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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000154-WC

LOUISVILLE TRANSPORTATION COMPANY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-12-01273

ERIC NEWMAN; HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2014-CA-000279-WC

ERIC NEWMAN — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-12-01273

LOUISVILLE TRANSPORTATION COMPANY; HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

ACREE, CHIEF JUDGE: Appellant, Louisville Transportation Company (LTC), petitions this Court for review of a December 27, 2013 opinion of the Workers' Compensation Board (Board). That opinion vacated and remanded the May 20, 2013 opinion and order of the Administrative Law Judge (ALJ). Eric Newman has filed a cross-appeal from the Board's order. We affirm as to both the appeal and the cross-appeal.

I. Factual and Procedural Background

While the procedural history of this case is complex, its facts are relatively simple. In 2010, Newman was working as an Emergency Medical Technician (EMT) tasked with transporting a patient on a gurney. The gurney got stuck and, as Newman tried to dislodge it, he felt a popping sensation in his lower back and pain near his tailbone. Conservative treatment failed to relieve Newman's pain; he eventually consulted Dr. Wayne Villanueva. Dr. Villanueva determined that Newman suffered from a disc problem and performed surgery.

The surgery was successful – at least for a time. Newman's pain subsided for several months and he was able to return to work, albeit not to his position as an EMT. Instead, Newman returned to work as a crash specialist for the Louisville Regional Airport Authority (LRAA). To supplement his income,

Newman also worked as an electrician for Easy E's Electric, a company Newman co-owned with his wife and where he worked prior to his injury. Eventually, Newman's pain returned, necessitating further treatment and the filing of this Worker's Compensation Claim.

Discovery confirmed that Newman's 2010 injury was simply the latest in a long history of back problems. Those problems began in 1995 when he injured himself lifting a tool box from a truck bed. For that injury, Newman sought chiropractic treatment from Dr. Mark Smith until 1997, and settled a Worker's Compensation claim with the Kentucky Department of Worker's Claims in 1998.

As part of the workup for Newman's 1998 Worker's Compensation claim, Dr. Smith apportioned Newman a two-percent whole person impairment. Dr. Smith based his determination on the Fourth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (Guides), the most current edition of the Guides in existence at the time.

Newman's back problems persisted and he received treatment from various providers at least until 2008. This long history of back problems prompted both LTC and Newman's own counsel to seek medical evaluations regarding Newman's impairment from the 2010 injury. Three different doctors assessed Newman and each arrived at a different conclusion.

The first doctor, Dr. Farrage, was an independent medical expert retained by Newman's counsel. Dr. Farrage evaluated Newman and his records

regarding the 2010 injury. Using the Fifth Edition of the Guides, Dr. Farrage assessed a thirteen-percent whole person impairment rating from the 2010 injury without attributing any portion of that impairment to Newman's 1995 injury. Although Dr. Farrage did not review records of Newman's post-1995 chiropractic treatment, he described Newman's medical history noting "a self-limiting low back injury approximately 15 years prior [to Dr. Farrage's examination] that responded to conservative treatment without subsequent sequella."

LTC retained a second doctor, Dr. Sexton. Dr. Sexton conducted an independent medical examination and reviewed Newman's medical history, including records relating to both Newman's 2010 injury and his 1995 injury. Using the Fifth Edition of the Guides, Dr. Sexton apportioned a ten-percent whole person impairment, but attributed between five and eight percent of that rating to Newman's 1995 injury as a preexisting condition. Dr. Sexton opined that because Dr. Villanueva's surgery was so successful, Newman suffered a net two-percent impairment from his 2010 injury.

Finally, Dr. Villanueva offered a third opinion. Like Dr. Farrage, Dr. Villanueva found a thirteen-percent whole person impairment rating pursuant to the Fifth Edition of the Guides. Initially, Dr. Villanueva opined that Newman's entire injury was compensable. However, like Dr. Farrage, Dr. Villanueva was unaware of Dr. Smith's two-percent impairment rating based on the 1995 injury.

