

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

2006-SC-0059-WC

FINAL

DATE 9-14-06 E.L.A. Groun, P.C.

MICHAEL REYNOLDS

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-1613-WC
WORKERS' COMPENSATION NO. 03-91900

MAXIM/CARLISLE CONSTRUCTION;
HONORABLE DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the statute of limitations barred a claim for the incident that caused the claimant's back injury and that the incident that occurred on November 3, 2003, was a temporary exacerbation of the injury. The ALJ awarded medical expenses from November 3, 2003, through December 24, 2003, after noting that the claimant's symptoms appeared to have returned to their pre-incident state by then and that the employer was not liable for medical treatment provided after the statute of limitations for the back injury expired. The Workers' Compensation Board and the Court of Appeals affirmed.

The claimant now concedes that the November, 2003, incident caused no permanent disability. However, he continues to assert that it caused a separate and

distinct injury and that the ALJ erred by limiting the duration of his medical benefits. Having concluded that the evidence did not compel a finding that the November 3, 2003, incident was anything more than a temporary exacerbation of the time-barred injury and, therefore, that the employer bore no liability for medical benefits after the two-year period of limitations expired, we affirm.

The claimant began working for the defendant-employer in 1998 as a field mechanic, performing on-site heavy equipment repair and maintenance. On January 10, 2004, he filed an application for income and medical benefits. Among other things, he alleged that he sustained work-related back injuries on January 3, 2002, and November 3, 2003.¹

Describing the January 3, 2002, back injury, the claimant stated that he felt pain throughout his back while attempting to remove a test kit from the bed of a pickup truck. He completed the shift and informed his supervisor on the following day when his symptoms increased. Although he continued to work, he was prescribed pain medication and muscle relaxers and underwent several months of physical therapy. He also received injections for leg pain that radiated from his buttocks to his calf with occasional numbness and tingling. In July, 2003, he began chiropractic treatment with Dr. Schweitzer.

The claimant testified that his symptoms increased on November 3, 2003, when he attempted to lift a heavy cylinder. He kept his regularly-scheduled appointment with Dr. Schweitzer later that day and returned about twice weekly for a period of time thereafter. The claimant described his pain from the incident as approximating what he

¹The claim also alleged left elbow injuries that occurred on December 24, 2001, and June 18, 2002, as well as a right shoulder injury that occurred on November 26, 2002.

experienced in January, 2002; however, after treating with Dr. Schweitzer for about a week, he was able to walk, stand erect, and perform his work. He stated that before the November, 2003, injury, his pain was 6 or 7 on a 10-point scale. At the hearing, he testified that he presently required treatment about every two weeks and rated his pain at about 5 on a 10-point scale. He took no medication, obtained his only treatment from Dr. Schweitzer, and continued to perform the same work that he did both on January 3, 2002, and November 3, 2003.

The medical evidence consisted of a Form 107, supplemental report, and deposition of Dr. Schweitzer. Dated September 13, 2004, the Form 107 indicated that the claimant sought treatment after suffering a herniated disc and radiculopathy due to an injury. He improved dramatically with treatment and was nearing maximum medical improvement (MMI) when he sustained another injury on November 3, 2003. That injury necessitated more frequent treatments. In Dr. Schweitzer's opinion, the second injury caused the majority of the claimant's present symptoms and/or residuals and 80 to 90% of the symptoms that he treated from November 3, 2003, to the present. The supplemental report of October 4, 2002, indicated that the claimant's present impairment was 8% but that he was not at MMI and that Dr. Schweitzer expected him to improve with further treatment.

When deposed, Dr. Schweitzer corrected the Form 107 to state that the claimant's initial injury occurred on January 3, 2002, and that the initial visit occurred on July 10, 2003. He stated that a February, 2002, MRI revealed numerous abnormalities in the claimant's spine: an L4-5 herniation with mild to moderate foraminal narrowing, a diffuse disc bulge with bilateral foraminal narrowing at L3-4, a disc herniation at L5-S1 that impacted the thecal sac, and mild hypertrophy of the facet joints in the lower back.

