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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001271-WC

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT — APPELLANT

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 13-WC-67680

V.

KRISTOPHER BRANHAM; HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE; AND KENTUCKY WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

GOODWINE, JUDGE: Lexington Fayette Urban County Government (LFUCG) appeals from an opinion of the Worker's Compensation Board affirming the

decision of the Administrative Law Judge (ALJ) finding that Kristopher Branham (Branham) gave due and timely notice of a low back injury.[1]

After careful review, we reverse the decision of the Board regarding due and timely notice with directions that the claim be remanded by the Board to the ALJ for additional findings consistent with this opinion.

BACKGROUND

Kristopher Branham is 38 years old. He is married and resides in Nicholasville, Kentucky. He and his wife have one child. Branham is a high school graduate and is a trained firefighter/EMT. Branham began his employment with LFUCG in 2005 as a firefighter/EMT. He suffered two work-related knee injuries: (1) September 10, 2013, and, (2) January 27, 2015. Branham testified that prior to that time he had no prior left knee problems and was in mostly good health. He was gainfully employed from 1997 until his second work-related knee injury in January of 2015.

Branham was first injured on September 10, 2013, while stepping out of a fire truck carrying equipment for a work-related run. His knee gave way, twisted, and popped. He felt pain in his ankle and entire leg. He went back to the

[1] The Board reversed and vacated the ALJ's finding regarding causation of Branham's low back injury and remanded for additional findings. Neither Branham nor LFUCG challenges that decision on appeal. Additionally, LFUCG does not challenge the ALJ's award of benefits to Branham for his two work-related knee injuries.

station and fell again while he was taking off his boots. He reported the injury to his supervisor and went to the hospital the same day. He described his pain as severe. He followed up with an orthopedist, Dr. Talwalker,[2] had an MRI, and attended physical therapy. He was off work until February of 2014, at which time he returned to light duty. He was not able to run, crawl, climb stairs or put pressure on his knee. He testified that his condition improved. Dr. Talwalker found he would need no restrictions and could return to full duty in January of 2015.

On January 27, 2015, Branham injured his left knee again while crawling through a dark obstacle course. He fell over a wall and landed on his knee in full gear that weighed approximately 80 pounds. He testified the pain he experienced was identical to the first injury but much more severe. He required help getting out of the dark enclosure and was driven to the emergency room. He again saw an orthopedist, underwent an MRI, and attended physical therapy. Again, physical therapy was not much help. He was referred to Dr. Johnson at the University of Kentucky who recommended surgery.

On June 16, 2016, Dr. Johnson performed surgery on Branham's knee, which was followed by physical therapy. Branham did not believe the

[2] He was not referred to Dr. Talwalker. Rather, he chose to treat with him because his mother-in-law worked in his office.

surgery led to much improvement and believed his knee was worse than before the surgery. Dr. Johnson restricted Branham from crawling. Branham began to experience low back pain immediately after his knee surgery. He began treating with Dr. Cassidy for his low back pain in October 2016. He had an MRI, an EMG, and an epidural steroid injection.

Branham had two independent medical examinations in December of 2016. He saw Dr. James Owen on December 7, 2016, and Dr. Frank Burke on December 15, 2016.[3] Dr. Owen opined:

> [Branham] comes back in today after [knee] surgery, complaining of persistent pain subsequent to the surgery and also down his low back. The surgery was done 6/16/2016 by Dr. Johnson at the university and that was an arthroscopy for plica removal and shaving of a bone. Unfortunately, the surgery really did not help him. He continued to have severe pain that seemed to be radiating from his back and into his left hip.
> . . .
>
> Review of the medical records indicates on my original IME, diagnosis of persistent knee pain that is not responding to appropriate conservative treatment. This is in need of further evaluation.
> . . .
>
> There is no definitive evidence that either the knee or the low back problem can be attributed to any other activity. However, it should be noted that the low back problem began fairly long after the knee problem, that being more than a year, although he gives history of two falls in that

[3] Dr. Owen previously treated Branham on February 11, 2016. Dr. Burke previously treated Branham on November 23, 2015.

> time period. He still is not sure what provoked the low back pain. I think the knee is clearly work related.
>
> Dr. Burke opined:
>
> [Branham] developed the onset of low back pain with radiation of pain down into the left lower extremity, believed to be secondary to overuse and the significant antalgic limp from his left knee according to Dr. D. Johnson. . . . The impression at that time was radiculopathy and low back pain.
>
> . . .
>
> Finally, this patient has been diagnosed with a lumbar back strain with a radiculopathy, which remains active and has been referred to interventional pain medicine for epidural steroid injections and these have been scheduled. In fact, this patient had an EMG nerve study that was consistent with an acute LG-S1 radiculopathy. This is the most irregular symptom pattern that this patient has, but it is consistent. It is the opinion of Dr. Johnson, as well as my own that this is related to his back usage because of a limp from his left knee.
>
> Dr. Burke assigned a 17% whole person impairment from the combined values.