LTC's counsel confronted Dr. Villanueva with records of Dr. Smith's impairment rating during his deposition. After reviewing Dr. Smith's rating, Dr.

Villanueva agreed there was "some preexisting problem" and "that two percent should be incorporated into the final assessment, meaning subtract it from the [thirteen]." Based on that calculation, Dr. Villanueva determined that Newman suffered an eleven-percent overall impairment as a result of his 2010 injury.

But LTC's counsel pressed on, urging Dr. Villanueva to consider Dr. Smith's prior two-percent impairment rating in light of the changes to the Fifth Edition of the Guides. Assessing Newman's 1995 injury under the Fourth Edition yielded a two-percent impairment. But Dr. Villanueva conceded that if the very same injury were assessed under the Fifth Edition it would fall in "Category I" and that would have meant a zero-percent impairment rating for that 1995 injury.[1]

The parties submitted these ratings to the ALJ on May 20, 2013. The ALJ accepted Dr. Villanueva's opinion from the deposition: Newman suffered a thirteen-percent whole person impairment, reduced by two percent from the preexisting injury in 1995, which thus left Newman with a compensable impairment rating of eleven percent. The ALJ specifically found Dr. Villanueva's rating persuasive due to his relationship with Newman as his treating physician. Conversely, the ALJ was not persuaded by Dr. Sexton's opinion.

The ALJ also considered another issue related to Newman's impairment: the proper wage calculation before and after his 2010 injury. The ALJ determined that Newman had three jobs prior to his injury: (1) as an EMT with

[1] Although it is counterintuitive that LTC rather than Newman would pursue this line of questioning with Dr. Villanueva, in context it appears calculated to enhance the persuasion of the employer-friendly opinion of Dr. Sexton who was the only doctor to apply the Fifth Edition of the Guides to both of Newman's claims.

LTC, (2) as a crash specialist with LRAA, and (3) as an electrician in Newman's own business, Easy E's Electric. However, following his injury, Newman only returned to work at LRRA and at Easy E's. The ALJ then determined Newman's pre-injury average weekly wage to be $1,636.24, while his post-injury average weekly wage was $1,451.37.

Unhappy with the ALJ's opinion, LTC petitioned for reconsideration. LTC's petition alleged the ALJ erred twice. First, under LTC's view, the ALJ erred by relying on any evidence incorporating Dr. Smith's two-percent preexisting impairment rating because it was based on the now outdated Fourth Edition of the Guides. Because the Fifth Edition of the AMA Guides was the most current edition available at the time of Newman's 2010 injury, LTC argued the ALJ should not have considered any impairment ratings based on the Fourth Edition. Second, LTC argued it was unaware of Newman's employment with Easy E's electric at the time of the 2010 injury; therefore, the ALJ should not have factored any income from Easy E's electric into Newman's pre-injury wage. The ALJ was persuaded by both arguments.

The ALJ agreed that relying on Dr. Smith's two-percent rating was error. But even after reconsideration, the ALJ took special care to note that he "simply was not convinced that Dr. Sexton's impairment rating of [five to eight percent was] an accurate assessment of plaintiff's lower back condition" prior to Newman's 2010 injury. Instead, the ALJ relied on Dr. Villanueva's initial opinion that Newman's entire injury was compensable, thus Newman should have been

apportioned a thirteen-percent overall impairment rating under the Fifth Edition of the Guide.

The ALJ also agreed he erred in his calculation of Newman's pre-injury wage. The ALJ concluded that Newman failed to proffer sufficient evidence demonstrating LTC's awareness of Newman's employment with Easy E's prior to the injury. Therefore, the ALJ agreed that he should not have included Newman's income from Easy E's in determining Newman's pre-injury wage. But the ALJ went a step further, subtracting Newman's income from Easy E's from the *post-injury* average weekly wage as well. The ALJ reasoned it would "not make sense to include the [amount] from the electrical business only in the post injury [adjusted weekly wage]." Then, the ALJ reduced both Newman's pre-injury weekly wage and his post-injury weekly wage, arriving at amounts of $1,136.24 and $951.37 respectively.

