

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000904-WC

WHAS-TV

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15-60076

BRYAN DERBY;
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION BOARD

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, JONES, AND L. THOMPSON, JUDGES.

COMBS, JUDGE: Appellant, WHAS-TV (WHAS), appeals from an opinion of the Workers' Compensation Board (Board) affirming the decision of an Administrative Law Judge (ALJ) determining that Appellee's cervical fusion surgery is compensable. We affirm.

We limit our discussion of the record to the issue before us. Appellee, Bryan Derby (Bryan), was employed by WHAS as a cameraman. On January 12, 2016, he filed a Form 101 (Application for Resolution of Injury Claim) claiming neck and right shoulder injuries on September 15, 2015.¹ WHAS failed to timely file a Form 111 (Notice of Claim Denial or Acceptance).

The case was bifurcated. On November 28, 2016, the ALJ rendered an interlocutory opinion and order, in relevant part as follows:

Prior to September 15, 2015, Plaintiff performed his job as a camera man in an unrestricted capacity. ... Plaintiff's symptoms significantly increased following a tour of the downtown Louisville bridge wherein he was required to carry his camera for an extended period of time. Dr. Bilkey has articulately explained Plaintiff's job duties, which required him to carry a camera on his shoulder, were factors which accelerated Plaintiff's degenerative right shoulder changes into a symptomatic disabling reality. This ALJ found Plaintiff's testimony regarding his work activities and Dr. Bilkey's causation opinion to be credible.

The ALJ determined that Bryan's current neck and right shoulder injuries were related to the September 15, 2015, injury, entitling him to future medical benefits pursuant to KRS² 342.020 for his neck and right shoulder, including but not limited to the cervical fusion performed by Dr. Vemuri. The ALJ

¹ He also alleged injuries to his back and right ankle which the ALJ subsequently dismissed and which are not at issue on appeal.

² Kentucky Revised Statutes.

placed the case in abeyance pending Bryan's reaching maximum medical improvement (MMI) or release to his customary job duties.

By an order dated January 11, 2018, the case was removed from abeyance. On October 26, 2018, following the submission of additional proof and a final hearing, the ALJ rendered an opinion and order as follows in relevant part:

This ALJ [previously] found Plaintiff sustained an injury to his right shoulder and neck, relying on Dr. Bilkey's opinions. . . . Defendant and Plaintiff have submitted additional evidence on this issue. Plaintiff submitted Dr. Barefoot's report, which agreed with Dr. Bilkey as to causation matters. Defendant submitted Dr. Moskal's report, wherein he opined Plaintiff did not sustain a work injury, but cited an at-home injury while sanding.

Defendant argues Plaintiff exhibited new findings on 12/22/2015 of sharp nerve pain radiating into his right medial forearm, which began on 12/16/2015. Dr. Richardson characterized this as a new finding, and referred Plaintiff to Dr. Vemuri. Dr. Moskal notes a history of increased symptoms while sanding. . . . Ultimately, this ALJ is not convinced Plaintiff's symptoms, including numbness and tingling documented in December 2015, was [sic] related to some non-work[-] related condition or non-work-related injury.

Defendant challenges Dr. Bilkey's causation opinion based upon a failure to obtain a detailed history of Plaintiff's job duties. However, Dr. Barefoot obtained a detailed description of Plaintiff's job duties and attributed Plaintiff's current right shoulder and cervical condition to Plaintiff's work activities. After reviewing the evidence, this ALJ continues to find Plaintiff sustained an injury to this [sic] right shoulder and neck as

the result of his work activities. In making this finding, the ALJ relies on Dr. Barefoot.

The ALJ also noted that she had previously found that WHAS had failed to timely file a Form 111, citing *Neace v. Asplundh Tree Expert Co., Inc.*, Nos. 2007-SC-000236-WC and 2007-SC-000268-WC, 2008 WL 1850622 (Ky. April 24, 2008) (Absent good shown for late filing of Form 111, allegations in application for benefits are deemed admitted). The ALJ explained that although “Plaintiff is still required to prove extent and duration, . . . causation is deemed admitted. Thus, even if this ALJ did not find in Plaintiff’s favor on the issue of causation substantively, she would have made the same finding based on Defendant’s failure to timely file a Form 111.”

