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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000886-WC (DIRECT APPEAL)
and
NO. 2002-CA-001060-WC (CROSS-APPEAL)

BRANSTUTTER CONCRETE CONSTRUCTION — APPELLANT/CROSS-APPELLEE

v.

PETITION AND CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-73504

HEATH JONES — APPELLEE/CROSS-APPELLANT

v.

RONALD MAY, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES/CROSS-APPELLEES

OPINION
AFFIRMING ON DIRECT APPEAL
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING ON CROSS-APPEAL
** ** ** ** **

BEFORE: COMBS AND DYCHE, JUDGES; AND POTTER, SPECIAL JUDGE.[1]

POTTER, JUDGE: Branstutter Concrete Construction (Branstutter) petitions for review from an opinion of the Workers= Compensation Board (Board) which vacated and remanded a decision of the

[1]Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Administrative Law Judge (ALJ) for further findings of fact concerning the ALJ=s rejection of the Range of Motion model in favor of the DRE model in assigning an impairment rating to appellee Heath Jones.

Jones cross-petitions for review of the Board=s decision alleging that the ALJ failed to address whether he is totally disabled; that the ALJ erred in permitting Branstutter to amend its Form 111; that the ALJ erred in permitting Branstutter to submit a medical report outside of its proof time; and that the ALJ erred by permitting Branstutter to submit photographs into evidence without proper authentication.

In Branstutter=s direct appeal, we affirm the Board=s decision to remand the case for additional findings. In Jones=s cross-appeal, we reverse the Board and remand on the issue of whether the ALJ adequately addressed whether Jones is totally disabled, and affirm on the remaining issues.

In June or July 1987, Jones was involved in a head-on automobile collision. As a result of the accident, among other things, Jones underwent back surgery for a herniated disc at lumbar 5, S1, and was off work for two years. The 1987 non-work related accident is relevant because the occupational injury at issue in this case also involves an injury to Jones=s back.

In April 2000, Jones began working for Branstutter Concrete as a laborer pouring and finishing concrete. On June 20, 2000, Jones suffered a work-related injury to his lower back

while unhooking a trailer from a company truck. On June 26, 2000, Jones aggravated the back injury while raking gravel in the course of his employment with Branstutter.

On May 7, 2001, Jones filed an application for resolution of injury claim with the Department of Workers Claims, and the case was assigned to the ALJ. On July 5, 2001, Branstutter filed a Form 111, notice of claim denial or acceptance. In the pleading, Branstutter admitted that Jones=s injury was covered under the Workers= Compensation Act; occurred or became disabling on June 20, 2000; and that Jones gave timely notice of his injury. However, Branstutter denied the claim on the basis that the injury was a temporary exacerbation of Jones=s prior active back problems.

On August 20, 2001, Branstutter took the deposition of Jones=s supervisor, Tony Belew. Belew testified that Jones did not, to the best of his knowledge, lift the trailer off the trailer hitch on June 20, 2000, as alleged, nor did Jones at any time provide notice to Belew of the occurrence of any work-related injury regarding that date. Based upon Belew=s testimony, on September 11, 2001, at the benefit review conference, the ALJ permitted Branstutter to amend its Form 111 to list causation/work-relatedness as a contested issue.

On September 25, 2001, the final hearing was held. At the hearing, Branstutter claimed that it had not received notice of Dr. James Owen=s June 19, 2001, deposition and, as a result,

had been denied to opportunity to cross-examine the physician. As a result, over the objection of Jones, the ALJ permitted Branstutter to submit as evidence outside of proof time the June 6, 2001, Form 107 medical report of Dr. Owen. Additionally, over the objections of Branstutter, Jones was permitted to file the deposition of Dr. John Kelly outside of proof time as rebuttal evidence. Also at the hearing the ALJ permitted Branstutter to file as evidence several photographs taken by a private investigator of Jones pumping gas and loading five gallon gas containers into the back of a pickup truck.

On November 26, 2001, the ALJ entered an opinion determining that Jones did sustain a work related injury on June 20, 2000, which was exacerbated by another work-related event on June 26, 2000; determining that Jones=s impairment rating was 14% based upon medical evidence submitted by Dr. James Owen which relied upon the DRE Model; determining that medical evidence supporting the use of the Range of Motion Model was unpersuasive; determining that Jones=s permanent partial disability rating was 26.25%; and awarding Jones permanent partial disability benefits of $57.00 per week.

