations of a pre-existing active right thumb condition; and (b) did not cause any permanent change. Like Dr. Gabriel, he disagreed with Dr. Bilkey's impairment rating.

On February 15, 2012, Dr. Bilkey submitted an addendum to rebut Dr. DoBu's medical opinion. Therein, he stated Zink had a 1% active impairment

rating prior to the December 2006 work-related injury. After the work injury, he had a 20% impairment rating with a total of 19% being assigned to the new injury.

Zink testified his thumb was most affected by the December 2006 injury, and worsened by the July 2009 accident. He indicated he cannot move his right thumb and has limited movement in his middle finger. He also has trouble moving his wrist and buttoning his clothes.

Zink sought workers' compensation benefits for all three work-related injuries. Zink claimed injuries to his right thumb, wrist, middle finger, low back, and shoulder. The ALJ consolidated the claims.

By opinion issued on April 6, 2012, the ALJ concluded Zink sustained work-related injuries to his right thumb and wrist on December 30, 2006, while employed by Kroger, and on July 6, 2009, and December 6, 2009, while employed by Transervice.[1] Notably, the ALJ found persuasive the testimony of Dr. Aziz and Dr. Bilkey. The ALJ awarded Zink income benefits for permanent partial impairment for each injury. The ALJ also awarded future medical benefits in accordance with Kentucky Revised Statute (KRS) 342.020, attributable to the December 2009 injury, thereby holding Transervice responsible for all future medical expenses.

The parties filed competing petitions for reconsideration. Relevant to this appeal, Transervice asked the ALJ to reconsider its finding that Zink suffered

[1] The ALJ rejected Zink's claim that he sustained right shoulder and low back work-related injuries. Zink did not appeal that portion of the ALJ's order to the Board or to this Court.

work-related injuries, as defined by statute, and, in the alternative, to apply the direct and natural consequences rule set forth in *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. 1997). With respect to its first argument, Transervice argued the 2009 incidents only temporarily aggravated Zink's thumb and, as a result, were non-compensable pursuant to *Calloway County Fiscal Court v. Winchester*, 557 S.W.2d 216 (Ky. App. 1977). The ALJ denied Transervice's petition.

Dissatisfied with the ALJ's decision, Transervice appealed to the Board, raising the same arguments contained in its reconsideration petition. By opinion entered February 22, 2013, the Board affirmed the ALJ's decision. In so doing, the Board, after discussing *Addington* and *Calloway*, noted that the record contained conflicting medical evidence, and found that "[t]he ALJ simply chose to believe the evidence that established Zink sustained additional trauma that produced separate compensable injuries." This appeal and cross-appeal followed.

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 ALJ, not the Board, is empowered "to determine the quality, character and substance of the evidence." *American Greetings Corp. v. Bunch*, 331 S.W.3d 600, 602 (Ky. 2010) (footnote omitted). The ALJ is free to reject testimony, *id.*, and "to believe part of the evidence and disbelieve other parts of the evidence[.]" *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Neither the Board nor this Court shall ever substitute its judgment for that of the ALJ "as to the weight of evidence on questions of fact." KRS 342.285; *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 316 (Ky. 2007).

We review *de novo* questions of law. *Bowerman v. Black Equip. Co.,* 297 S.W.3d 858, 866 (Ky. App. 2009).

III. Direct Appeal

Transervice first asks us to reverse the ALJ's finding that Zink sustained compensable work-related injuries. Transervice argues that, on each occasion, Zink suffered a mere aggravation of a pre-existing, active condition and not an "injury" as defined by KRS 342.0011(1). That statute identifies a compensable injury "as being a work-related traumatic event that is the proximate cause producing a harmful change in the human organism as evidenced by objective medical findings." *Sweasy v. Wal-Mart Stores, Inc.*, 295 S.W.3d 835, 838 (Ky. 2009); KRS 342.0011(1). It is Transervice's position that the 2006 and 2009 incidents did not produce a harmful change to Zink's right thumb and wrist and, therefore, do not qualify as compensable injuries. In support of its argument, Transervice points to Dr. DuBou's medical opinions. We are not persuaded.

The ALJ issued the following reasoning in support of its finding that Zink suffered compensable work-related injuries in 2006 and 2009, resulting in a permanent impairment rating:

> [Zink] undoubtedly, prior to December 30, 2006 had sustained a right thumb injury significant enough that it required a fusion. As recently as October, 2006, approximately two months prior to the first date of injury herein, he continued to seek medical treatment for that injury and it was noted, among other things, that the screw used in the fusion had become dislodged.
>
> However, it must also be remembered, as is relevant to any discussion of causation and pre-existing active conditions, that [Zink] had returned to work, without any work-restrictions or impairment rating.
>
> I also reject the notion that because the incidents of December 30, 2006, July 6, 2009, and December 6, 2009 were un-witnessed that they either did not happen or had no or minimal impact on [Zink's] right thumb condition. In fact, I believe [Zink's] testimony that the events occurred and that after these occurrences he experienced a spike in pain and limitations.
>
> I will state, affirmatively and with conviction, that I have great respect for Dr. DuBou and Dr. Gabriel. I could certainly conclude on their opinions that the entirety of the right thumb and right wrist conditions were pre-existing and active and not work-related. There is sufficient medical evidence from the treating physicians' medical records to make this conclusion. Dr. Aziz performed a fusion surgery in 2005 and as late as October, 2006 noted the fusion screw had come loose. He later said the wrist problems are related to the thumb problems. Dr. Barrett, first, said there is no permanent work related condition.
>
> However, the above analysis is counter-balanced by the fact that Dr. Barrett, later, said he would defer to the primary treating physician, Dr. Aziz, in determining the

