

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2006-SC-0444-WC

DATE 3-15-07 ELLAGrou44, D.C.

RICHARD BAKER

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2006-CA-0076-WC
WORKERS' COMPENSATION NO. 00-93851

INDUSTRIAL POWDER COATING,
WORKERS' COMPENSATION BOARD
AND
ADMINISTRATIVE LAW JUDGE,
HON. IRENE STEEN

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On remand from the Workers' Compensation Board (Board) to reconsider the evidence under Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), an Administrative Law Judge (ALJ) determined that the claimant's work-related knee injury did not cause his non-work-related degenerative back condition to become symptomatic and refused to award future medical benefits for the back symptoms. The Board and the Court of Appeals affirmed, but the claimant continues to maintain that the order of remand and the medical evidence compelled a favorable finding. Convinced that the ALJ's decision complied with the order of remand and was reasonable, we affirm.

The claimant injured his right knee while working for the defendant-employer on

September 8, 1997, and underwent arthroscopic surgery about six months later. The parties settled the claim by an approved agreement that was based on an 11% permanent impairment rating, with medical benefits remaining open.

In May, 2000, the claimant moved to reopen and also filed a claim for subsequent knee injuries. On January 29, 2001, an ALJ found that the subsequent incidents were only exacerbations of the 1997 knee injury. The ALJ found no permanent worsening of condition due to the injury but did award a period of temporary total disability (TTD) benefits following the last incident as well as medical benefits.

On June 1, 2001, the claimant filed another motion to reopen together with a medical fee dispute in which he sought TTD and medical benefits relative to a total knee replacement that Dr. Catalano recommended. The ALJ disposed of the proposed surgery and TTD benefits in an order entered in December, 2001, and the claimant underwent the procedure in February, 2002. After he recovered, the parties litigated the remaining issues, including a newly-alleged back condition.

At the hearing, the claimant testified that the knee replacement surgery had helped his knee pain. He had seen Dr. Catalano in November, 2002, and was not scheduled to return until a year later; however, persistent lower back pain and pain and numbness from the waist down in both legs had caused him to return for treatment on July 1, 2003. His present condition was worse than it had been in 1999 because he now had pain and numbness in both legs, had difficulty with his knee "giving out," and had to elevate his legs several times a day. He walked with a cane, took anti-inflammatory and pain medication, and had not worked since August, 2000, when his employer fired him because his knee prevented him from performing his work. Stating that his only prior experience was in heavy labor, he asserted that he was unable to

return to full-time work due to his knee and low back problems.

Dr. Catalano, an orthopedic surgeon, noted on February 15, 2002, that the claimant's knee was healing well following the surgery and he was doing well in physical therapy. On March 29, 2002, he noted that the claimant had 107 degrees of flexion and continued to do well with a minimal limp. On July 16, 2002, the claimant complained of lower back pain. X-rays revealed significant degenerative disc disease of the lumbar spine and disc space narrowing with anterior spurring. Dr. Catalano diagnosed lumbar degenerative disc disease for which he prescribed medication and exercise. On October 15, 2002, the surgical wound was well-healed; swelling was reduced; and there was an excellent range of motion and no instability. The claimant reported increasing back pain that radiated into his buttocks. Dr. Catalano advised him to return in a year for repeat knee x-rays. He also ordered an MRI of the lumbar spine, but the employer refused to approve it.

In a letter to the claimant's attorney, dated November 18, 2002, Dr. Catalano stated that he had treated the claimant for both right knee pain and back pain since the September, 1997, injury. Although the claimant had complained of back pain from the outset, they had focused on his knee. It had gradually improved, but on March 8, 1999, the claimant complained of pain that radiated down the right leg with numbness and tingling into the foot. It increased after he returned to work. To rule out a ruptured disc, Dr. Catalano had ordered an MRI of the lumbar spine that was performed on March 23, 1999. It revealed multi-level degenerative disc disease and midline disc bulging at L5-S1. Dr. Catalano stated that his opinion at the time had been that the condition was aggravated by the work-related injury and subsequent return to work. Noting that the back complaints coincided with the leg injury by history, he thought that the condition

had been brought into disabling reality by the knee injury and that the subsequent change in walking mechanics and shifting of his body weight aggravated it further.

