

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001116-WC

NALLY AND HAMILTON
ENTERPRISES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-90-47101

CORBAL LEE SMITH; HON. SHEILA LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND KNOPF, JUDGES; AND JOHN D. MILLER, SPECIAL
JUDGE.¹

JOHNSON, JUDGE: Nally and Hamilton Enterprises, Inc. has
petitioned for review of an opinion of the Workers' Compensation
Board affirming the reopening of Corbal Lee Smith's injury
claim. The Board affirmed the decision of the Chief
Administrative Law Judge (CALJ) who found that Smith had

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

sustained his burden of proof in establishing a worsening of his occupational disability and found him to be totally occupationally disabled as a result of a work-related injury sustained in November 1990. We affirm.

On November 29, 1990, while working for Nally and Hamilton as a mechanic, Smith sustained an injury to his eyes when a battery blew up, splashing acid into his eyes. As a result of that injury, Smith filed a workers' compensation claim and in an opinion dated June 29, 1992, he was awarded benefits based on a 20% occupational disability. At that time, Smith's treating physician assigned a six to eight percent functional impairment to the body as a whole and found uncorrected vision in the right eye of 20/60 with the potential to correct it to 20/40 or 20/50. The physician opined that scarring in the eye might result in future surgery.

After this injury Smith continued to work for Nally and Hamilton, primarily as a rock truck driver. In late 1992 he was involved in a traumatic incident as a result of a dynamite explosion; however, he did not miss work or seek medical attention. Approximately one year later, Smith suffered a stroke while hunting; and he never returned to work following the stroke. Smith subsequently filed a workers' compensation claim alleging coal workers' pneumoconiosis, hearing loss and that the stroke was work-related as a result of the dynamite

explosion. In an opinion rendered on July 29, 1995, the ALJ concluded that Smith had failed to sustain his burden of proof to establish pneumoconiosis, a compensable hearing loss, or that the stroke was work-related. In 1995 Smith suffered a heart attack, which created additional physical problems. Smith has not worked since 1993, and he has been adjudged entitled to Social Security disability benefits as a result of his stroke and subsequent heart attack.

On December 11, 2000, Smith filed a motion to reopen his 1990 injury claim, asserting that his vision had deteriorated to the point that he had a total loss of vision in his right eye, that he could no longer drive, and that he experienced double vision as well as constant floaters in his field of vision. His motion to reopen was supported by medical records from his optometrist. It was determined that Smith had made a prima facie showing of entitlement to benefits pursuant to KRS² 342.125 and the matter was reopened on the merits. When the ALJ assigned to the case resigned, the case was transferred to the CALJ.

Before the CALJ, Smith testified as to the worsening of his condition, noting that he had not worked since his stroke, that the eye condition was in and of itself disabling, that he was limited in his activities because of his decreased

² Kentucky Revised Statutes.

vision, that if he drives at all it is only short distances to the store, that he suffers from double vision, and that he noticed some deterioration prior to his stroke but had not had an opportunity to talk to his employer about it as a result of the stroke. He testified that he has some limitations on one side of his body relating to the stroke.

Medical evidence was presented in the form of reports by Dr. Donald Holbrook, Dr. Bruce Koffler and Dr. Leon Ensalada. Dr. Koffler's report indicated that his examination revealed significant deterioration in the right eye, difficulty with double vision and problems with floaters. Dr. Koffler concluded that Smith now has uncorrected and corrected vision of 20/400. Dr. Koffler reported that he believed there had been nuclear sclerotic changes in both eyes. An impairment analysis was performed, which concluded that there was a 90% loss of vision in the right eye, a 30% loss of vision in the left eye, with an impairment of the visual systems of 45%, which was computed as a 42% impairment to the whole body.

Dr. Ensalada did not see Smith, but he performed a medical records review. He believed that the stroke and heart attack rendered Smith totally disabled. He did not address Dr. Koffler's findings as to the eye injury.

The CALJ concluded that even considering another condition that may have been disabling in and of itself, based

on the 42% impairment, the almost total loss of vision in the right eye, and the significant impairment of the entire visual system, coupled with Smith's own testimony, as a result of Smith's eye condition he was totally occupationally disabled.

Nally and Hamilton appealed to the Board. Its argument to the Board is the same argument it makes to this Court - that since the stroke and subsequent heart attack were totally disabling, as a matter of law, Smith could never be entitled to total occupational disability benefits for the antecedent eye injury.

