

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: APRIL 24, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0442-WC

FINAL
DATE 5-15-03 SJA/Growth, D.C.

ATR WIRE & CABLE COMPANY

APPELLANT

V.
APPEAL FROM COURT OF APPEALS
2001-CA-2755-WC
WORKERS' COMPENSATION BOARD NO. 93-50778

BETTY JO BENJAMIN; DIVISION OF
WORKERS' COMPENSATION FUNDS,
SUCCESSOR TO SPECIAL FUND;
HON. JAMES L. KERR, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

In a reopening proceeding an Administrative Law Judge (ALJ) determined that because the claimant sustained a subsequent injury that was not work-related and because the subsequent medical treatment was for the effects of that injury, the employer was not liable for the expense. Reversing a decision of the Workers' Compensation Board (Board), the Court of Appeals determined, however, that the ALJ's analysis was incomplete and that uncontradicted medical evidence compelled a finding that the treatment was compensable as a natural consequence of the work-related injury. We affirm with regard to the necessary legal analysis but reverse to the extent that a particular finding is compelled on remand.

At the time of her injury, the claimant had worked for the defendant-employer for 14 years, the last ten of which had been as a forklift operator. On July 20, 1993, she felt a sharp pain in the left side of her neck while backing up a fork lift. Her symptoms increased, leading her to inform her supervisor later in the shift. After working lighter duty for about six months, she quit working altogether and has not worked since then.

On June 19, 1997, an ALJ awarded a 30% occupational disability, expressing a belief that the claimant could return to light duty work so long as she avoided bending her neck frequently. In reaching that conclusion, the ALJ relied upon Dr. Patrick's testimony that the claimant sustained a herniated disc without nerve impingement and that she should not lift more than 15 pounds or repetitively rotate or hyperextend her neck. At the time, Dr. Patrick indicated that the claimant's cervical condition warranted a DRE Category II impairment of 5%. He also indicated that she had full flexion, extension, lateral tilting, and rotation of her neck but that she had soreness to the extremes.

In 1998, after the pain in her neck and back failed to improve, the claimant underwent a cervical discectomy and fusion at C5/6, after which she moved to reopen the claim. The motion was denied under the 1996 amendment to KRS 342.125 that imposed a two-year waiting period on reopening, and her appeal was held in abeyance pending a decision concerning the applicability of the amendment to a pre-December 12, 1996, injury. Sometime in March, 1999, the claimant slipped in some liquid while shopping. Although she did not fall, she did experience pain in her neck and back. Thus, she sought treatment in the emergency room and from Dr. Gilbert, her treating physician since 1996. The claim was reopened in January, 2000.

In November, 1998, Dr. Gilbert noted that the claimant was doing very well at 90 days after her surgery. She had indicated that she was amazed at the amount of pain relief that the surgery produced and that she took pain medication only on an as-needed basis. On March 9, 1999, Dr. Gilbert noted no new findings although the claimant complained of some symptoms that were unrelated to the injury. On March 29, 1999, she reported that she had slipped on some liquid on March 23, after which she had experienced increased neck, arm, low back and leg pain. On April 28, 1999, she complained of dizziness and anxiety since the recent incident, and she continued to do so on May 12, 1999. On September 17, 1999, Dr. Gilbert noted persistent pain since the March, 1999, incident. As of November 17, 1999, he assigned a 20% impairment for neck and back pain due to the work-related injury and also noted that the claimant experienced chronic pain since the March, 1999, incident. When deposed, Dr. Gilbert indicated that although none of the claimant's impairment was due to the March, 1999, incident, medical treatment since then was related to the incident. He explained that the claimant was off medication before the incident but that, since the incident, she was back on medication and required much more treatment.

Dr. Keating, a chiropractor, initially saw the claimant on March 25, 1999. At that time, she reported that she slipped on water and oil while shopping. She indicated that she jerked to catch herself from falling and felt a sharp pain in her neck as well as in her mid and lower back. Dr. Keating reported that, in his opinion, the incident was the cause of the claimant's present symptoms. He also stated:

However, Ms. Benjamin's past medical history is significant for prior cervical spine injuries which required disc surgery and fusion. This slip injury has currently exacerbated her previously dormant cervical spine condition.

Convinced that the claimant's occupational disability had increased since the initial award, the ALJ determined that her present disability due to the injury was 75%. Relying upon Dr. Gilbert's testimony that all medical care he provided after the March 23, 1999, incident was related to the effects of the incident, the ALJ determined that the incident was significant and that because it was not work-related, it relieved the employer from responsibility for the subsequent medical care. The claimant appealed.

In determining that the decision was erroneous as a matter of law and should not have been affirmed, the Court of Appeals relied upon Addington Resources v. Perkins, Ky.App., 947 S.W.2d 421 (1997). Appealing the decision, the employer maintains that the present facts are distinguishable because, here, the ALJ chose to rely on testimony from Dr. Gilbert and Dr. Keating that subsequent medical treatment was attributable to the effects of the March, 1999, incident rather than the work-related injury. Thus, the decision was supported by substantial evidence and should not have been disturbed. Whereas, in Addington, the ALJ relied upon medical evidence that were it not for the work-related injury and resulting surgery, the worker would not have had the changes in his spine that led to the subsequent injury at a different level. Thus, the conclusion that the worker's medical expenses remained compensable despite the subsequent injury was upheld by the court as being supported by substantial evidence.

The Addington decision was grounded in the principle that a subsequent injury is compensable, whether an aggravation of the original injury or a new and distinct injury, if it is the direct and natural consequence of a compensable primary injury. Id. at 423. The employer is correct in asserting that both Dr. Gilbert and Dr. Keating attributed the disputed medical expenses to the March, 1999, incident. As the Court of Appeals correctly explained, however, the ALJ reached a conclusion about the legal significance

of that testimony without completely analyzing the evidence.

Medical testimony established that because the claimant's cervical condition had stabilized and no longer required regular treatment or pain medication until after the March, 1999, incident, it was the incident that precipitated the need for treatment. However, the ALJ's opinion made no reference to Dr. Keating's statement that the incident exacerbated the previously dormant cervical spine condition and failed to consider whether the need for treatment following the March, 1999, incident was a direct and natural consequence of the claimant's pre-existing condition. Although Dr. Keating's statement appears to be uncontroverted, the ALJ is the finder of fact and is free to reject even uncontroverted medical evidence if a sufficient basis for doing so is stated. See, for example, Osborne v. Pepsi-Cola, Ky., 816 S.W.2d 643 (1991); Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., Ky.App., 618 S.W.2d 184 (1981). For that reason, we reverse the Court of Appeals only to the extent of determining that we are unwilling to deprive the ALJ of discretion on remand.

The decision of the Court of Appeals is hereby affirmed in part, reversed in part, and this matter is remanded to the ALJ for further consideration.

All concur.

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