

RENDERED: December 3, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000868-WC

LINK BELT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-58192

GARY CHAD CAMPBELL;
HONORABLE R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AND ORDER

DISMISSING APPEAL

** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Link Belt appeals from an opinion of the Workers' Compensation Board ("the Board") affirming in part, vacating in part, and remanding a decision of the Administrative Law Judge ("ALJ"). The ALJ awarded Gary Chad Campbell ("Campbell") permanent partial disability benefits ("PPD") for injuries sustained to the cervical and lumbar spine. The issues

on appeal to the Board were whether an L1 fracture and secondary lumbar injury were work-related. The Board opined that the ALJ correctly found that the L1 fracture was brought into disabling reality by the work injury, but it vacated and remanded on the issue of whether the L5 - S1 pain was work-related. After reviewing the parties' briefs on appeal, this Court entered a show cause order as to why this case should not be dismissed as being taken from a non-final and appealable order. Link Belt responded and argued that "[i]n the claim sub judice, the original opinion was issued on December 20, 2002. Since that time the Appellee's potential right to indemnity for the L1 fracture has been held up in the appeals process[.] Likewise, the Appellant's potential liability for indemnity has continued to expand at the rate of 12% per annum pursuant to KRS 342. These potential rights and obligations are in no way influenced by the adjudicative status of the L5-S1 injury." Campbell did not file a responsive pleading. Having reviewed this matter, we do not believe that Link Belt has shown sufficient cause why this matter should not be dismissed. In order to avoid piecemeal litigation, we believe the issue as to the L5-S1 injury needs to be resolved before this case can be presented for appellate review. Therefore, for the reasons stated herein, we must dismiss the instant appeal.

On May 23, 2002, Campbell filed an Application for Resolution of Injury Claim with the Department of Workers' Claims. He alleged that on December 7, 2000, he suffered an injury to his neck and back during the course of his employment with Link Belt.

Campbell's job at Link Belt required him to engage in medium to heavy manual labor while painting construction equipment. Campbell testified that on the date in question, he was struck in the head by a large commercial door that was closing from its overhead position. Campbell stated that he fell to his knees and experienced immediate neck pain. He testified that later the same day he felt his low back pop while lying in bed.

Campbell visited an emergency room the following day and was referred to Dr. Menke. He was taken off work, and had cervical and lumbar x-rays taken on December 15, 2000. In February, 2001, Campbell was laid off by Link Belt, but subsequently was rehired in a position requiring light duty labor. Campbell sought treatment from Dr. Lockstadt in March, 2001. Dr. Lockstadt determined that Campbell sustained a probable disc level strain at C4-5 or C5-6 without nerve root compression, and prescribed exercise, anti-inflammatory medication, and a cervical injection. He stated that Campbell could lift up to 30 pounds occasionally, should not bend or

twist, and should change positions at work every half-hour. The record indicates that Campbell testified he never had any pain or other medical condition in his neck or back prior to the date of injury, and now has constant pain.

On April 24, 2001, Dr. Lockstadt assigned to Campbell an 8% whole person impairment based on DRE Cervical Category II pursuant to the AMA Guides, fifth edition. He observed some improvement in Campbell's condition, and continued to evaluate him over the following months.

On June 26, 2002, Campbell complained to Dr. Lockstadt of severe low back pain at the lumbosacral junction. This level of pain had not previously been experienced by Campbell. Dr. Lockstadt believed the problem was mechanical instability, and prescribed an epidural injection.

On May 2, 2002, Campbell was examined by Dr. Templin at the request of Campbell's counsel. Dr. Templin stated that the December 15, 2000, x-ray revealed a compression fracture of L1 with degenerative changes and/or disc narrowing at T12 - L1. He diagnosed chronic cervical, low back and thoracic pain syndromes, and three cervical disc bulges, and assigned a whole body impairment of 13% pursuant to the AMA Guides. The rating represented 8% for a DRE Cervical Category II and 5% for a DRE Lumbar Category II. In deposition, Dr. Templin later stated that, in his opinion, the L1 fracture pre-existed the work

injury. He opined that the fracture and degenerative changes were pre-existing dormant conditions aroused into disabling reality by the December 7, 2000, work injury.

At the request of Link Belt, Campbell was examined by Dr. Kriss on August 16, 2002. He determined that Campbell had an 8% impairment rating arising from the cervical injury, but that Campbell had a normal lumbar examination indicating no impairment rating arising from the lower back. Like Dr. Templin, Dr. Kriss believed that the L1 fracture pre-existed the work injury. He stated that he believed Campbell was experiencing low back pain, but that it appeared to arise from a soft tissue strain. His conclusions were based in part on the fact that the cervical and low back pain were not anatomically connected because the cervical pain was well above L1 and the low back pain was well below L1.

The matter went before the ALJ, who was persuaded by Dr. Templin's opinion that Campbell sustained a 13% impairment rating as a result of the work injury. The ALJ awarded PPD benefits. Link Belt filed a timely petition for reconsideration, arguing that Campbell's lumbar impairment rating was not changed by the injury, and that it was erroneous to attribute the onset of L5 - S1 symptomatology to the injury occurring 18 months earlier.