The Worker's Compensation Board entered an opinion on December 27, 2013, vacating the ALJ's determinations and remanding the matter back to him for further consideration. The Board found errors regarding both the ALJ's assessment of Newman's impairment and the ALJ's calculation of Newman's wages. Specifically, the Board held that the ALJ "impermissibly reversed himself" on the issue of prior impairment. Because the ALJ initially determined, as a threshold matter, that Newman suffered some prior impairment from the 1995 injury, the ALJ could not, on reconsideration, determine that Newman's prior

impairment rating was zero, notwithstanding the fact that zero percent would have been the correct rating had the Fifth Edition of the Guide been used at the time.

But even though the Board determined the ALJ erred by reversing himself, the Board accepted the ALJ's initial assessment of Newman's prior impairment as correct for two reasons. First, the Board disagreed with "LTC's assertion that Dr. Smith's impairment rating must have been assessed pursuant to the Fifth Edition of the Guides." According to the Board, because Dr. Smith used the most current edition of the Guides available at the time of his assessment in 1995, Dr. Villanueva could incorporate Dr. Smith's two-percent prior impairment rating into his overall impairment rating for the 2010 injury.

Second, the Board offered an alternative rationale for its holding: the ALJ "appropriately relied" on Dr. Villanueva's deposition testimony to calculate Newman's impairment from the 2010 injury instead of Dr. Smith's prior impairment rating. In its opinion, the Board specifically noted this statement from Dr. Villanueva's deposition:

> I think that there was some pre-existing problem. He had the same complaints of back pain and left leg pain several years before that he had several years before when he came to see me. I'm not aware of a diagnosis being made that he had a herniated disk, but chances are he had some disk problems at that time which would lead me to say that some of that two percent should be incorporated into the final assessment, meaning subtract it from the 13.

Based on Dr. Villanueva's statement, the Board concluded the ALJ "did not rely on Dr. Smith's impairment rating in finding Newman had a pre-

existing impairment for a prior active condition." Instead, the ALJ "relied upon the specific testimony of Dr. Villanueva that Newman had a [two-percent] impairment rating prior to the February 2010 injury." As a result, the Board held that Dr. Villanueva's testimony, standing alone, constituted substantial evidence in support of the ALJ's determination.

The Board also overruled the ALJ's calculation of Newman's post-injury average weekly wage, concluding that while the ALJ correctly refused to consider Newman's income from Easy E's in determining Newman's *pre*-injury wage, that income should not have been excluded from the *post*-injury wage. The Board explained that the purpose underlying the statute governing post-injury wages is to encourage claimants to return to work at an equal or greater wage even if they cannot return to their prior employment.

LTC's appeal to this Court challenges the Board's ruling on Newman's impairment rating. Newman's cross-appeal asserts the Board erred by disturbing the ALJ's calculation of Newman's post-injury adjusted weekly wage. We address each party's arguments in turn.

II. Standard of Review

Our function 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). However, for questions of law, we

owe the Board no deference and engage in *de novo* review. *Justice v. Kimper Volunteer Fire Dep't*, 379 S.W.3d 804, 807 (Ky. App. 2012).

III. Analysis

On appeal, LTC presents one claim: the Board erred by holding that Newman's impairment rating did not have to be based on the Fifth Edition of the AMA Guides. With this, we agree. But LTC's argument is a bit more subtle. Says LTC, because Dr. Sexton is the only physician to have assessed both of Newman's injuries under the Fifth Edition of the Guides, we should vacate the Board's finding of a preexisting two-percent impairment and instruct the Board to "adopt Dr. Sexton's assessment of pre-existing impairment" of five to eight percent. While we agree with LTC that the Board followed the wrong path, we find no ground for vacating its ultimate conclusion regarding the impairment ratings. As we explain, the error that occurred here was harmless.

