IMPORTANT NOTICE

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RENDERED: APRIL 24, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0265-WC

KENTLAND-ELKHORN COAL CORPORATION — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
NO. 2001-CA-1759-WC
WORKERS' COMPENSATION BOARD NOS.: 82-9610 & 98-57315

MICHAEL DALE ROSE; APPLETON & RATLIFF COAL CORPORATION; KENTLAND-ELKHORN COAL CORPORATION; SPECIAL FUND; IRENE STEEN, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND

2002-SC-0266-WC

MICHAEL DALE ROSE — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
NO. 2001-CA-1740-WC
WORKERS' COMPENSATION BOARD NOS.: 82-9610 & 98-57315

APPLETON & RATLIFF COAL CORPORATION; KENTLAND-ELKHORN COAL CORPORATION; SPECIAL FUND; IRENE STEEN, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The claimant injured his back in 1982, while working for Kentland-Elkhorn Coal Corporation. He returned to work and was injured again in 1998, while working for

Appleton & Ratliff Coal Corporation. Considering a claim for the 1998 incident and a reopening of the 1982 claim, an Administrative Law Judge (ALJ) determined that all of the permanent disability at reopening was due to a worsening of the 1982 injury and was not persuaded that the 1998 incident caused a psychological disability. The Workers' Compensation Board (Board) and the Court of Appeals have affirmed the findings. Nonetheless, both Kentland-Elkhorn and the claimant maintain that the ALJ erred by failing to attribute part of the physical disability to the 1998 incident. The claimant also maintains that substantial evidence did not support the finding that he had no psychological disability. We affirm.

The claimant was born in 1949. He had a high school education with no specialized or vocational training, and his work history consisted of general labor. In 1982, he injured his back while lifting a water pump at Kentland-Elkhorn and returned to work approximately six weeks later, having undergone surgery to repair a ruptured disc in his lumbar spine. The claim was settled for a 10% disability.

Although the record reflected an incident in August, 1994, while the claimant was removing a wheel from a shuttle car, he denied any injury, and no claim was filed. In any event, sometime in 1994, he began to experience pain in his lower back and legs. It responded to epidural injections by Dr. Anderson, a pain management specialist, and did not return until 1997, at which point the injections were resumed. In August, 1997, Dr. Anderson noted additional complaints of left upper back and left arm pain, and he diagnosed chronic cervical thoracic strain syndrome.

On June 10,1998, while working for Appleton & Ratliff, the claimant slipped in some oil while cleaning a continuous miner. He testified that he fell to the ground from a height of about seven feet and landed on his left shoulder. After the incident, he

experienced pain in his neck, left shoulder, and lower back. This time, however, the lower back pain did not respond to injections, and Dr. Briggs suggested that a spinal cord stimulator implant might help to relieve it. Dr. Narola, a psychiatrist, also treated the claimant and prescribed medication for depression. After Appleton & Ratliff stopped paying benefits voluntarily, the claimant filed an application for benefits. The parties stipulated that the claimant lacked the physical capacity to return to his former employment, and he testified that he was unable to perform any type of work after the 1998 incident.

Inasmuch as the 1998 claim included low back complaints, Appleton & Ratliff's motion to join Kentland-Elkhorn and the Special Fund was granted, and the 1982 claim was reopened. The claimant maintained, however, that he had no problems following his recovery from the 1982 surgery and that he did not become permanently disabled until after the 1998 incident. Although acknowledging that Dr. Kennedy had referred him to Dr. Anderson for treatment of neck and arm pain long before the 1998 incident, he testified that he had experienced "no more than normal pains of working in the coal mines." Furthermore, he stated that up until the 1998 incident, he worked 12- to 14-hour days, 6 to 7 days per week.

After reviewing the voluminous lay and medical evidence, the ALJ determined that although the claimant returned to work after the 1982 surgery, his treating physicians would have imposed significant restrictions and impairment ratings had they been asked to do so at that time. MRI reports from 1994 and 1998 contained few, if any, differences and indicated that the claimant had developed an osteocartilaginous spur at L4-5, the site of the 1982 surgery. The spur seemed to be pressing on the dura and irritating the L4-5 nerve root; thus, any improvement following the injections was

only temporary. Drs. Muffly and Primm testified that they would have given the same impairment rating both before and after the 1998 incident, and no physician assigned an impairment rating to the effects of the incident. Thus, the ALJ determined that the 1998 incident had only exacerbated the 1982 injury. Although it resulted in a period of temporary total disability (TTD) and the need for some medical treatment, Appleton & Ratliff had already paid for both. Relying on Dr. Shraberg, who was found to be more credible, the ALJ was not persuaded that the claimant had a psychiatric disability as he alleged. Furthermore, concluding that the claimant was totally disabled from a worsening of the 1982 injury at reopening, the ALJ apportioned liability for the award equally to Kentland-Elkhorn and the Special Fund.

Overruling petitions for reconsideration, the ALJ indicated that the medical treatment the claimant had required since 1994 belied his assertions that he had no problems until after the 1998 incident. Reiterating the finding that the claimant's disability at reopening resulted from the 1982 injury, the ALJ pointed to Dr. Primm's testimony that the low back symptoms were, more than likely, due to chronic degenerative changes since the initial surgery and that the 1998 injury represented "another aggravation or exacerbation of his chronic changes." Referring to a portion of Dr. Primm's testimony that characterized 75-80% of the claimant's impairment as "preexisting active" and the balance as being due to the further arousal of the degenerative condition, the ALJ explained that the statement was open to interpretation and that when Dr. Primm's testimony was considered in its entirety, he clearly attributed the claimant's current problems to the 1982 injury and surgery.