Jones subsequently appealed the ALJ=s decision to the Board. The appeal to the Board raised five claims: that the ALJ abused his discretion by rejecting the Range of Motion Model of impairment assessment in favor of the DRE method calculated by the same physician; that the ALJ erred by failing to address

whether he was rendered totally disabled by his work related injuries; that the ALJ erred by permitting Branstutter to amend its Form 111 to include as an issue causation/work-relatedness at the benefit review conference; that the ALJ erred by permitting Branstutter to submit additional medical records outside of its proof time without a proper motion for extension of time; and that the ALJ erred by permitting Branstutter to introduce into the record photographs taken of Jones by a private investigator without proper authentication pursuant to KRE 901.

On March 28, 2002, the Board entered an opinion vacating the ALJ=s opinion on the issue of his rejection of the Range of Motion model in favor of the DRE model on the basis that the ALJ had failed to provide sufficient factual findings in support of his decision. The Board affirmed the ALJ=s decision on the remaining issues. This petition and cross-petition for review followed.

Branstutter contends that the Board=s decision to remand the case to the ALJ for additional findings was erroneous because the ALJ relied upon substantial evidence of record in choosing to apply the DRE model over the Range of Motion model; that the ALJ made sufficient findings of fact to support his use of the DRE model; and that in the event of a remand, the ALJ must apply the DRE model.

The ALJ rejected the impairment rating of Dr. Owen calculated under the Range of Motion Model of the Fifth Edition

of the AMA Guides, which was calculated to be 21%, in favor of Dr. Owen=s DRE rating calculation of a 14% impairment rating. In conjunction with his ruling, the ALJ stated, in relevant part, as follows:

> The ALJ is not persuaded by the evidence which would support making an impairment rating on some basis other than the DRE Model. Although there is medical evidence that the Range of Motion Model would be the preferred method in this instance, the ALJ was not persuaded by that evidence. Dr. James Owen testified that if he were to evaluate plaintiff=s impairment using the DRE Model of the 5th Edition of the AMA Guidelines that plaintiff would have a whole body impairment of 14%. The ALJ is more persuaded by that evidence and plaintiff=s disability will be computed and based upon Dr. Owen=s DRE rating of 14%.

KRS 342.275(3) provides that the record should contain A[t]he award, order, or decision, together with a statement of the findings of fact, rulings of law, and any other matters pertinent to the question at issue . . .@ The ALJ is required to "clearly set out" the "basic facts" used "to support the ultimate conclusions." Shields v. Pittsburgh & Midway Coal Mining Co., Ky. App., 634 S.W.2d 440, 444 (1982). Further, KRS 342.275 and case decisions require the fact-finder, in this case the ALJ, to support his conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision." Id. "[T]he litigants are entitled to at least a modicum of attention and

consideration to their individual case." Id; Mosely v. Ford Motor Co., Ky. App., 968 S.W.2d 675, 678 (1998).

In considering whether the ALJ had sufficiently set forth the findings of fact relied upon in choosing the DRE model over the Range of Motion model, the Board stated as follows:

> Although ALJ May unequivocally states in his November 25, 2001 decision that he was not persuaded Aby the evidence which would support making an impairment rating on some basis other than the DRE Model,@ he fails, in our view, to provide any findings of fact to support his determination. Without expressly setting out such findings, in our judgment, the ALJ has merely substituted his interpretation of the AMA Guides for that of contrary medical expert witnesses. Since, as we have already set out above, proper application of the AMA Guides as to the assessment of an impairment rating is exclusively a medical determination regardless of which edition is at issue, the ALJ, in this instance, has committed reversible error.
>
> What=s more, it is also necessary, as a matter of law, for an Administrative Law Judge to provide the parties with sufficient factual findings to support his ultimate conclusions, if for no other reason to allow a meaningful appellate review. Kentland Elkhorn Coal Co. V. Yates, Ky. App., 743 S.W.2d 47 (1988); Shields v. Pittsburgh & Midway Coal Mining Co., Ky. App., 634 S.W.2d 40 (1982). In our opinion, on this particular question, the ALJ=s determination is also inadequate. We therefore have no alternative but to vacate the ALJ=s ruling on this limited issue and remand this matter for additional findings.

When reviewing decisions of the Board, our function is to correct the Board only where we perceive that the Board "has overlooked or misconstrued controlling statutes or precedent, or

committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

In his June 19, 2001, deposition testimony, Dr. Owen, whose opinion the ALJ ultimately relied upon, indicated that in the present case, the Range of Motion model was preferable to the DRE model because Jones had experienced a previous injury and had undergone surgery to the same region involved with his work-related injury. For example, in his deposition testimony, Dr. Owen testified as follows:

> Q. Doctor, I meant to address this earlier. Regarding the DRE method of the 5th edition, what impairment range would he be placed in that? Although I do know that, and the reason why you prefer the range of motion per the guides. What would that be for this individual?
>
> A. Well, the DRE doesn=t really take into account the multiple surgeries. So it would be a DRE radiculopathy, which is a three. That is a ten percent, plus in this circumstance, because of the ADL bumping, would be a plus three, and then whatever the pain score would be. In this circumstance, I assigned a plus one. So per the DRE, that would probably be a 14 percent.
>
> Q. But based upon the AMA guidelines, pages 379-380, they would steer you to use the range of motion tests for all the reasons we=ve already discussed?
>
> A. That=s correct.