Branham testified at his July 17, 2017 deposition he never told LFUCG about the low back pain he experienced immediately after knee surgery in July 2016, nor following the medical diagnoses by Dr. Owen and Dr. Burke in December 2016. He did not recall having prior low back pain that was anything "more than normal." However, the medical records indicate Branham had an MRI in 2009 and a consultation in 2011 for low back pain.

Branham filed two incident reports[4] with LFUCG: (1) September 10, 2013, and (2) January 27, 2015. He filed his application for resolution of claim, form 101, on August 19, 2015, alleging he sustained work-related left knee injuries on September 10, 2013[5] and January 27, 2015.

LFUCG filed its response to Branham's application for resolution of claim on October 8, 2015, admitting, among other things, that: (1) the alleged occurrences occurred or became disabling on September 10, 2013, and January 27, 2015; (2) Branham provided due and timely notice of alleged occurrences; (3) temporary total disability income benefits were paid as the result of the September 10, 2013 injury from September 11, 2013 through February 17, 2014, in the total amount of $15,775.08; (4) no TTD benefits were paid for the January 27, 2015 injury; and (5) all known medical expenses have been paid as the result of the alleged occurrences.

On July 18, 2017, Branham filed a motion to amend the form 101 to include a lumbar spine injury claim. The ALJ entered an order directing Branham "to provide a more specific request of the nature of injury and supporting documentation." On August 14, 2017, Branham filed a "Memorandum in Support

[4] First Report of Injury, SP302.

[5] "9 October 2013" is handwritten on the Form 101 next to "1)" and above "2) 27 day of January 2015." Branham testified his injury occurred on September 10, 2013. The First Report of Injury confirms the September date.

of Plaintiff's Motion to Amend the 101" and a notice of filing with the December 15, 2016 report of Dr. Frank Burke and the December 12, 2016 report of Dr. Owen attached.

The ALJ failed to enter an order ruling on the Motion to Amend Form 101. However, the parties discussed the issue at the September 25, 2017 hearing and listed as contested issues: (1) work relatedness and causation of the low back injury; (2) notice for the low back injury; (3) injury as defined by the Act for the low back; and (4) causation, reasonableness, and necessity of medial Plaqueness syndrome. LFUCG acknowledged on the record those were the contested issues. Branham did not receive any temporary total disability benefits for his low back.

LFUCG challenges the ALJ's finding of due and timely notice of the low back injury because she failed to analyze or explain why she made the finding. LFUCG challenges the Board's determination that the ALJ's finding of due and timely notice of the low back injury was supported by substantial evidence and found as a matter of law. For the following reasons, we reverse in part and remand to the Board with directions that the claim be remanded by the Board to the ALJ for further findings.

STANDARD OF REVIEW

"On appeal, our standard of review of a decision of the Workers' Compensation 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.'" *Pike Cty. Bd. of Educ. v. Mills*, 260 S.W.3d 366, 368 (Ky. Ct. App. 2008) (internal citation omitted). "The burden of persuasion is on [Branham] to prove every element of a workers' compensation claim." *Id*. (internal citation omitted).

The ALJ is the sole factfinder in all worker's compensation claims. KRS 342.285(1). In fact, "KRS 342.285 designates the ALJ as finder of fact, and has been construed to mean that the factfinder has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence." *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009). "In short, appellate courts may not second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion. *Id*. (internal citation omitted). An ALJ abuses discretion when the decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* "Furthermore, if the issue presented is one of statutory interpretation our review is *de novo.*" *Consol of Kentucky, Inc. v. Goodgame*, 479 S.W.3d 78-81 (Ky. 2015) (internal citations omitted). With these standards in mind, we review the issues raised in this appeal.

ANALYSIS

LFUCG challenges the ALJ's finding of due and timely notice of Branham's low back injury because she failed to analyze reasonable inferences or lack thereof to be drawn from the evidence or explain why she made the finding. Additionally, LFUCG challenges the Board's determination that the ALJ's finding of due and timely notice of Branham's low back injury was supported by substantial evidence and found as a matter of law.

The notice requirement of KRS 342 has three purposes: (1) to provide prompt medical treatment to minimize the worker's ultimate disability and the employer's liability; (2) to enable the employer to make a prompt investigation of the circumstances of the accident; and (3) to prevent the filing of fictitious claims. *See Harlan Fuel Co. v. Burkhart*, 296 S.W.2d 722 (Ky. 1956).

KRS 342.185 provides that notice of a work-related "accident" must be given "as soon as practicable after the happening thereof[.]" The notice requirement includes among other things, notice of the time, place, nature, and cause of the accident as well as the nature and extent of any resulting injury. A worker is not obliged to give notice of a latent harm until the worker becomes aware of it. *See Smith v. Cardinal Construction Co.*, 13 S.W.3d 623 (Ky. 2000) (citing *Bates & Rogers Construction Co. v. Allen*, 183 Ky. 815, 210 S.W. 467, 472-74 (1919)).

