

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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RENDERED: May 20, 2004

NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2003-SC-0451-WC

DATE June 10, 2004 E. J. F. G. W. H. D. C.

DENHAM-BLYTHE CO., INC.

APPELLANT

APPEAL FROM COURT OF APPEALS

2002-CA-1604-WC

V.

WORKERS' COMPENSATION BOARD NO. 92-26541

RUFUS WOOTEN; HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; HON. ROBERT L.
WHITTAKER, DIRECTOR OF WORKERS COMPENSATION
FUNDS, SUCCESSOR TO SPECIAL FUND; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

At the reopening of the claimant's workers' compensation award, an Administrative Law Judge (ALJ) determined that he had become totally disabled due to a worsening of his physical condition and that he was suffering from work-related depression for which he was entitled to medical treatment. Having failed to convince the Workers' Compensation Board (Board) or the Court of Appeals that the decision was erroneous as a matter of law, the employer now appeals to this Court. It maintains that the psychiatric claim was nonwork-related and barred by limitations under Slone v. Jason Coal Co., Ky., 902 S.W.2d 820 (1995), and also that there was no substantial evidence to support the finding of total disability. We affirm.

The claimant was born in 1950 and has a twelfth-grade education as well as training in diesel mechanics. He had prior work experience in a factory, in park maintenance, as a welder, and as a manager of an aluminum recycling business. He

worked for the defendant-employer as a construction laborer. On June 23, 1992, he sustained neck and lower back injuries when a co-worker who was working above him fell and landed on him. The ALJ who considered the claim determined that there was evidence of a bulging or herniated cervical disk, which caused nerve root impingement and radiculopathy into the arms. Although convinced that the injury was not totally disabling as the claimant alleged, the ALJ determined that the claimant could not return to manual labor or to a full range of medium-duty jobs. In an award that was rendered in September, 1995, the claimant received a 50% occupational disability. Based on evidence that the trauma aroused pre-existing degenerative changes, half of the liability was apportioned to the Special Fund.

On August 9, 2000, the claimant moved to reopen the claim, alleging a worsening of his back and neck conditions. He asserted that, since the award, surgery had been recommended and also that he had developed severe depression. The motion was granted, and the parties proceeded to take further proof.

The claimant testified at reopening that he had neither worked nor looked for work since the 1992 injury because he was unable to work. He maintained that both his physical and emotional condition had worsened since then. He experienced greater pain in his neck and arms and began to lose the use of his arms. Although he was referred to Dr. Natelson, who performed surgery in 1997, the pain returned and increased after about two months. Although medication provided some relief from the pain, he testified to constant numbness in his left arm and pain in his neck. He also had difficulty standing or sitting for long periods and difficulty sleeping. He stated that after the surgery he received a permanent social security disability award.

The claimant stated that after the 1997 surgery, he developed severe depression and underwent counseling at his own expense. He stated that it was helpful. He denied having previously experienced depression or having previously taken medication for the condition. When asked whether a Dr. Wright had prescribed antidepressants at the time of the hearing on the initial claim, he testified that he saw Dr. Wright shortly after the injury. He stated that Dr. Wright was his family doctor at the time and referred him to a neurosurgeon in Lexington. He did not know what Dr. Wright prescribed. At the hearing, he testified that he presently took Xanax for his psychiatric condition.

Dr. Natelson first saw the claimant on May 1, 1995, at which time he complained of neck and low back pain. An MRI revealed a spinal stenosis, prompting Dr. Natelson to recommend surgery. The claimant declined the procedure at that time, but he returned on January 27, 1997, complaining of numbness and tingling in both hands and neck pain, and later agreed to the surgery. Dr. Natelson performed a decompressive cervical laminectomy at C3, C4, C5, and C6 on June 17, 1997. He testified that the spinal stenosis was a dormant condition that was brought into disabling reality by the work-related injury. As of December 10, 1997, the claimant indicated that his right arm had returned to normal, but he continued to experience numbness in the index and long finger of the left hand. Dr. Natelson assigned a 15% impairment.