A finding of permanent partial disability under Kentucky Revised Statutes (KRS) 342.0011(11)(b) or (c) must be supported by evidence of a permanent disability rating, which requires a medical expert to determine the claimant's permanent impairment rating pursuant to the latest available edition of the Guides. *Colwell v. Dresser Instrument Division*, 217 S.W.3d 213, 217 (Ky. 2006).

Our Supreme Court has interpreted the phrase "latest available edition of the Guides" to mean the "the latest edition that has been certified as being generally

available as of the date that proof time closes." *George Humfleet Mobile Homes v. Christman*, 125 S.W.3d 288, 293-94 (Ky. 2004). While "an ALJ is free to choose among impairments that were assigned under the latest edition available at the closing of proof, an ALJ is not free to rely upon an impairment that was assigned under an earlier edition." *Id.*

On March 1, 2001, approximately nine years prior to Newman's 2010 injury, the Commissioner of the Department of Workers' Claims certified that the Fifth Edition of the Guides was "generally" available. *Id.*

To date, the Fifth Edition of the Guides is still the most current. Moreover, KRS Chapter 342, which governs our Worker's Compensation scheme, contemplates the usage of the Fifth Edition of the Guides unless specifically excepted by other statutory provisions. *See* KRS 342.0011 (35)-(37). Given that the Fifth Edition of the Guides is still the most current, it was the most current available at the close of proof for Newman's 2010 injury. Thus, Newman's impairment rating should only have been rated under the Fifth Edition of the Guides, and should not have taken into account any impairment ratings assessed under the Fourth Edition.

But those rules only solve half the puzzle presented by the case before us. When a worker has sustained multiple injuries, preexisting impairment must be excluded from present impairment when calculating an award. *See Roberts Brothers Coal Co. v. Robinson,* 113 S.W.3d 181 (Ky. 2003). Here, the ALJ had to consider Newman's impairment based on two injuries – Newman's 1995 injury

and his injury in 2010 – and then calculate his compensable impairment in this claim by subtracting his impairment due to his 1995 injury from the impairment from his 2010 injury. So, this case presents a problem: Newman's preexisting back injury from 1995 was rated based on the now outdated Fourth Edition of the Guides. And Dr. Villanueva's impairment rating for the 2010 injury incorporated that now-outdated preexisting impairment rating. We are therefore convinced that the ALJ relied on a doctor's opinion that incorporated an out-of-date version of the Guides. Simply stated, the ALJ relied on an opinion of a doctor who compared apples to oranges, or at least Granny Smiths to McIntoshes.

This was error. The Fifth Edition of the AMA Guides clearly requires that all injuries be assessed under its guidelines – even those injuries that were initially rated under a prior edition. Therefore, an ALJ may not rely on a medical opinion that incorporates, even in part, an outdated version of the Guides. Instead, the Fifth Edition of the Guides clearly explains how a medical expert should calculate a claimant's impairment in cases involving preexisting injuries, using an example quite similar to the current case:

> [I]n apportioning a spine impairment rating in an individual with a history of a spine condition, one should calculate the current spine impairment. Then calculate the impairment from any preexisting spine problem. The preexisting impairment rating is then subtracted from the present impairment rating to account for the effects of the former. *This approach requires accurate and comparable data for both requirements*. (Emphasis added).

Guides to the Evaluation of Permanent Impairment, Fifth Edition, p. 12.

Under the example in the Fifth Edition, Dr. Villanueva (or any testifying physician) should have engaged in a three-step process. First, Dr. Villanueva should have calculated Newman's overall impairment rating from the 2010 injury. Second, he should have *re-calculated* Newman's impairment rating from the 1995 injury based on the Fifth Edition of the Guides. Third, Dr. Villanueva should have subtracted Newman's prior impairment rating from his impairment due to his 2010 injury in order to determine the present level of impairment in light of the prior injuries.