In March 4, 2003, letter Dr. Catalano stated that he had last seen the claimant on October 15, 2002, at which time he had reached maximum medical improvement with good range of motion in the knee. Although he reported some occasional discomfort since the surgery, the overall result was very good. Dr. Catalano stated that he did not perform impairment ratings but agreed with the rating that Dr. Gleis assigned. The claimant might require physical therapy for his knee but no additional surgery.

When deposed on July 16, 2003, Dr. Catalano stated that he saw the claimant again on July 1, 2003. His knee was stable and doing well, but he had some tightness in his hamstrings and complained of weakness, numbness, and tingling in his right leg. Dr. Catalano testified that the claimant's knee and back conditions were not directly related. He explained that he thought an abnormal gait due to the knee injury "stirred up" the degenerative disc disease, resulting in what he thought was a temporary muscle dysfunction and lower back symptoms. Asked by counsel for the employer whether it did so to the extent that the claimant described, he responded, "No." He imposed various restrictions but thought that the claimant could work.

Dr. Gleis, an orthopedic surgeon, evaluated the claimant both before and after the knee replacement surgery. In October, 2001, he diagnosed arthritis in both knees. He thought that the condition existed in the right knee before the 1997 injury; that it was aroused by the injury; that it was exacerbated by a subsequent incident; that the claimant had reached MMI; but that he would probably require bilateral total knee replacements in the future. Dr. Gleis assigned a 25% permanent impairment rating to the right knee and imposed work restrictions. He thought that the claimant lacked the

physical capacity to return to his former job.

On November 5, 2002, Dr. Gleis examined the claimant again and reviewed his treatment records. He reported that x-rays revealed a normal alignment of the knee following surgery, both with standing and lateral weight bearing. Range of motion in the knee was 90 degrees at that time but had been greater for Dr. Catalano. Dr. Gleis assigned a 20% permanent impairment rating based on the claimant's subjective complaints and stated that he could return to light-duty work with restrictions.

Dr. Gleis noted that the claimant also complained of back pain that began with the 1997 knee injury, quit for a while in 1998, but returned. The claimant attributed his pain to an altered gait and described it as being equal on both sides and as occasionally radiating into his buttocks. He also stated that it extended up to his neck and "would affect my vision." Dr. Gleis noted the evidence of significant lumbar degenerative disc disease and found the complaints to be of an undetermined etiology.

Dr. Baker, an orthopedic surgeon and no relation to the claimant, evaluated him on July 24, 2003. Dr. Baker's report and deposition testimony indicated that the claimant had an excellent result from knee surgery. He diagnosed multi-level disc degeneration and degenerative arthritis of the right knee, status post arthroscopy and total knee replacement. In Dr. Baker's opinion, the 1997 knee injury accelerated and aggravated the underlying degenerative condition, resulting in knee replacement.

The claimant gave Dr. Baker a history of numbness in his legs since July, 2002, and of occasional low back pain that radiated into his neck. A physical exam revealed no obvious muscle spasm in the lumbosacral area, and sensation in the lower extremities appeared to be intact. Dr. Baker noted the evidence of pre-existing degenerative disc disease and commented that many individuals the claimant's age

had occasional backaches. He stated that an altered gait due to the arthritis and post-operative course following the knee replacement could and probably did exacerbate the lower back condition. However, the complaints of bilateral foot and lower extremity numbness, which were unrelated to any type of activity, to inactivity, or to a particular position, were not consistent with a lumbar disc or spine problem or radiculopathy and were extremely unusual. A muscle spasm or a bad disc could occasionally cause referred pain up the spine but would not be the basis for the numbness. In his opinion, nothing indicated that the claimant had a significant problem in the lumbar spine other than degenerative disc disease. Dr. Baker assigned a 15% permanent impairment rating based on the knee but stated that no permanent impairment rating was appropriate for the spine. He found no evidence of symptom magnification, imposed restrictions, but thought that the claimant could work.