When the claimant returned on January 19, 2001, he complained of numbness in the left hand that was made worse by holding things and of low back pain with radiation into the left leg. Dr. Natelson ordered an MRI, which revealed a ruptured disc at C7-T1 and a slight central bulge at L5-S1 that also explained his symptoms. Dr. Natelson prescribed physical therapy and medication. On July 11, 2001, the claimant continued

to have symptoms that Dr. Natelson viewed as being "real" but for which he did not think surgery was appropriate.

On December 8, 2000, Dr. Chaney testified that he had treated the claimant for seven to eight years. In his opinion, the 1997 surgery was not successful because it did not relieve the claimant's pain. He thought that the claimant was worse physically than he had been in 1995 and that he now suffered from depression. Dr. Chaney assigned a 15% impairment for the neck and back conditions, using the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment (Guides). He restricted the claimant from repetitive bending, stooping, twisting, and turning and limited him to lifting a maximum of twenty pounds and to lifting ten pounds occasionally. He acknowledged, however, that the claimant's restrictions were the same as they had been in 1994 and that, in his opinion, the claimant was unable to return to his previous work when he received the initial award.

Dr. Chaney testified that, after the surgery, the constant pain, the fact that it did not improve, and the claimant's inability to work caused him to develop anxiety and depression. He received counseling from a psychologist who worked at Dr. Chaney's office for a period of time and was prescribed antidepressants and anxiolytic medication. Dr. Chaney stated that his records indicated that he first prescribed medication for anxiety in 1997. He testified that he did not begin treating the claimant for depression until about 1999. In his opinion, the psychiatric condition caused a 10-20% impairment.

Dr. Rapier examined the claimant in April, 2001, and diagnosed a contusion and strain to the neck and back which aggravated a preexisting, dormant, degenerative disease. He noted the prior surgery for a cervical spinal stenosis. Furthermore, he

assigned a 29% impairment and limited lifting to a maximum of twenty pounds and frequent lifting to ten pounds.

Dr. Travis examined the claimant in February, 2001, on behalf of the employer. He noted a cervical laminectomy involving C3, C4, C5, and C6 and the claimant's continuing complaints of pain in the neck and left arm. He reported, however, that his examination revealed no objective findings with respect to the cervical spine or related nerve roots and that it did reveal overt and flagrant symptom magnification. He assigned a 0% lumbar spine impairment and a 15-18% cervical impairment. He found no objective evidence of a worsening of condition since 1995, no evidence of spinal stenosis or of a herniated disc, and no evidence of nerve root or neuro-foraminal involvement. In his opinion, the 1997 surgery was successful. He also reported that a February, 2001, MRI revealed nothing to indicate the need for additional cervical or lumbar surgery.

Dr. Granacher, a psychiatrist, examined the claimant in February, 2001, and concluded that he had a 10% psychiatric impairment due to depression. He stated that the claimant gave a history which indicated that Dr. Chaney had treated him with some type of medication for bad nerves in 1992. Dr. Granacher noted, however, that he could not document the history from the information at hand. He indicated that the claimant's mood was depressed, that his affective range appeared to be constricted, and that no external stressors accounted for his current mental state. He actively complained of pain, had numerous pain behaviors, appeared uncomfortable, and had a distressed facial expression. Dr. Granacher stated that if the claimant did, in fact, have depression in 1992, his present depression would be related to the 1992 condition.

As reflected in the memorandum of the Benefit Review Conference conducted on October 17, 2001, the ALJ indicated that the contested issues were limited to "work-

relatedness/causation of the psychiatric condition” and to “increase in occupational disability.” Nonetheless, the employer’s brief to the ALJ asserted that no medical evidence established that the psychiatric condition was work-related and that even if the psychiatric condition was work-related, compensation was barred under Slone v. Jason Coal Co., supra. As the basis for the second assertion, the employer referred to testimony by the claimant in the initial proceeding that he experienced depression and that a physician had prescribed antidepressants.

After reviewing the evidence, the ALJ relied upon Dr. Chaney’s testimony that the claimant was diagnosed with depression after his surgery and determined that the condition was due to the work-related injury. Relying upon Drs. Natelson and Chaney, the ALJ determined, however, that the claimant’s present physical condition, by itself, caused him to be totally disabled. Based on the findings, the ALJ increased the claimant’s income benefits and awarded medical benefits for treatment of the depression.