Although determining that the findings concerning apportionment were insufficient and remanding the claim for further proceedings in that regard, the Board

affirmed in all other respects. The decision was affirmed by the Court of Appeals, and these appeals by Kentland-Elkhorn and the claimant followed. Although Kentland-Elkhorn now concedes that the claimant is totally disabled, it maintains that at least some of his physical disability must be attributed to the 1998 incident for which it bears no liability. The claimant agrees. He also maintains that substantial evidence did not support the finding that he had no psychiatric disability and also maintains that an award for psychiatric disability due to the 1998 incident was compelled. Although Kentland-Elkhorn also asserts that the 50/50 apportionment was supported by substantial evidence and that a remand for further findings is unnecessary, we will not address the argument because it was not raised to the Court of Appeals and, therefore, is not preserved for our review.

First, we will address the psychological claim. Dr. Narola began treating the claimant in September, 1999, on referral from Dr. Nadar, his treating orthopedic surgeon. At that time, Dr. Narola received a history of a dramatic life change following the 1998 accident and diagnosed major depression, moderate to severe. By January, 2000, however, he characterized the depression as being mild. When deposed in June, 2000, he described the condition as moderate and assigned a 30% AMA impairment. Dr. Narola stated that the cause of the depression was the claimant's inability to work since the 1998 accident and indicated that the condition would affect his ability to work. In contrast, Dr. Shraberg diagnosed a mild depression that caused no AMA impairment, characterizing it as "a transient condition due to his transition to a disability retirement status." He thought that the claimant would benefit from performing some light duty work.

It is clear that Dr. Narola's testimony would have permitted a finding in the claimant's favor. Nonetheless, the ALJ found Dr. Shraberg to be a more credible witness and, therefore, was not persuaded by the claimant's evidence that he had a psychiatric disability. The issue of causation was not addressed.

The claimant asserts that Dr. Shraberg failed to relate his depression to the 1998 injury because he thought that the claimant had retired; whereas, he quit due to an inability to work after the 1998 injury. Furthermore, emphasizing what he perceives to be flaws in the quality of Dr. Shraberg's medical opinions, he maintains that the testimony did not constitute substantial evidence to support the ALJ's conclusion. We note, however, that there is no requirement that substantial evidence must support a finding that the party with the burden of proof failed to meet that burden. Butcher v. Island Creek Coal Co., Ky., 465 S.W.2d 49 (1971). Furthermore, the ALJ is the finder of fact with regard to a workers' compensation claim and has the sole authority to weigh the evidence and to judge its quality and character. KRS 342.285. Despite the claimant's assertions to the contrary, the evidence in his favor was not overwhelming, and the conclusion that he had no psychological disability was reasonable under the evidence. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

We turn, now, to the physical injury claims. In common parlance, the word "injury" refers to an event that causes harm and also to the resulting harm. In the context of workers' compensation law, however, the word "injury" is a term of art that is defined in KRS 342.0011(1). In 1982, "injury" was defined as a harmful change in the human organism; whereas, in 1998, it was defined as a traumatic event that causes such a change. It is also useful to keep in mind that a harmful change may be temporary or permanent, that it may also increase or decrease in severity over time,

and that the occupational disability that results from a harmful change was defined and measured differently in 1982 and 1998. Because the law is dynamic, the precise use of terms such as "injury," "disability," and "impairment" and an awareness of the significance of each term under the applicable version of Chapter 342 are critical, particularly where claims that arose at different times are being considered together.

Rejecting an argument that the claimant's current physical disability was due to the 1998 accident, the ALJ noted the subsequent exacerbations of the 1982 injury as well as the absence of any difference in the 1994 and 1998 MRI's, stating:

> Therefore, I do not feel that Plaintiff meets the criteria and definition of injury as set forth in the 1996 Amendments. Although Plaintiff appears to have suffered an additional exacerbation of his previous back problems in 1998, no physician has given a specific functional impairment rating due to that injury and, thus, no occupational disability is warranted from 1998.

Focusing upon the first sentence, the employer maintains that the evidence of a 1998 injury is "overwhelming and uncontradicted." We agree, but we would also point out that when determining that the 1998 incident resulted in a period of TTD and certain medical expenses, the ALJ clearly recognized that the claimant sustained work-related trauma that caused a harmful change, i.e., an "injury" under the 1996 definition. Therefore, when the sentence is considered in the context of the entire opinion, its apparent meaning is that although a harmful change resulted from the 1998 incident, the change accounted for no permanent impairment and, therefore, no permanent disability under the 1996 Act. Instead, the claimant's entire permanent impairment and disability were due to the effects of the 1982 incident. It was for that reason, that the ALJ held Appleton & Ratliff liable for the TTD and medical benefits that it had paid voluntarily but held Kentland-Elkhorn liable for the increased award of permanent income benefits that began on the date of the motion to reopen.

Although there was lay and medical evidence from which the ALJ could have determined that some of the claimant's permanent disability was due to the 1998 incident, the fact remains that there was substantial evidence that the 1998 incident caused only a temporary exacerbation of the degenerative condition in the claimant's back and that any permanent disability and impairment were due to the effects of the 1982 injury. Likewise, there was substantial evidence from which the ALJ could conclude that the effects of the 1982 injury, by themselves, caused the claimant to be totally disabled. Under those circumstances, the findings were not unreasonable.

The decision of the Court of Appeals is affirmed.

All concur.

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