effects of the work-related injury. Dr. Aziz has, affirmatively and unambiguously, related the 2007 and 2008 surgeries, one to the right thumb and the other to the right wrist, to the work-related injury of December 30, 2006.

As noted by [Zink] only Dr. Aziz, of all the physicians providing opinions ha[ve] had an opportunity to examine [Zink] and follow him pre and post December 30, 2006. Dr. Aziz has explained how the incident with the pallet caused a new, permanent injury to the right thumb. He has explained how the injury led to the DeQuervain's syndrome.

The opinions of Dr. Aziz are, of course, supported by [Zink] who has reported an increase in symptoms and a decrease in functioning since December 30, 2006.

Not only has Dr. Barrett deferred to Dr. Aziz, whose diagnoses and assignment of causation are supported by substantial evidence, but they are confirmed by Dr. Bilkey. Dr. Bilkey generated a complete and detailed set of records, as summarized above. Among other things, he assigns an impairment rating of 12% to the December 30, 2006 incident, 4% to the July 6, 2009 incident and 8% to the December 6, 2009 incident. However, on February 15, 2012, Dr. Bilkey stated that prior to December 30, 2006 [Zink] had a 1% impairment rating and after that date he has a 19% impairment rating.

It is the last question, that of what impairment rating and restrictions are apportioned to each condition and date of injury which is the only truly confusing part of this claim. Dr. Gabriel has assessed no impairment rating and that opinion is rejected. Dr. DuBou has assessed no work related impairment rating and that opinion is rejected. Dr. Bilkey has taken two opportunities to assess impairment ratings and the two are inconsistent and the second time he does not even address apportionment between the multiple dates of injury or the impairment rating of the wrist.

> In this claim, and with acknowledgment that the February 15, 2012 [impairment rating] from Dr. Bilkey is more recent, I find that the ratings he assigned on September 29, 2011 more accurately reflect the plaintiff's actual impairment ratings for the work-related injuries. This results in a 12% impairment rating for the December 30, 2006 injury; a 4% impairment rating for the July 6, 2009 date of injury and an 8% impairment rating for the December 6, 2009 date of injury. The combined values of these impairment ratings [are] not relevant herein.
>
> I also find that inasmuch as Dr. Bilkey was clearly aware of the preexisting injury to the right thumb and inasmuch as he specifically assigned an impairment rating to each date of injury that the assigned impairment ratings are those compensable portions which have effectively excluded any non work-related and/or pre-existing active component.

The ALJ fully considered the competing medical opinions and found the testimony proffered by Dr. Aziz and Dr. Bilkey more persuasive. The ALJ was certainly entitled to accept and rely on Dr. Aziz's and Dr. Bilkey's medical opinions to the exclusion of Dr. DuBou's. Those opinions constitute substantial evidence in support of the ALJ's finding that Zink sustained compensable work-related injuries in 2006 and 2009, and not mere aggravations of a prior, active condition. We decline to disturb the ALJ's findings.

We repeat that an appellant's ability to identify contrary medical evidence does not render the ALJ's factual findings erroneous. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000) (other evidence that "would have supported a contrary conclusion is not an adequate basis for reversal on appeal"). There is almost *always* conflicting and contrary evidence in workers'

compensation cases. The ALJ must sift through the conflicting evidence and designate which evidence he deems most credible. *Bunch*, 331 S.W.3d at 602. "[W]here medical testimony is concerned and that testimony is conflicting, . . . the question of who[m] to believe is one exclusively for the [ALJ]." *Pruitt v. Bugg Brothers*, 547 S.W.2d 123, 124 (Ky. 1977). The ALJ in this case was undoubtedly aware of, and complied with, his statutory duties. We decline to disturb the ALJ's factual findings.

As a corollary to its first argument, Transervice claims the ALJ and the Board overlooked and/or misconstrued the aggravation rule set forth in *Calloway County*, *supra*. Transervice also argues that the ALJ failed to render adequate findings of fact explaining why the events in 2009 failed to qualify as non-compensable aggravations of the prior 2006 injury.

Contrary to Transervice's conclusion, the orders of the ALJ and the Board reveal they were certainly aware of the aggravation principle. They did not overlook or misconstrue it; they simply rejected it. The ALJ's thoughtful and well-crafted opinion reveals he carefully considered all the medical evidence, including Dr. DuBou's medical opinion, but ultimately rejected Dr. DuBou's medical opinion in favor of those offered by Dr. Aziz and Dr. Bilkey. We do not think the ALJ was in any way deficient in his recitation of the facts needed to support his decision. And the Board accurately recognized it was bound by the ALJ's supported factual findings. KRS 342.285(2). We perceive no error.