Notice of a work-related accident and of a resulting injury may be given in the context of filing a claim; however, such notice may or may not be timely depending upon the circumstances which are present. *See* KRS 342.190; *Peabody Coal Co. v. Powell*, 351 S.W.2d 172 (1961).

[Branham] was not required to give notice that he had sustained a work-related gradual injury to his back until he was informed of that fact. *See Alcan Foil Products v. Huff*, 2 S.W.3d 96 (Ky. 1999); *Special Fund v. Clark*, 998 S.W.2d 487 (Ky. 1999). Branham testified that he first experienced low back pain in June of 2016 following knee surgery. He did not notify LFUCG at that time.

Following *Huff*, the Kentucky Supreme Court refined the cumulative trauma discovery rule in *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503 (Ky. 2001), holding that [Branham] does not have to self-diagnose and is not required to give notice of a work-related cumulative trauma injury until a medical professional tells [him] a condition is work-related. Thus, for cumulative trauma injuries, the obligation to provide notice arises when the claimant is advised by a physician that he has a work-related condition. *Id*. Drs. Owen and Burke told Branham his low back pain may be causally related to his left knee injury in December of 2016. Yet, Branham did not tell LFUCG of his low back pain nor did he amend his Form 101 until July of 2017.

The ALJ does not discuss the reasonableness or lack thereof of Branham's actions. Rather, the ALJ discussed notice as follows:

> It is [Branham's] own testimony that he did not tell [LFUCG] of his low back pain. [Branham] has not made an inappropriate request for a back payment of TTD during a time [LFUCG] was not aware he had back pain. The claim was amended to include injury to the low back. There has been no prejudice or burden to [LFUCG] related to a notice issue. The back pain was certainly not the focus of this claim as the knee problem was acute and most pressing. The delay in receiving appropriate treatment for his knee is hard to rationalize. Additionally, the back pain was not a sudden onset but more of an evolving condition, as described in *Cardinal Construction, supra.* Although plaintiff did not give immediate notice at the onset of back pain, notice is not found untimely.

ALJ Opinion at 16-17. As the Board noted, the ALJ's analysis was "limited and flawed." We agree.

The ALJ did not make factual findings of (1) when Branham first experienced low back pain; (2) when he became aware that his low back condition was work-related; nor (3) when he advised LFUCG. The ALJ did not discuss whether the lengthy delay in amending his claim was reasonable or "as soon as practicable." Reasonableness under these circumstances is a finding of fact and not a matter of law. Such a finding must be made by the ALJ as factfinder and cannot be made by the Board.

An ALJ's finding of fact cannot be entirely conclusory in nature, as doing so fails to provide the parties with an adequate basis for requesting review of the ALJ's decision. *Shields v. Pittsburgh and Midway Coal Mining Company*, 634 S.W.2d 440 (Ky. App. 1982). Furthermore, Branham has the burden of proving due and timely notice. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). Branham failed to meet this burden admitting that he never notified LFUCG of the alleged back injury nor explained why he did not report his low back pain when he first experienced it in July of 2016 or when Drs. Owen and Burke advised him that it was related to his knee injury.

The ALJ cited no authority for the proposition that a gradual onset of an injury excuses the employee entirely from providing any notice altogether even after the employee becomes aware of the condition and that the condition is work-related. Further, the ALJ made no findings that low back pain reasonably flows from a knee injury.

The Board erred by usurping the authority of the ALJ finding that Branham provided due and timely notice as a matter of law. By statute, the Board "shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact." KRS 342.285; *Shields v. Pittsburgh & Midway Coal Mining Co.*,634 S.W.2d 440, 441 (Ky. App. 1982).

The Board impermissibly weighed the evidence regarding whether Branham provided due and timely notice to LFUCG. The Board impermissibly found that although the ALJ's analysis of notice was "limited and somewhat flawed," due and timely notice was provided as a matter of law. The Board relies on case law holding that "notice given to an employer by an employee of a work-related physical injury carries with it notice of all conditions which may be reasonably anticipated to result from the injury." *Dawkins Lumber Co. v. Hale,* 221 Ky. 755, 299 S.W. 991 (1927). Whether a low back injury "may be reasonably anticipated to result" from a left knee injury under the circumstances in this case is a question within the province of the ALJ, not within the province of the Board. The ALJ failed to make such a finding or draw any reasonable inferences from the medical evidence to reach such a conclusion.

Branham waited over seven months after being diagnosed with his low back condition before amending his application and never provided any notice to LFUCG. The ALJ made no finding whether Branham's delay in amending his claim was reasonable and whether it was "as soon as practicable" once he was diagnosed with a low back injury.

CONCLUSION

Based on the foregoing analysis, we reverse the decision of the Workers' Compensation Board as to due and timely notice of Branham's low back

injury with directions that the claim be remanded by the Board to the ALJ for additional findings consistent with this opinion.

ALL CONCUR.

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