The Board determined that although one condition took Smith out of the work force, the other continued to worsen to the point it would have caused him to be totally disabled. It concluded that the former did not prohibit the latter from resulting in a total occupational disability award. As such, the Board affirmed the award by the CALJ.

Nally and Hamilton argues that the Board's approach violates the holding in Johnson v. Scotts Branch Coal Co.³ In Johnson, this Court held that subsequent, nonwork-related conditions resulting in additional occupational disability cannot be added to extend the compensable period for the earlier work-related conditions. Nally and Hamilton also argues that

³ Ky.App., 754 S.W.2d 555 (1988).

the holdings in Whittaker v. Fleming,⁴ and Fleming v. Windchy,⁵ preclude an employer, responsible for an original injury, from being held liable for total occupational disability benefits after a subsequent injury renders an employee totally disabled. It also relies upon the holding in Spurlin v. Brooks,⁶ that earlier injuries cannot legally be found to be totally occupationally disabling if the earlier injuries in and of themselves did not produce a total occupational disability. It cites Teledyne-Wirz v. Willhite,⁷ for the proposition that it was at least entitled to a finding of the percentage of occupational disability due to the 1993 stroke and the 1995 heart attack, and to have the percentage subtracted from any percentage of occupational disability attributable to the eye condition.

The Board determined that the cases cited by Nally and Hamilton were inapplicable to this case and we agree. In affirming the opinion of the CALJ, the Board distinguished the cases cited by Nally and Hamilton from the holdings in Beth-Elkhorn Corp. v. Dotson,⁸ and Schneider v. Putnam.⁹ In Beth-Elkhorn, the worker had Category 3 coal workers' pneumoconiosis.

⁴ Ky., 25 S.W.3d 460 (2000).

⁵ Ky., 953 S.W.2d 604 (1997).

⁶ Ky., 952 S.W.2d 687 (1997).

⁷ Ky.App., 710 S.W.2d 858 (1986).

⁸ Ky., 428 S.W.2d 32 (1968).

He continued to work with that condition but eventually left work as the result of a nonwork-related heart attack. The Supreme Court concluded that simultaneous and concurrent causes for total disability do not prohibit a finding that a work-related condition by itself would or could have resulted in total disability.¹⁰ The Supreme Court in Beth-Elkhorn reaffirmed the principle enunciated in Daugherty v. Watts,¹¹ that a "disability an employe[e] sustains in the course of and arising out of employment is not cancelled out, for compensation purposes, by disability from another cause."¹² In Schneider, the worker suffered from blindness and was injured in a work-related accident. The Supreme Court held that "if the disability caused by the compensable injury or disease would have been no less in any event, the pre-existing condition of the claimant is irrelevant and cannot constitute pre-existing disability within the meaning of the workmen's compensation law."¹³

The difference between the cases cited by Nally and Hamilton and those relied upon by the Board is the nature of the subsequent injury. The cases make a clear distinction between

⁹ Ky., 579 S.W.2d 370 (1979).

¹⁰ Beth-Elkhorn, supra at 34.

¹¹ Ky., 419 S.W.2d 137 (1967).

¹² Id. at 138.

¹³ Schneider, supra at 372.

nonwork-related injuries that are "superimposed" on work-related injuries and nonwork-related injuries that are "simultaneous and concurrent" with a work-related injury. In Johnson, the worker was attempting to add two different work-related injuries together in order to enhance benefits. In that case, neither injury alone caused total occupational disability. In Spurlin, the worker suffered from a back injury and later reinjured his back. The question before the Supreme Court was the apportionment of benefits between two different insurers. In Fleming, the worker suffered from a back injury while working for one employer and then reinjured his back while working for another. The issue was whether the first employer was liable for an injury superimposed over the original injury.

Smith's stroke and heart attack occurred concurrently with the worsening of his eye injury, but there was no evidence that the stroke or heart attack caused the eye condition to worsen. The CALJ determined, based on substantial evidence, that the eye condition alone deteriorated to cause a total occupational disability. Therefore, the eye injury would have been no less, with or without the stroke and heart attack. The Board correctly determined, that under the circumstances, the stroke and heart attack were irrelevant and that Beth-Elkhorn controlled.

We review workers' compensation cases in accordance with the standard set forth in Western Baptist Hospital v. Kelly.¹⁴ We may correct the Board only where we perceive "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."¹⁵ We conclude that the Board correctly applied the controlling precedent.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEE:

Edmond Collett
John Hunt Morgan
Monica Rice Smith
Hyden, Kentucky

¹⁴ Ky., 827 S.W.2d 685 (1992).

¹⁵ Id. at 687.