

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000058-WC

DANIEL BOONE TRANSIT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-01002

LUCY BOWLING; SENTURE, LLC;
HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

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

DIXON, JUDGE: Daniel Boone Transit (DBT) seeks review of a Workers' Compensation Board decision affirming an Administrative Law Judge's (ALJ) award of income and medical benefits to Lucy Bowling. We affirm.

Bowling worked as a bus driver for DBT, driving passengers to and from medical appointments. On August 5, 2009, she was involved in a motor vehicle accident while driving a DBT van. Bowling sought medical treatment for neck and shoulder pain after the accident. Bowling continued working for DBT after the accident for approximately nine months. In May 2010, Bowling left her employment at DBT and took a job with Senture, LLC, working in a call center. Bowling continued having neck pain, and she ultimately had a cervical fusion procedure in February 2012.

Bowling filed a claim for workers' compensation benefits against DBT and Senture for her neck and shoulder injuries. Bowling testified at the final hearing and introduced the medical records and deposition of her treating neurosurgeon, Dr. Amr El-Naggar. Dr. El-Naggar diagnosed a large osteophyte at C4-5 and performed a discectomy and fusion. Dr. El-Naggar noted that, while the osteophyte was a degenerative condition, it likely became symptomatic due to the trauma of the motor vehicle accident. Dr. El-Naggar assessed Bowling's impairment at 25%. He apportioned 50% of the impairment to the motor vehicle accident, 25% to Bowling's work at Senture, and 25% to degenerative disc disease.

DBT and Senture contested a number of issues, including causation and preexisting disability. DBT submitted the medical report and deposition of Dr. Richard Sheridan. Dr. Sheridan diagnosed a resolved acute cervical and lumbar strain as a result of the motor vehicle accident. He assessed a 0% impairment rating, and he opined the cervical fusion surgery was not related to Bowling's

accident with DBT. DBT also submitted the report and deposition of Dr. Joseph Zerga. Dr. Zerga diagnosed a cervical and left shoulder strain due to the motor vehicle accident. Dr. Zerga concluded there was no permanent injury, and he assessed a 0% impairment rating.

Senture submitted the medical report of Dr. Rick Lyon. Dr. Lyon diagnosed a level C4-5 osteophyte complex with probable exacerbation due to the motor vehicle accident, and he opined the condition was not related to Bowling's work at Senture. Dr. Lyon explained that Bowling had a degenerative cervical condition that would have eventually warranted surgery; however, the accident exacerbated the underlying condition. Dr. Lyon assessed a 25% impairment rating. Senture also submitted the medical records of Dr. Douglas Irwin. Bowling treated with Dr. Irwin twice in 2006, and once in 2008, with complaints of chronic neck pain.

After considering all the evidence, the ALJ concluded that Bowling suffered a compensable work-related injury as a result of the motor vehicle accident that occurred during her employment with DBT. In his opinion and award, the ALJ carefully summarized the lay and medical testimony. The ALJ relied on the opinions of Dr. El-Naggar and Dr. Lyon to conclude the August 2009 accident aroused a dormant preexisting degenerative cervical condition into disabling reality. The ALJ noted there was no evidence to indicate that Bowling had a symptomatic and impairment-ratable preexisting condition immediately before the accident in August 2009. The ALJ concluded Bowling was entitled to permanent

partial disability benefits based on a 25% impairment rating. The ALJ attributed Bowling's impairment to her employment with DBT and dismissed the claims relating to Senture.

DBT appealed the ALJ's decision to the Board. In its opinion affirming, the Board concluded substantial evidence supported the ALJ's finding that Bowling suffered a work-related injury as a result of the motor vehicle accident while she was employed by DBT. This petition for review followed.

The findings of an ALJ in favor of an injured worker will not be disturbed on appeal where the decision is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). "The [ALJ], as the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented" *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Furthermore, the ALJ is free "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). When this Court reviews a workers' compensation decision, our function is to correct the Board only where we believe "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).

As it did before the Board, DBT contends there was no evidence in the record to support the ALJ's conclusion that the entire 25% impairment rating was attributable to the motor vehicle accident.

In his opinion and award, the ALJ stated, in relevant part:

Having reviewed and considered the entirety of the medical and lay testimony in this claim, the ALJ is persuaded by the testimony of Dr. El-Naggar given his status as the treating neurosurgeon and finds that plaintiff has suffered a compensable injury under the Kentucky Workers' Compensation Act as to her August 5, 2009 motor vehicle accident in her employment at DBT. While Dr. El-Naggar attributed 25% of the responsibility or liability for plaintiff's condition on her work at Senture, the ALJ is persuaded by the testimony of Dr. Lyon that plaintiff's work at Senture did not cause any injury, impairment or need for surgery and plaintiff's claim against Senture is hereby dismissed. The opinion of Dr. Lyon that plaintiff's work related motor vehicle accident in her job at DBT likely exacerbated plaintiff's pre-existing underlying degenerative condition in her cervical spine and resulted in her needing the cervical surgery supports Dr. El-Naggar's opinion that plaintiff's injury at DBT is responsible for plaintiff's cervical condition including surgery.

Both Dr. El-Naggar and Dr. Lyon assessed a 25% impairment rating for Bowling's cervical fusion. The ALJ relied on the combined opinions of Dr. El-Naggar and Dr. Lyon regarding causation and apportionment to conclude that the 25% impairment rating was attributable to the motor vehicle accident.

After careful review, we conclude the ALJ sufficiently articulated his reasoning and the evidence supporting his finding of permanent partial disability. Although DBT cites "evidence which would have supported a conclusion contrary

to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal.” *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000).

Given the ALJ’s broad discretion in weighing the evidence, we are not persuaded the ALJ erred by relying on the opinions of Dr. El-Naggar and Dr. Lyon to conclude that Bowling’s 25% impairment rating was attributable to her work at DBT. After fully considering all of the issues raised by DBT, we conclude the Board did not err in affirming the ALJ’s award.

For the reasons stated herein, the decision of the Workers’ Compensation Board is affirmed.

ALL CONCUR.

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