Further, Dr. John B. Kelly testified in his September 21, 2001, deposition that ASo, it appears that the guides in the case of Mr. Heath Jones specifically mandate the range of motion method.@

Moreover, in its brief, Branstutter concedes that Dr. Richard Sheridan and Dr. John Larkin Adid not explain why they chose to exclusively use the DRE method.@

In light of the testimony of Dr. Owen and Dr. Kelly that the AMA guidelines would favor the use of the Range of Motion model over the DRE model, and the absence of an explanation for using the method by Dr. Sheridan and Dr. Larkin, we agree with the Board that the ALJ did not sufficiently set forth findings of fact supporting his rejection of the Range of Motion Model in favor of the DRE model. Specifically, the ALJ merely stated that he was Anot persuaded by the evidence@ without making findings of fact in support of his conclusion.

In its review of Jones=s appeal, the Board did not overlook or misconstrue controlling statutes or precedent, or commit an error in assessing the evidence so flagrant as to cause gross injustice. We accordingly affirm the Board=s decision to remand the case to the ALJ for additional findings of fact.

In his cross-petition, first, Jones contends that the ALJ failed to address whether or not Jones was totally disabled as required by McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854, 860 (2001) and Ira A. Watson Dept. Store v. Hamilton, Ky., 34 S.W.3d 48 (2000).

It is among the functions of the ALJ to translate the lay and medical evidence into an individualized finding of occupational disability. McNutt Construction at 860. This

necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact, and whether the particular worker would be able to find work consistently under normal employment conditions. Id. The ALJ also must consider that a worker's ability to do so is affected by factors such as whether the individual will be dependable and whether his physiological restrictions prohibit him from using the skills which are within his individual vocational capabilities. Id.

In his opinion and award of November 26, 2001, the ALJ stated, in relevant part, as follows:

> As plaintiff=s work injury occurred prior to the effective date of the 2000 Amendments, his benefit must be determined under the version of the ACT existing at the time of injury. . . . When plaintiff=s impairment rating of 14% is applied to the multiple of 1.25 found in KRS 342.730(1)(b) the result is 17.5%. The evidence is persuasive that the injury residuals would prevent plaintiff from returning to the type of work he was performing at the time of injury and he is therefore further entitled to the multiple of 1.5 found in Subsection (1)(c)1 which results in plaintiff=s permanent partial disability rate of 26.25%.

In its March 28, 2002, opinion affirming the ALJ, the Board addressed the issue from the stand-point of whether the evidence of record compelled a finding that Jones is totally and permanently occupationally disabled. However, that was not the specific issue Jones raised on appeal to the Board. The issue raised, as in this appeal, was whether the ALJ had engaged in the

individualized analysis prescribed under McNutt Construction, supra.

While the ALJ, in his recitation of the facts, did set forth certain of the relevant factors under McNutt Construction, as with the issue concerning the use of the DRE model as opposed to the Range of Motion model, we are persuaded that the ALJ did not set-forth the level of individualized determination identified in McNutt Construction. As noted in our discussion of the appropriate impairment model, KRS 342.275(3) provides that the record should contain A[t]he award, order, or decision, together with a statement of the findings of fact, rulings of law, and any other matters pertinent to the question at issue . . .@ The ALJ is required to "clearly set out" the "basic facts" used "to support the ultimate conclusions." Shields v. Pittsburgh & Midway Coal Mining Co., supra. Further, KRS 342.275 and case decisions require the fact-finder, in this case the ALJ, to support his conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision." Id. "[T]he litigants are entitled to at least a modicum of attention and consideration to their individual case." Id; Mosely v. Ford Motor Co., supra.

In summary, we are persuaded that the ALJ failed to sufficiently set forth findings of fact supporting his conclusion that Jones suffered a permanent partial disability as opposed to a permanent total disability. We accordingly reverse the

decision of the Board on this issue, and remand the case to the ALJ for additional findings to be entered in accordance with McNutt Construction, supra.

Next, Jones contends that the ALJ erred in permitting Branstutter to amend its Form 111 to include as contested issues for the hearing the issues of causation and notice. In its initial Form 111 filing, Branstutter admitted that Jones had incurred a work-related injury and that he had given timely notice of his injury. However, on August 20, 2001, Branstutter took the deposition of Jones=s supervisor, Tony Belew. In the course of his deposition testimony, Belew testified that Jones did not, to the best of his knowledge, lift the trailer off the trailer hitch on June 20, 2000, as alleged by Jones, nor did Jones at any time provide notice to Belew of the occurrence of any work-related injury regarding that date.