The employer’s petition for reconsideration reiterated its position that the psychiatric condition was present at the time of the initial award and was barred. Although the ALJ did not address its argument that the claim was barred by Slone v. Jason Coal Co., supra, the employer did not bring that fact to the ALJ’s attention or request specific findings concerning the presence of depression before 1995. Nonetheless, it argued on appeal that the psychiatric condition was not work-related and also that the claim was barred at reopening because the claimant knew of the condition in 1995 but failed to raise it in his initial claim. Slone v. Jason Coal Co., supra. The employer also argues that the evidence did not support the finding of total disability.

In Slone v. Jason Coal Co., supra, the worker filed workers’ compensation and social security disability claims at about the same time. It was undisputed that his

mental condition was present at the time, for a psychiatric evaluation was one of the grounds for the social security disability claim. Yet, he failed to offer evidence of the condition when litigating the workers' compensation claim. At reopening, he alleged that the condition had been dormant at the time of the initial award and had only recently become disabling. The Court determined, however, that attempting to claim benefits for the condition by means of a subsequent reopening amounted to piecemeal litigation, which was prohibited in Wagner Coal & Coke Co. v. Gray, 208 Ky. 152, 270 S.W.2d 721 (1925). Furthermore, because KRS 342.125 based reopening on a change of occupational disability, the Court pointed out that a motion to reopen cannot be based upon a condition that was known during the pendency of the initial action but not litigated. Id. At 822.

Unlike the situation in Slone v. Jason Coal Co., supra, the present reopening was premised on a worsening of the claimant's orthopedic condition and on the development of depression as a result of the post-award surgery. None of the testimony from the claimant's 1995 proceeding appears in the record at reopening. Although the employer asserts that the claimant testified to experiencing depression due to his neck pain and to taking antidepressants at that time, the opinion and award did not mention any lay or medical testimony which indicated that the claimant was depressed or had a psychiatric condition. It may well be that the ALJ who considered the matter simply ignored the claimant's testimony that he was depressed because there was no psychiatric claim. It may also be that in the absence of supporting medical evidence, the ALJ did not find the self-serving testimony to be persuasive. In any event, although the testimony was relevant to the question of occupational disability, it did not compel a finding that the claimant suffered from work-related depression at that time or

a rejection of the claim for medical benefits at reopening. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979); Grider Hill Dock v. Sloan, Ky., 448 S.W.2d 373 (1969).

Contrary to the employer's assertion that the only treatment the claimant received for depression after 1995 was some counseling, Dr. Chaney testified he began treating the claimant for depression in about 1999 and that he prescribed anxiolytic medication in 1997. Furthermore, he stated that the claimant's anxiety and depression resulted from his pain, the failure of the surgery to relieve it, and his inability to work. Dr. Granacher determined that the depression was present in 1992, but he made it clear that his conclusion was based solely on a history given by the claimant, which indicated that Dr. Chaney had treated him with some type of medication for bad nerves in 1992. Under the circumstances, we are not persuaded that the evidence that was introduced at reopening compelled a finding that the claimant suffered from work-related depression in 1995 or a finding that the depression he alleged at reopening was caused by anything other than the persistent symptoms of pain, the unsuccessful post-award surgery, and the claimant's inability to work. Under the circumstances, we find no error in the decision to award medical benefits for the condition.

At reopening, the ALJ determined that the claimant's physical injury, by itself, had become totally disabling. The employer's second argument is that the evidence did not support the finding that the claimant was totally occupationally disabled. Pointing to medical evidence that the claimant's restrictions were unchanged and to what the employer characterizes as a successful surgery, the employer maintains that his condition has actually improved. It asserts, therefore, that the award should not have been increased.

Contrary to the employer's assertion, the medical evidence established a worsening of the claimant's physical condition since 1995. Furthermore, although Dr. Chaney did not think that the claimant could return to his previous work in 1995, his opinion at reopening was that the claimant could no longer perform even the medium or light-duty work of which he had been capable at that time. Despite the employer's medical evidence to the contrary, there was substantial evidence from which the ALJ could reasonably conclude that the claimant's physical condition had worsened since the initial award and that he was no longer capable of even the light to medium-duty work that the previous ALJ envisaged when awarding a 50% occupational disability in 1995. Under the circumstances, the award was properly affirmed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The decision of the Court of Appeals is affirmed.

All concur.

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