WHAS filed a petition for reconsideration requesting additional findings of fact regarding the compensability of the cervical fusion. By order rendered November 26, 2018, the ALJ denied the petition as a re-argument of the merits.

WHAS appealed to the Board, which affirmed the ALJ’s order by an opinion rendered on May 10, 2019, in relevant part as follows:

On appeal, WHAS argues the medical evidence does not establish compensability of the cervical fusion, and the ALJ invaded the province of the medical experts in her consideration of the proof. WHAS asserts the record is clear that Derby had a long history of neck stiffness with complaints of infrequent findings of pain in the third and fifth fingers. On December 22, 2015, Drs. Richardson

and Vemuri for the first time found increased numbness and tingling, paraspinal muscle spasms, and a positive Spurling's test for the right upper extremity. Dr. Vemuri noted paresthesias in a C6 distribution into the thumb and index finger on March 10, 2016. WHAS asserts these new symptoms were the reason Dr. Richardson referred Derby to a neurosurgeon for a possible cervical fusion, which Dr. Vemuri performed. WHAS contends the fusion surgery and any resulting disability is [sic] not compensable.

As the Board noted, Derby was successful before the ALJ.

Therefore, the standard of review on appeal is whether the ALJ's decision is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). The Board explained as follows:

The proof in this claim contained differing medical opinions addressing the cause of Derby's conditions. Based upon the totality of the lay and medical evidence, the ALJ concluded Derby sustained injuries to his cervical spine and shoulder, and that the underlying work activities necessitated the surgery. We find substantial evidence supports the ALJ's determination.

Dr. Bilkey reviewed Dr. Vemuri's medical records and the IME reports of Drs. Best and Moskal. In his September 21, 2016 supplemental report, Dr. Bilkey disagreed with Dr. Best's diagnosis and opinion on causation. Dr. Bilkey also disagreed with Dr. Moskal, who had stated the cervical condition was not work-related based upon the new onset of symptoms almost three months after Derby stopped working. Thus, Dr. Bilkey was clearly aware of the purportedly "new" symptoms, although he may not have considered the deposition testimony of Dr. Richardson. After reviewing the evidence, and the ALJ's decision, we cannot

conclude Dr. Bilkey had a history so inaccurate or incomplete as to render his opinion unreliable.

...

[T]he ALJ was convinced Dr. Bilkey had a sufficient understanding of Derby's job duties. We note the duties of a television cameraman are not outside the understanding of the common person. While WHAS may disagree, the ALJ was well within her role as fact-finder in reaching that determination. We are without authority to usurp the ALJ's authority and reach a different conclusion.

While WHAS has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. As such, the ALJ acted within her discretion

On appeal, WHAS argues that the Board erred in finding that the ALJ's determination is supported by substantial evidence. WHAS contends that "[m]ore particularly, the ALJ erred in relying on the evidence from Drs. Bilkey and Barefoot, ignoring the fact that the opinions of both were based upon inaccurate and incomplete findings." WHAS cites *Osborne v. Pepsi-Cola*, 816 S.W.2d 643 (Ky. 1991), *superseded by statute on other grounds as stated in Smith v. Dixie Fuel Co.*, 900 S.W.2d 609 (Ky. 1995) (ALJ not required to rely on expert causation opinion based upon history that is sufficiently impeached); and *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839, 842 (Ky. 2004) (Medical opinion based upon erroneous or deficient history *completely unsupported by any other credible evidence* does not constitute substantial evidence.). The facts of this case are

highly distinguishable from those in *Cepero*. WHAS simply reargues its case and has been unable to impeach or to undermine the substantial evidence upon which the ALJ and the Board relied.

As our Supreme Court explained in *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992),

The function of further review of the [Board] in the Court of Appeals is to correct the Board only where [this 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.

We perceive no such error. Therefore, we AFFIRM the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, BRYAN
DERBY:

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