On September 11, 2001, a benefit review conference was held. Based upon Belew=s deposition testimony, the ALJ permitted Branstutter to amend its Form 111 to list causation/work-relatedness as a contested issue. We agree with the reasoning of the Board regarding this issue:

> As to Jones= assertions that the ALJ abused his discretion by permitting Branstutter to amend its Form 111 to include an additional issue at the benefit review conference, we find no merit in this argument. Jones is correct that pursuant to 803 KAR 25:010 ' (5)(2), Branstutter was required to file its Form 111 within forty-five days after the issuance of notice that an Application for Resolution of Injury Claim had been filed.

> However, the fact that causation would be an issue was made apparent at Belew=s deposition held on August 20, 2001. Jones had an opportunity to cross-examine Belew at that time and to later submit criminal records out of proof time, bringing Belew=s credibility into question. Furthermore, even if causation was stipulated at the time Branstutter originally filed its Form 111 in this action, 803 KAR 25:010, ' (14)(2) permits a party to be relieved from such a stipulation provided a motion for relief is filed at least ten days prior to the date of the hearing and as soon as practicable upon discovery that the stipulation is erroneous. Given the circumstances of this case, we cannot state that Branstutter=s motion to amend was untimely filed. Furthermore, the ALJ clearly rejected Belew=s testimony regarding causation and ruled in Jones=s favor. Consequently, as pointed out by Branstutter, this issue is now moot.

Next, Jones contends that the ALJ erred in permitting Jones to introduce the report of Dr. Owen outside of proof time without filing a timely motion for an extension of time. Dr. Owen evaluated Jones on June 6, 2001, and gave his deposition on June 19, 2001, 25 days after the proof taking order was entered, and 20 days before Branstutter=s notice of denial or acceptance was due. The deposition date was also before counsel for Branstutter made an entry of appearance.

On September 25, 2001, the final hearing was held. At the hearing, Branstutter claimed that it had not received notice of Dr. Owen=s June 19, 2001, deposition and, as a result, had been denied to opportunity to cross-examine the physician. As a result, over the objection of Jones, the ALJ permitted Branstutter to submit as evidence outside of proof time the June

6, 2001, Form 107 medical report of Dr. Owen. Again, we adopt the reasoning of the Board with regard to this issue:

> Regarding . . . the ALJ=s ruling allowing Branstutter to file the Form 107 of Dr. Owen after the close of proof time, we also find no abuse of discretion. Dr. Owen testified from and referred to the medical report in question at the time of his deposition. Furthermore, we are at a loss to understand why Jones is attempting to conceal portions of his own expert witness= medical findings. Nevertheless, it has long been accepted that the fact-finder has the authority to control the taking and presentation of proof and that it is not unreasonable for an Administrative Law Judge to direct additional proof to be presented or prohibit evidence in order to maintain a reasonable element of due process. See Yocom v. Butcher, Ky. App., 551 S.W.2d 841 (1977); Cornett v. Corbin Materials, Inc., Ky., 807 S.W.2d 56 (1971); see also Ajax v. Collins, 269 Ky. 222, 106 S.W.2d 617 (1937); Searcy v. Three Point Coal Co., Ky., 134 S.W.2d 228 (1939).

Finally, Jones contends that the ALJ erred by allowing Branstutter to introduce pictures of him filling up a pickup truck with gas and loading gas cans into the back of the truck.

KRE 901(a) governs the authentication and identification of evidence: AThe requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.@ "This requirement may be met by the testimony of a witness with knowledge of the document by his testimony that the document is what it is claimed to be. KRE 901(b)(1); Mollette v. Kentucky Personnel Bd., Ky. App., 997 S.W.2d 492, 495 (1999). Under KRE

901, a party seeking to introduce an item of tangible evidence need not satisfy an "absolute" identification requirement, and evidence is admissible if the offering party's evidence reasonably identifies the item. Grundy v. Commonwealth, Ky., 25 S.W.3d 76, 80 (2000). Wide discretion over issues relating to the admissibility of tangible evidence is granted. Id.

We are persuaded that the photographs of the private investigator were authenticated and identified sufficient to support their admission pursuant to KRE 901. At the hearing, Jones testified that the pictures were of him and by his own testimony authenticated the pictures. The authentication requirements of KRE 901 were complied with and the trial court did not err in permitting the introduction of the photographs.

For the foregoing reasons the opinion of the Workers' Compensation Board is affirmed in part, reversed in part, and remanded to the ALJ for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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