The ALJ found the claimant to be totally occupationally disabled by the knee condition, alone, and increased his award accordingly. Convinced that no permanent back condition existed as a result of the 1997 knee injury, the ALJ dismissed that portion of the claim as being non-work-related. The claimant appealed.

Relying on Robertson v. United Parcel Service, supra, the Board determined that the claimant was entitled to medical benefits if his knee injury caused a temporary flare-up of back symptoms, regardless of whether the back condition warranted a permanent impairment rating or income benefits. Stating specifically that "the medical evidence establishing that the temporary exacerbations were work-related was conflicting," the Board remanded the claim to the ALJ for further consideration of whether an abnormal gait from the knee injury had exacerbated a non-work-related back condition, causing it to become symptomatic and require medical treatment.

The ALJ noted on remand that in Dr. Catalano's opinion the claimant's back problems were exacerbated by a change in his gait due to the knee condition and, therefore, resulted from the knee condition. Dr. Gleis reported that there were degenerative changes in the back and found that the back complaints were of an unknown etiology. Finally, Dr. Baker noted the complaints of back pain and observed that the claimant suffered from longstanding lumbar degenerative disc disease. Although he thought that the knee injury and subsequent replacement surgery could have aggravated the pre-existing back condition temporarily, he also noted that the lumbar and bilateral leg complaints were extremely unusual and not consistent with true lumbar pathology.

Citing Robertson v. United Parcel Service, supra, the ALJ concluded that the claimant's back complaints were not due to a work-related injury or temporary gait derangement; that no evidence indicated that they required any special treatment; and that no evidence indicated the presence of a permanent change in the human organism or permanent low back impairment from the knee injury. Noting that the claimant had an excellent result from the knee replacement surgery, the ALJ specifically found that the claimant's "low back condition is in no way work related."

In Robertson v. United Parcel Service, supra, an ALJ found that work caused a temporary exacerbation of symptoms from a pre-existing, non-work-related condition but no permanent impairment. The symptoms had resolved when the claim was heard, and nothing indicated that they would require any future medical treatment. The ALJ found that because work-related trauma had caused a harmful change in the human organism (symptoms), the worker had sustained an injury but it was only transient. Therefore, although he was entitled to be compensated for the treatment he had

received for his symptoms, he was not entitled to income benefits or future medical benefits. The court affirmed findings that the worker was not entitled to permanent disability or future medical benefits, noting that the worker was asymptomatic before the hearing and that work caused no permanent change in his condition.

This appeal concerns whether the ALJ erred when finding that claimant's back and lower extremity symptoms were not caused by an altered gait from the knee injury and refusing to award future medical benefits. When remanding the claim, the Board clearly noted that the medical evidence was conflicting and did not require a particular result. Although the Board and the Court of Appeals affirmed the decision on remand, the claimant continues to assert that the ALJ failed to comply with the order of remand. He states that his back complaints are not a permanent condition that warrants income benefits but argues that the evidence compelled findings that his work-related knee injury caused a lower back condition that required future medical treatment. We disagree.

The Board's order of remand clearly indicated that there was conflicting evidence concerning the cause of the claimant's back symptoms. Although there was medical evidence attributing at least some of the symptoms to the effects of the work-related knee injury, it was not so overwhelming as to compel a finding that they were work-related. The most recent medical reports indicated that the claimant had an excellent result from the knee replacement surgery. When read in the context of Dr. Gleis's entire report, his statement that the back pain was of undetermined etiology could reasonably be interpreted as indicating that he was not convinced that it was due to an altered gait. It was reasonable under the circumstances for the ALJ to conclude that the knee injury did not cause the symptoms.

The decision of the Court of Appeals is affirmed.

All concur.

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