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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001096-WC

SPADE CORPORATION

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-80043

SECUNDINO DELEON;
HON. JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Spade Corporation appeals from an opinion of the Workers' Compensation Board affirming a decision of the Administrative Law Judge awarding Secundino DeLeon permanent, partial occupational disability benefits for a work-related back injury. Spade argues that the Board incorrectly concluded that the ALJ's decision on the issues of notice and causation is

¹ Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

supported by substantial evidence. For the reasons stated below, we affirm the Board's opinion.

Having closely examined the record, the written arguments and the law, it is apparent that we cannot improve upon the Board's well-written opinion. In the interests of judicial economy, and so as not to merely re-state the Board's reasoning, we adopt the Board's opinion as that of this Court. The Board stated, in relevant part, as follows:

DeLeon, born July 1, 1962, has a second grade education in Mexico and no specialized or vocational training. His past work history consists of employment as a laborer. He began working for Spade in June 2000 as a laborer. His job duties included working with tanks and pipes.

DeLeon testified he sustained a work injury on Friday, May 2, 2003, at a gas station work site in Louisville, Kentucky. He was in the process of picking up left over pipes of various sizes. While picking up an especially large pipe to place a strap around it, he experienced pain in his low back. DeLeon explained no supervisors were present because they were attending a meeting off-site. He was working with the crane operator, Dan Jefferson ("Jefferson"), and informed Jefferson of his back pain at the end of the day.

DeLeon explained that his English is not very good and at times he is misunderstood. He has trouble reading and writing English. DeLeon testified that through the weekend his pain continued to worsen and he sought treatment at Georgetown Hospital. DeLeon was questioned concerning the history of his problem given at the hospital. He testified that he was

questioned as to what he was doing when he experienced the episode of pain. He responded "Nothing, I have a little bicycle wheel in my hands." DeLeon explained that a friend had taken the bicycle wheel off a child's bike and DeLeon picked it up because he could use it for his daughter's bike. The episode of increased back pain occurred while he was holding this bicycle wheel. He testified he told the doctor at the hospital that the onset of back pain occurred at work while lifting pipes. He did not know that the doctor wrote down on the report. In any event, DeLeon was x-rayed, given pain medication and referred to his family physician, Dr. Cedric Craig.

DeLeon sought treatment from Dr. Craig the following Monday. Dr. Craig gave DeLeon a work excuse, which he took to Ken Sturgill ("Sturgill"), his supervisor at Spade, the same day and informed Sturgill of the injury. DeLeon testified that after two or three weeks, the doctor gave him a return to light duty work. He then returned to work at Spade and Sturgill told DeLeon there was no light duty work available.

Following his treatment with Dr. Craig, DeLeon was referred to Dr. Chris Stephens and then to Dr. Harry Lockstadt. DeLeon testified he gave each of these doctors a history of back injury while lifting pipes at work.

DeLeon was questioned concerning whether he had previous back problems. When deposed, DeLeon initially denied previous back problems. At his hearing, he admitted a previous back condition but denied any problems like his current condition. He described his previous back problem as the type one gets when sleeping wrong. DeLeon admitted he had previously been treated by Dr. Craig for his back, but denied he had a previous MRI.

At his hearing, DeLeon testified that he currently has low back pain which sometimes radiates into the left leg at night. He was currently working for Hammonds Lawn Care pulling weeds and fixing pallets. He testified the pallets weigh between thirty and forty pounds and he was required to do some bending and stooping. DeLeon stated he would not lift anything heavier than the thirty to forty pound pallets.

Dan Jefferson, the crane operator's deposition was taken by Spade. Jefferson testified he had been employed by Spade for eighteen years as an equipment operator. He did not remember whether or not he worked with DeLeon on May 2, 2003. He further stated he did not recall whether DeLeon told him that he hurt his back, nor did Jefferson remember seeing any physical evidence that DeLeon injured his back.

Spade also presented the testimony of Ken Sturgill via deposition. Sturgill testified he was vice-president of Spade and had been with the company since 1979. Sturgill was questioned concerning a memo he prepared with regard to DeLeon's injury. The memo stated that May 2, 2003 was the last day DeLeon worked and on May 5, 2003, he did not report to work and called in sick. Either later that day or the next day he presented a doctor's excuse and occasionally came in to provide updates during his time off. On June 20, 2003, DeLeon requested a time to discuss an "injury" and met with Sturgill on June 23, 2003. DeLeon advised Sturgill that he hurt his back on his last day of work. Sturgill asked DeLeon why he had not reported it earlier and the reason for delay in reporting a work injury. DeLeon told Sturgill he told one of the equipment operators at the time and he delayed because until present he did not need the money. Sturgill testified DeLeon stated the

doctor's excuses indicated he was off work due to illness rather than an injury.