On January 21, 2003, the ALJ denied the petition for reconsideration. The ALJ was more persuaded by the reports of Drs. Templin and Menke who believed that the work-related lumbar injury resulted in permanent partial disability.

Link Belt appealed to the Board from the ALJ's opinion and award, and from the denial of the motion for reconsideration. After the matter was remanded to the ALJ for a resolution of a medical fee dispute, the Board rendered an opinion on April 7, 2004, which forms the basis for the instant appeal. Upon considering the record, the Board found the ALJ's conclusion that the L5 - S1 condition was work-related was unsupported by substantial evidence. Rather than reversing on this issue, it remanded the matter to the ALJ as it found that the ALJ had failed in considering the effect, if any, of Dr. Lockstadt's opinion as to work-relatedness of the L5 - S1 condition. The Board ordered the ALJ to consider whether Dr. Lockstadt's testimony did or did not support a finding that the lumbar condition was work-related. It went on to affirm the ALJ's opinion and award of PPD benefits calculated on the basis of a 13% impairment rating. This appeal followed.

Link Belt now argues that the Board erred in affirming the ALJ's conclusion that the work injury brought the L1 fracture into disabling reality and is therefore compensable. It notes that Dr. Templin assigned a DRE lumbar category II

rating to the fracture, but maintains that there is no evidence anywhere in the record that there exists a 25% to 50% compression of a vertebral body as the AMA Guides requires for a category II rating. Since such a rating may be assigned based on either symptoms and diagnostic test, or based on the presence of a fracture, and as it is Link Belt's belief that Campbell showed no symptoms, it concludes that the Board erred in sustaining an award based on a category II rating since nothing in the record shows a 25% to 50% compression as the Guides require. As such, Link Belt requests an order reversing the Board on this issue.

Having thoroughly reviewed this matter, including Link Belt's response to this Court's show cause order, we conclude that the Board's opinion is not final and appealable. "A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." CR 54.01.

The judgment shall recite . . . that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

CR 54.02. Furthermore, we stated in King Coal Company v. King, Ky. App., 940 S.W.2d 510 (1997) that,

Pursuant to SCR 1.030(5) and 803 KAR 25:012 § 14, a final decision of the Board may be appealed to this court. An order of the Board is appealable only if it terminates the action itself, acts to decide the matter litigated by the parties, or operates to determine some rights in such a manner as to divest the Board of power.

In the matter at bar, the Board's action to affirm in part, and vacate and remand in part did not terminate the action itself, decide the matter litigated by the parties, or divest the Board of power. While the Board's opinion affirmed the ALJ on the L1 fracture issue, the remanded L5 - S1 issue obviously remains to be resolved. As the Board still has or will have jurisdiction over not only the remanded issue but the entire claim for benefits, its April 7, 2004, opinion is not final and appealable.

For the foregoing reasons, Link Belt's appeal of the Workers' Compensation Board's April 7, 2004, opinion is ordered dismissed.

ENTERED: December 3, 2004

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

COMBS, CHIEF JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN RESULT AND FILES SEPARATE
OPINION.

KNOFF, JUDGE, CONCURRING IN RESULT: I agree that the Board's order in this case was not final and appealable, but I write separately because I believe the majority has applied the wrong standard. In reaching its conclusion, the majority relies upon King Coal Company v. King, Ky. App., 940 S.W.2d 510 (1997), discussing the standard for determining whether the Board has issued a final order. However, King Coal Co. relied in turn upon Stewart v. Lawson, Ky., 689 S.W.2d 21 (1985), which the Kentucky Supreme Court overruled in Davis v. Island Creek Coal Co., Ky., 969 S.W.2d 712 (1998).

In Stewart, the Court suggested that a workers' compensation order by the circuit court was not final because it only remanded the case for further findings and did not make a final disposition by way of terminating the action. The Court in King Coal Co. v. King, *supra*, followed this holding. But the Supreme Court in Davis v. Island Creek Coal Co., *supra*, rejected this approach on several grounds. The Supreme Court first found, contrary to the holding of Stewart v. Lawson, that CR 54 has no application in determining whether an order by the Board is final and appealable. *Id.* at 713. Moreover, the Court in Davis went on to hold that a Board order is final and appealable only if it divests a party of a vested right. Thus, an order setting aside an award of benefits and remanding with directions to take additional proof and make additional findings of fact is

final and appealable even though it does not make a final disposition of the claim. Id. at 714.

In this case, the Board affirmed the ALJ's holding that Campbell's L1 fracture was work-related, but remanded the matter to the ALJ to consider whether Dr. Lockstadt's testimony supported a finding that the lumbar condition was work-related. Clearly, the Board's order divested Campbell of a vested right. However, only Link Belt has appealed from the Board's order. Because the Board's order did not divest Link Belt of any vested right, I agree that the Board's order was not final and appealable under the rule set out in Davis.

BRIEF FOR APPELLANT:

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