Dr. Villanueva did not calculate the impairment from any preexisting injury under the Fifth Edition of the Guides. Therefore, he failed to use "accurate and comparable data" to derive Newman's impairment rating. Dr. Villanueva's opinion in determining Newman's impairment from the 2010 injury runs afoul of KRS 342.0011(11)(37)(a)'s requirement that impairment rating be based solely on the Fifth Edition of the Guides. The ALJ's reliance on that opinion was error.

We now confront a thornier issue: applying this rule to the current case.

We begin the analysis by considering LTC's argument that because the ALJ initially decided that Newman did suffer some impairment as a result of the 1995 injury, he was precluded on reconsideration from accepting any doctor's opinion that rated Newman's prior impairment at zero percent. Doing so, LTC argues, would effectively allow the ALJ to reverse himself on the factual question of whether Newman suffered impairment from the 1995 injury. On this point, the Board agreed with LTC. Both LTC and the Board are wrong.

Their view suffers from an erroneous understanding of the fact-finding in this case. If the ALJ first had found as fact Newman suffered a prior-occurring injury but then, without taking further evidence, found there was no such injury, a reviewing body could justifiably conclude that the ALJ acted arbitrarily and, therefore, impermissibly. That is not what occurred here. Here, the ALJ found there was a prior-occurring injury and he never recanted that fact. He also found two other facts: (1) the prior-occurring injury resulted in a two-percent impairment rating when reviewed under the Fourth Edition of the Guides and (2) the prior-occurring injury resulted in a zero-percent impairment rating when reviewed under the Fifth Edition. There was no reversal of fact-finding. LTC's interpretation is a red herring.

Still, to resolve this case, we are left with but two options, neither of them perfect. The first is to accept LTC's argument that, because the ALJ has already decided Newman's 1995 injury caused some impairment prior to the 2010 injury, the Board must accept the only prior impairment rating based on the Fifth Edition of the Guides – Dr. Sexton's testimony. The catch for us, however, is that Dr. Sexton's opinion has already been thrice rejected – twice by the ALJ and once by the Board – as factually unpersuasive.

Option two is to uphold the Board's acceptance of Dr. Villanueva's opinion because, in the Board's view, his opinion constituted substantial evidence. The problem with this option is that it is founded on the erroneous premise that Dr. Villanueva's opinion existed independent from Dr. Smith's outdated rating. The

truth is that Dr. Villanueva arrived at his opinion regarding Newman's prior impairment only after reviewing Dr. Smith's opinion, but Dr. Villanueva failed to re-rate Newman's impairment from the 1995 injury under the Fifth Edition of the Guides. Instead, Dr. Villanueva merely subtracted Dr. Smith's two-percent impairment rating from his overall impairment rating, thus combining ratings derived under both the Fourth and Fifth Editions of the AMA Guides. In fact, Dr. Villanueva admitted, under cross-examination, that if he evaluated Newman's prior impairment rating under the Fifth Edition of the Guides, he would place Newman in "Category I" with a zero-percent impairment rating.[2]

At the end of the day, our standard of review commands that we extend substantial deference to the Board's assessment of the evidence. In light of that deference, we choose option two: we uphold the Board's assessment that Dr. Villanueva's opinion, taking into account the prior injury and claim, constituted substantial evidence of Newman's overall impairment rating. In doing so, we take care to remember that our charge as a reviewing court is to overturn the Board's assessment of the evidence only when it will prevent *gross injustice*. *Western Baptist Hosp.*, 827 S.W.2d at 688. Inherent in our deferential review is the notion that every mistake by the Board does not warrant reversal, only mistakes so great and so grave as to imperil the concept of justice itself. Here, the Board assessed the evidence, particularly Dr. Villanueva's deposition testimony, and determined

[2] Newman's cross-appeal did not challenge the Board's rejection of a zero-percent prior impairment rating in favor of the two-percent rating. If it had, we could, perhaps, consider another option – we could rely on Dr. Villanueva's opinion that under the Fifth Edition Newman had a prior impairment rating of zero percent. That issue has not been presented to us on appeal.