The medical records of Georgetown Hospital were filed into evidence. Records dated May 4, 2003 indicated DeLeon presented with back pain and no known trauma. He complained of a sudden onset of sharp pain radiating into his legs while he was holding a bicycle wheel. DeLeon was advised to limit lifting for three days and not to return to work until he was re-checked by Dr. Craig.

Medical records from Dr. Craig were introduced into the record. The remote records from 1999 indicate that in March and May of 1999 DeLeon complained of back pain in the cervical, thoracic and lumbosacral spine. An MRI of the lumbar spine was performed on July 1, 1999, which indicated "abnormal central and left paracentral disc protrusion at L4-L5 as described most likely resulting in a neuro compression." Dr. Craig's notes dated July 5, 1999 indicated DeLeon presented with complaints of back pain four days previously.

Concerning the work injury, Dr. Craig's notes indicate he saw DeLeon on May 5, 2003 for pain in his back going to his knees and he was unable to walk due to the pain. An appointment was scheduled for DeLeon with Dr. Chris Stephens on May 8, 2003. DeLeon presented for follow-up visits for back pain on May 13, 2003 and May 23, 2003 and was scheduled to see Dr. Lockstadt on May 30, 2003. An MRI of the lumbar spine dated May 15, 2003, indicated lumbar alignment to be normal; signal loss present at L405; and extruded soft disc at L4-5 in left paracentral position displacing thecal sac, particularly the left L5 nerve root. Dr. Craig signed an excuse slip dated May 5, 2003, indicating DeLeon was to be off work until May 9, 2003, pending an appointment with orthopedic due to illness. An excuse

slip dated May 23, 2003 indicated DeLeon was to be off work until May 30, 2003, pending appointment with orthopedic specialist on May 30, 2003 due to illness.

The medical records of Dr. Stephens were filed into evidence. They indicate that on May 8, 2003, DeLeon presented with low back pain without radiation into the legs. Dr. Stephens' impression was probable annular tear. He recommended Aleve or Advil and felt DeLeon would get better fairly rapidly over the next few days.

Dr. Harry Lockstadt first saw DeLeon on May 30, 2003, for complaints of back pain and left leg pain. Dr. Lockstadt received a history of DeLeon's back trouble in the past, which was usually well controlled. DeLeon reported that while bending over to pick up some pipes he experienced back pain. A cortisone injection had not provided significant relief. An MRI revealed degenerative discs with L4-5 herniation irritating the L5 nerve root. Epidural injections were recommended and if they didn't help, DeLeon would be a candidate for a discectomy. Dr. Lockstadt's note of June 12, 2003 indicates degenerative disc at L4-5 and small herniation toward the left. DeLeon underwent epidural steroid injections. On June 26, 2003, DeLeon reported some improvement following the injection, but he was still having significant pain in the lower back into the left leg. DeLeon continued to have pain spasm and painful range of motion in the low back. Dr. Lockstadt recommended another attempt with epidural injection and if there was no improvement he would consider a discectomy. A second epidural injection was not helpful. Dr. Lockstadt continued to see DeLeon for complaints of back pain and recommended a CT of the lumbar spine, which was performed on August 25, 2003. It revealed at L4-5 a "moderate sized left paracentral disc herniation, which is mildly

extruded inferior . . . [which] compresses the L5 nerve root sleeve extending partially into the left lateral canal recess." It also showed a tiny central disc herniation at L5-S1 without compression of nerve structures. The conclusion was a left paracentral L4-5 protrusion and extrusion compressing the L5 nerve root which most likely accounted for DeLeon's symptoms. A myelogram of the lumbar spine, also dated August 25, 2003, revealed an indentation of the thecal sac and left L5 nerve root sleeve at L4-5.

Dr. James Owen performed an evaluation of DeLeon on January 29, 2004. He received a history of the pipe lifting incident on May 2, 2003. DeLeon reported a history of upper back strain about six years prior. Dr. Owen performed a physical examination and reviewed medical records of Dr. Lockstadt and Dr. Craig. Dr. Owen diagnosed persistent L5 radiculopathy with back and leg pain. He opined that within reasonable medical probability, DeLeon's injury was the cause of his complaints and no part of his condition was attributable to the natural aging process or any preexisting, dormant or non-disabling condition. He assessed an 11% impairment based on a DRE Category III. Dr. Owen placed restrictions against bending, squatting, stooping, and lifting more than ten pounds. He believed DeLeon did not retain the physical capacity to return to the type of work performed at the time of injury.