Reviewing his treatment notes, most of which were not of record, Dr. Schweitzer stated that the claimant's condition improved during the initial months of chiropractic therapy. However, on November 3, 2003, the claimant reported really bad days the previous Monday, Tuesday, and Wednesday and stated that he had pulled on a big cylinder while working. The treatment Dr. Schweitzer provided on that day was no different from that on earlier visits. By November 10, 2003, the claimant was regaining elasticity. He stated that "this week was pretty good" and that his leg pain continued but "would go away at times." By December 12, 2003, he reported to Dr. Schweitzer that he was much better and rated his pain at 5 on a 10-point scale. His gait had improved dramatically. On January 5, 2004, Dr. Schweitzer diagnosed left leg sciatica, chronic but stable.

As he had in the Form 107, Dr. Schweitzer attributed the symptoms that he treated after November 3, 2003, to an injury on that date. He explained that the claimant had experienced numerous episodes at work that could be classified as being a re-injury or exacerbation, but the November 3, 2003, episode was the most significant. He stated that the claimant's present impairment and residuals were probably about the same as before the injury and that he was "at about the same baseline that he was before the November 2003 exacerbation." Dr. Schweitzer acknowledged that an individual with the claimant's back condition might be expected to have occasional flare-ups of symptoms with certain activities.

The parties stipulated that the employer paid no temporary total disability benefits for the January 3, 2002, low back injury but that it did pay nearly \$26,000.00 in medical benefits arising from the injury, which the ALJ noted was largely for chiropractic treatment. After summarizing the evidence, the ALJ determined that KRS 342.185

barred any claim for the January 3, 2002, back injury. The ALJ then noted that the claimant was undergoing active chiropractic treatment before November 3, 2003, for back symptoms that waxed and waned depending on his job duties. Yet, he was "an industrious worker" and continued to perform his usual job, which involved activities that "could be expected to exacerbate his already-active back complaints." Relying on Dr. Schweitzer's testimony that the claimant's present symptoms were about the same as before the incident and that he had returned to what had been his baseline before the incident, the ALJ determined that the incident caused only a temporary exacerbation of the pre-existing back injury rather than a new injury. The ALJ awarded medical benefits to December 24, 2003, explaining that the claimant reported significant improvement on December 12, 2003, at which point his symptoms and range of motion had improved dramatically. After that, his symptoms appeared to wax and wane, just as they had done before November 3, 2003. Moreover, the employer was not liable for medical services provided more than two years after the Neither party petitioned for reconsideration.

Dr. Schweitzer indicated in the Form 107 and his deposition that the claimant re-injured his back on November 3, 2003, and that 90% of the chiropractic treatment thereafter was for the effects of the incident. Pointing to those statements, the claimant asserts that Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981), prohibited the ALJ from disregarding uncontradicted medical evidence that the claimant sustained a new injury on November 3, 2003, and that the evidence compelled the ALJ to award reasonable and necessary medical treatment for the effects of that injury.

The evidence did not compel the ALJ to determine that the November 3, 2003,

incident caused a distinct injury rather than a temporary exacerbation of the time-barred injury. Contrary to the claimant's assertion, the ALJ did not ignore uncontradicted evidence of causation. As the finder of fact, the ALJ had the freedom to consider all of Dr. Schweitzer's testimony, to weigh conflicting testimony, and to draw reasonable inferences. Dr. Schweitzer's interpretation of the February, 2002, MRI provided objective medical findings regarding the claimant's condition after the time-barred injury but before the alleged injury on November 3, 2003. When deposed, he stated that the claimant's impairment would have been about the same both before and after November 3, 2003, and that the claimant had returned to "the same baseline that he was before the November 2003 exacerbation." He also stated that it was not unusual for an individual with the claimant's underlying back condition to have occasional flare-ups of symptoms that required a period of more frequent treatment.

Under the circumstances, the ALJ made reasonable findings: 1.) that the claimant sustained a pre-existing back injury that was time-barred; 2.) that he did not sustain a new injury in November, 2003, but suffered a temporary exacerbation of symptoms from the pre-existing injury; and 3.) that he had greatly improved by December 12, 2003, after which his symptoms waxed and waned as they had done before November 3, 2003. Because a claim for the pre-existing injury was time-barred, the ALJ did not err in concluding that the employer was not liable for medical treatment provided more than two years after the injury occurred.

The decision of the Court of Appeals is affirmed.

Lambert, C.J.; Graves, McAnulty, Roach, Scott, and Wintersheimer, JJ., concur.
Minton, J., not sitting.

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