Dr. Villanueva's opinion to be independent from Dr. Smith's. While we have expressed a contrary understanding, the Board's assessment of that same evidence was not so unfair as to result in gross injustice, and therefore, the Board's determination stands.

We are reinforced in our belief that our decision is a correct one when we consider the alternative. Accepting LTC's position would lead to the unjust and absurd result of requiring that the Board adopt an impairment rating established by testimony the Board clearly and repeatedly rejected as inaccurate and unpersuasive. To overrule the Board on this basis would be to substitute our assessment of the evidence.

Taking that course would not only undermine the "beneficent purpose" which motivates our Worker's Compensation scheme, *Jewish Hospital v. Ray,* 131 S.W.3d 760, 764 (Ky. App. 2004); *Wilson,* 893 S.W.2d at 802, it would undercut the Board's expertise. Here, each time the ALJ or Board confronted Dr. Sexton's opinion, they rejected it because they simply did not believe it. LTS's appeal presents no basis upon which we could justify vacating the Board's order.

Turning to Newman's cross-appeal, we now consider whether the Board properly declined to consider Newman's income from Easy E's in determining his pre-injury average weekly wage.

Newman argues that the Board erred by including his income from Easy E's in the calculation of his post-injury average weekly wage, but not his pre-injury

average weekly wage. Put simply, Newman claims logic dictates his income from Easy E's either should be considered in both calculations or not at all.

We disagree and affirm the Board's decision. The ALJ discounted Newman's income from Easy E's because Newman failed to prove LTC was aware of that employment prior to his injury. As the claimant, Newman had the burden to prove every element of his claim, including his average weekly wage, *Fawbush v. Gwinn*, 103 S.W.3d 5, 10 (Ky. 2003). Because he failed to produce sufficient evidence demonstrating LTC's pre-injury awareness of his employment with Easy E's, the ALJ properly declined to consider it as a source of income. KRS 342.140.

If there is a perception of illogic here, it is born of Newman's failure to carry his burden. The purpose behind comparing the claimant's pre-injury wage to his post-injury wage is to assess whether the claimant was able to return to the same level of income after suffering injury. This assessment depends on an accurate calculation of both pre- and post-injury wages. As with any calculation, the result depends on the factors. The claimant who fails to accurately establish those factors bears the consequence of that failure and will not be heard to complain about the result.

Moreover, our Supreme Court has already decided that income from different sources of employment should be considered in *Toy v. Coca Cola Enterprises*, 274 S.W.3d 433, 435 (Ky. 2008). There the court evaluated the

purpose of the statutes governing the calculation of a claimant's average weekly wage, both before and after injury. The Court held:

> Consistent with the purpose of the benefit and with KRS 342.710(1)'s goal of encouraging a return to work, KRS 342.730(1)(c) 2 focuses on post-injury wages. Although KRS 342.710(1) expresses a preference for a return to the same employment, KRS 342.730(1)(c) 2 requires only that the injured worker "returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury." Thus, it applies without regard to whether the worker returns to the employment in which the injury occurred or to other employment.

Id.

Given that the purpose of KRS 342.730(1)(c) 2 is to encourage a claimant's return to gainful employment, regardless of whether the claimant returns to the same position, we think the Board appropriately considered Newman's income from Easy E's in his post-injury average weekly wage. Newman returned to work, albeit not as an EMT with LTC, and thus the income earned from such work must be included as part of his post-injury average weekly wage. We affirm the Board's determination regarding this issue.

For the foregoing reasons, the December 27, 2013 opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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