Dr. William Lester evaluated DeLeon on February 2, 2004. According to an introductory letter received by Dr. Lester, DeLeon reported a history of injury on May 2, 2003 when he and a co-worker were moving pipes. Dr. Lester performed a physical examination and reviewed records from Drs. Craig, Lockstadt and Owen. Dr. Lester also reviewed MRI reports from July 1, 1999 and May 15, 2003. He diagnosed a "lumbar disc

at L4 and 5." He opined DeLeon did not have any permanent functional impairment as a result of the May 2, 2003 injury because he already had a "lumbar disc at L4 and 5 with nerve root impingement." Dr. Lester would place restrictions of lifting no greater than fifty pounds related to the disc in the 1999 MRI. He did not believe a new injury occurred in 2003 and DeLeon suffered an exacerbation on Sunday, May 5, 2003, the date DeLeon went to the hospital. Dr. Lester recommended home exercise and occasional medication.

The ALJ reviewed the lay and medical testimony in the record. On the issue of notice, the ALJ found the testimony of DeLeon most credible. He believes DeLeon's testimony that he informed Dan Jefferson on May 2, 2003 of the back injury. The ALJ further found that Dr. Craig's excuse slips, which DeLeon gave to Sturgill, put Spade on notice of an orthopedic condition related to a work injury. The excuse slips indicated DeLeon was off work because of an orthopedic problem with his back, the specific injury he alleged.

The ALJ next relied on the 11% impairment rating assessed by Dr. Owen. On the issue of causation, the ALJ also relied on Dr. Owen, stating as follows:

Dr. Owen reviewed records from Dr. Harry Lockstadt and Dr. Cedric Craig and opined that the injury was the cause of plaintiff's complaints. Dr. Owen also opined that plaintiff did not have an active impairment prior to his injury. Dr. Owens's assessment of no prior active impairment is supported by the fact that the plaintiff worked for the defendant/employer as a laborer for approximately three (3) years, from June of 2000 to May 2, 2003,

working with pipes weighing approximately 150 pounds or more. Although the plaintiff has previous back complaints, it is clear that the back condition, prior to May 2, 2003, was not active and that the injury of May 2, 2003, while working for the defendant/employer, brought the prior non-disabling condition to disabling reality. An MRI, dated 7/7/99, of the lumbar spine was interpreted by Dr. Cedric Craig to reveal Mr. DeLeon had a history of low back pain with left hip pain and leg pain and lumbar radiculopathic injury. At the L4-5 level there was abnormal central and somewhat left paracentral disc protrusion noted in association with high signal that may reflect an accompanying linear annular tear, which slightly impresses the anterior portion of the lumbar dural tube and may encroach on the traversing L5 nerve root but otherwise the lumbar spine was unremarkable. An MRI, dated 5/4/03, was interpreted by Dr. Craig to indicate normal lumbar alignment but there was signal loss present at the L4-5 level; extruded soft disc present at L4-5 in the left paracentral displacing the thecal sac, particularly the left L5 nerve root. Dr. Craig's assessment of a possible encroachment on the traversing L5 nerve root and possible linear annular tear in 1999 increased to extruded soft disc displacing the thecal sac, particularly the L5 nerve root on May 15, 2003. Dr. Craig's impressions support the assessment of Dr. Owen with objective medical evidence. And, Dr. Henry [sic] Lockstadt's

medical report of a lumbar spine CT with contrast, dated 8/25/03 lists at L4-5 there was a moderate sized left paracentral disc herniation mildly extruded inferior which compresses the L5 nerve root sleeve extending partially into the left lateral canal recess and L5-S1 tiny central disc herniation. Dr. Lockstadt's impression is of a second herniation, at L5-S1, not identified by Dr. Lockstadt in his report of the 1999 MRI.

Since DeLeon had returned to work as a laborer for a lawn care company, the ALJ determined he was not entitled to the three multiplier. Accordingly, the ALJ awarded benefits pursuant to KRS 342.730(1)(b).

Thereafter, Spade filed a petition for reconsideration, arguing the ALJ erred with regard to his findings on work-relatedness, causation, and notice. The ALJ denied the petition for reconsideration and Spade's appeal before this Board ensued.

On appeal, Spade continues to argue the ALJ's findings with regard to notice and causation are not supported by substantial evidence in the record.

Since DeLeon, the party with the burden of proof, was successful before the ALJ, the issue on appeal is whether the ALJ's decision is supported by substantial evidence in the record. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). As fact finder, the ALJ has the authority to determine the quality, character, and substance of the evidence. Square D.

Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may weigh the evidence and draw any reasonable inferences therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). The mere presence of evidence that would support a decision contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse a decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

On appeal, Spade first argues the ALJ erroneously decided the issue of notice in favor of DeLeon. It contends the ALJ's reliance on the language of the excuse slips stating DeLeon was being referred to an orthopedic specialist does not support a finding of notice of a work-related back injury. It further contends that in light of the fact that the excuse slips did not make reference to a work injury the ALJ should have addressed the contemporaneous evidence from Georgetown Hospital and the records of Dr. Stephens, which also do not mention a work injury. It also points to Sturgill's testimony that DeLeon did not mention an incident lifting pipes before June 23, 2003.

The ALJ believed DeLeon's testimony that he told Dan Jefferson, who was at the job site with him the day of the accident, that he hurt his back. The ALJ further relied on Sturgill's acknowledgement that DeLeon brought him the excuse slips from Dr. Craig. DeLeon testified at his hearing that when he gave Sturgill the work slips, he

told him about his back injury. DeLeon specifically testified he told Sturgill that when he picked up one heavy pipe he had an onset of back pain.

Here, the evidence was conflicting and a primary responsibility of a fact finder is to resolve conflicts in the testimony. The ability of a party to point to evidence which would support a contrary conclusion in the face of substantial evidence is not the standard of review and, for the most part, is largely irrelevant. This Board's inquiry on appeal is whether the finding of the ALJ is so unreasonable in relation to the evidence of record that it must be disregarded as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The ALJ's decision to believe DeLeon is not such a finding.

Spade next argues the ALJ's determination that DeLeon sustained an 11% permanent partial impairment as a result of a work-related injury based on the assessment of Dr. Owen, is unsupported by substantial evidence. Spade relies heavily on the supreme court's decision in Cepero v. Fabricated Metals, Corp., 132 S.W.3d 839 (Ky. 2004). It contends DeLeon, like Cepero, denied previous injury and treatment. Spade submits DeLeon denied he had undergone an MRI even after copies of a 1999 MRI report were introduced into the record and argues neither Dr. Owen nor Dr. Lockstadt had a history of the previous back pain which necessitated an MRI in 1999. It contends the ALJ should have relied on Dr. Lester, the only physician to render an opinion based on a complete and accurate history and felt any impairment DeLeon might have was present prior to May 2003.

In order to prevail on the issue of work-relatedness, a claimant must prove to the satisfaction of the fact finder that any or all of the impairment/disability was

probably caused by a work-related event. Markwell & Hartz, Inc. v. Pigman, 473 S.W.2d 842 (Ky. 1971); Stauffer Chemical Co. v. Greenwell, 713 S.W.2d 825 (Ky.App. 1986). Typically, when the causal relationship between an injury and trauma is not readily apparent to a layman, the question is one properly within the province of medical experts. Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky.App. 1981). Pursuant to Osborne v. Pepsi-Cola Co., 816 S.W.2d 643 (Ky. 1991), the ALJ is free to disregard even the unrebutted testimony of a physician where the facts or data upon which the expert's opinion is based are sufficiently impeached. Thus, where the evidence establishes that a physician's opinion as to causation is based upon an inaccurate past medical history, the fact finder may reject that opinion as lacking in reliability and probative value. This is a discretionary matter, however, in which we are generally inclined to accord considerable deference to the ALJ as fact finder.

Cepero, supra, involved a medical opinion erroneously premised on the claimant's egregious omission of directly relevant past medical history. The supreme court found the circumstances sufficient to mandate reversal based on an insufficient history received by the medical expert. The court held "medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable." Id. at 482.

In Cepero, the claimant denied previous injury to his knee, while in fact he had sustained a serious injury which kept him wheelchair bound for a considerable time. We do not believe DeLeon's denial of a previous MRI rises to the level of deceit in Cepero. DeLeon admitted he had previous back pain; however, he denied having

undergone a previous MRI. Both Dr. Owen and Dr. Lockstadt received a history of previous back pain. We believe this case falls closer to Osborne v. Pepsi-Cola Co., supra, than Cepero and for that reason the ALJ was not compelled to disregard the opinion of Dr. Owen addressing causation.

The ALJ undertook a detailed analysis of the medical evidence and compared the 1999 MRI to the 2003 MRI, noting a second herniation at L5-S1, not previously identified. He then relied on the medical evidence of Dr. Owen to conclude DeLeon sustained an 11% impairment rating due to the work injury with Spade. The ALJ's decision is based on medical evidence contained in the record. Though another fact finder may have reached a different result, we are unable to say that based on the arguments presented in this appeal the findings of the ALJ are so unreasonable that his opinion must be reversed as a matter of law or that any other fact findings is warranted.

The Board's analysis is persuasive, and properly disposes of Spade's claims of error. For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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