Finally, Transervice contends that the Board has overlooked and/or misconstrued controlling precedent, namely the "direct and natural consequences" rule adopted by this Court in *Addington*, *supra*, and that the ALJ failed to render adequate findings of fact and conclusions of law with respect to this legal doctrine. Transervice contends the direct and natural consequences principle precludes an award of workers' compensation benefits against Transervice because Zink's 2009 injuries were the direct and natural consequence of the right thumb and wrist injuries Zink sustained in 2006 while employed by Kroger. Accordingly, Transervice argues that Kroger is wholly responsible for the 2009 injuries.

The direct and natural consequences rule addresses whether compensability should be extended to a subsequent injury or aggravation related in some way to a prior work-related injury. *See Addington*, 947 S.W.2d at 423. "The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." *Id.* (citation omitted). "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment[]" and is compensable. 1 Larson's Workers' Compensation Law § 10 (2004).

Addington is the seminal case in Kentucky discussing the direct and natural consequences rule. 947 S.W.2d at 423. In *Addington*, the claimant suffered a work-related back injury in 1990 and underwent surgery. Five years later, after a normal recuperation period, the claimant suffered a non work-related

back injury. This Court affirmed the ALJ's conclusion that medical expenses incurred as a result of the second injury were related to the first injury. *Id.* Vital to our decision was medical evidence suggesting that the initial work-related injury caused the claimant's back to be more susceptible to injury. *Id.* Consequently, the second, non-work related injury was the "direct and natural result of" the compensable 1990 injury.

Transervice argues the Board committed error when it applied the "substantial evidence" standard of review because the application of the direct and natural consequences rule is one of law, not of fact. We do not perceive any error by the Board.

As explained, the direct and natural consequences rule is premised on the notion that the "the initial injury is the cause of all that follows." *Anderson v. Westfield Group*, 259 S.W.3d 690, 696 (Tenn. 2008) ("The rationale for the rule is that the original compensable injury is deemed the 'cause of the damage flowing from the subsequent' injury-producing event." (citation omitted)). Whether a causal connection exists between the initial work-related injury and a subsequent injury is a question of fact to be decided by the ALJ. *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003) ("Causation generally is a question of fact." (citation omitted)); *Hudson v. Owens*, 439 S.W.2d 565, 569 (Ky. 1969). And the Board, as does this Court, owes deference to the ALJ's factual findings. *Hamilton*, 34 S.W.3d at 52.

To support its position that Zink's 2009 injuries were the direct and natural consequences of the 2006 injury, Transervice again directs us to Dr. DuBou's testimony. Transervice characterizes Dr. DuBou's medical opinion as "uncontroverted" and declares that Dr. DuBou opined that the 2006 injury Zink sustained while working for Kroger pre-disposed him to the injuries he later sustained in 2009 while working for Transervice. We find Transervice's interpretation of Dr. DuBou's medical opinion suspect. In the argument section of its brief, Transervice fails to cite to the portion of the record containing Dr. DuBou's allegedly uncontroverted medical opinion.[2] Our review of the record reveals Dr. DuBou attributed Zink's right-thumb impairment to the 2005 motor vehicle accident, not the 2006 work-related accident. (R. at 710, 717, 718). Thus, to the extent Dr. DuBou opined, if at all, that Zink's right thumb was susceptible to re-injury, that susceptibility derived from a non work-related event.

In any event, Dr. DuBou's medical opinion is inconsequential because the ALJ explicitly rejected it. Absent Dr. DuBou's medical opinion, Transervice has not identified, and we cannot find, any other medical evidence in the record indicating the 2006 work-related incident left Zink's right thumb and wrist in a weakened state and thus vulnerable to re-injury, or that the 2009 injuries would not have occurred absent the 2006 injury. 1 Larson's Worker's Compensation Law § 13.12(a) (explaining the necessary causal connection is established when the compensable injury causes a weakened condition which results in subsequent

[2] Kentucky Rules of Civil Procedure 76.12(4)(c)(v) (requiring that the argument portion of an appellant's brief contain "ample supportive references to the record[.]").

injuries). While it was certainly possible for the ALJ to infer such a causal connection based on the medical evidence presented, the ALJ declined to do so. Instead, the ALJ reasonably concluded that the 2009 injuries did not flow from the 2006 work-related injury. Accordingly, based on the facts as found by the ALJ, we find, as a matter of law, that the "direct and natural consequences" rule has no applicability to this case.

IV. Cross-Appeal

In his protective cross-appeal, Zink argues that, in the event this Court finds Transervice was erroneously held responsible for his future medical expenses, Kroger must bear the cost of any future medical expenses. We have found no reason to disturb the Board's opinion affirming the order of the ALJ in Zink's favor. Accordingly, we need not address Zink's cross-appeal.

V. Disposition

We affirm the February 22, 2013 order of the Workers' Compensation Board. We deny Zink's cross-appeal as moot.

ALL CONCUR.

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