

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001170-WC

ALLTEL KENTUCKY, INC.,
AS INSURED BY LIBERTY MUTUAL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-93596

MENVIL LARRY DISHMAN; GTE, INC.;
HON. R. SCOTT BORDERS, ADMINISTRATIVE
LAW JUDGE; AND THE WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Alltel Kentucky Inc., as insured by Liberty Mutual, (Alltel) petitions this Court to review a May 8, 2007, opinion of the Workers' Compensation Board which vacated and remanded for more specific findings of fact the Administrative Law Judge's

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

(ALJ) opinion, order and award (finding that Menvil Larry Dishman suffered on February 4, 2003, a temporary exacerbation of an injury that occurred in 1982).² We affirm.

The claimant, Dishman, worked for GTE, Inc. and then Alltel for some thirty years. He was originally hired by GTE, Inc. but the company was ultimately acquired by Alltel.

In 1982, Dishman suffered a work-related back injury while employed by GTE, Inc., as administered by Broadspire (GTE). The case was settled based upon a twenty-two percent permanent partial disability with future medical benefits remaining open. On February 4, 2003, Dishman allegedly suffered another back injury while working for Alltel. As a result, Dishman filed a motion to reopen the 1982 claim. He sought payment of medical expenses and temporary total disability (TTD) benefits from GTE.³ He also filed an application for adjustment of injury claim against Alltel. He alleged that the February 4, 2003, injury was a new injury to his low back and thus he was entitled to a six percent permanent partial disability award.

The ALJ ultimately found that the February 4, 2003, injury “was nothing more than a temporary exacerbation of [Dishman's] L4-5 disc which was injured in the 1982 incident.” The ALJ then held GTE responsible for payment of medical expenses

² Menvil Larry Dishman had suffered a work-related injury in 1982. The primary issue framed by the Administrative Law Judge was whether the 2003 injury was a new injury as defined by applicable law or an exacerbation of the 1982 injury.

³ Because of the February 4, 2003, injury, Dishman was unable to work from February 2003 until June 2003.

caused by the February 4, 2003, injury and for payment of TTD benefits. Upon review, the Workers' Compensation Board (Board) concluded that the ALJ failed to make sufficient findings of fact and that the findings were “contradictory.” As such, the Board vacated and remanded for specific findings of fact. Our review follows.

Alltel contends the Board erred by vacating the ALJ's opinion.

Specifically, Alltel argues that the ALJ's findings of fact were based upon substantial evidence; thus, the Board exceeded its proper scope of review.

In its opinion vacating and remanding, the Board concluded:

We believe the ALJ has made ambiguous and contradictory findings with regard to the nature of the February, 2003 work incident and apportionment of liability between GTE and Alltel. The ALJ determined the February, 2003 event did not meet the definition of injury but was merely an exacerbation of the earlier 1982 injury. The ALJ clearly found an exacerbation of the condition in February, 2003. What is not clear is whether the ALJ believed that the 1982 injury in and of itself was responsible for Dishman's condition or whether the ALJ determined that the 2003 incident produced a temporary change. The ALJ relied on the opinions of Dr. [William H.] Brooks who stated all of Dishman's symptoms were related to his exacerbations and remissions as one would anticipate. One could infer from Dr. Brooks' opinions that he believed the totality of Dishman's symptoms were the natural result of his 1982 injury. Certainly, there is ample evidence upon which an ALJ could have determined that the 2003 incidents resulted in a temporary harmful change to Dishman's human organism. If that were the case, Alltel would be responsible for a period of TTD benefits and a limited period of medical benefits until such time as Dishman's condition returned to its baseline state that was the result of the 1982 injury. Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held that it is possible for an injured worker to establish a temporary injury for which

only temporary disability benefits and temporary medical benefits may be paid, but yet failed in the burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized.

It is not clear the ALJ had a correct understanding of when Dishman first experienced his right leg symptoms. A correct understanding of when the right leg pain or radiculopathy [sic] could be crucial to the determination of whether the 2003 incident constituted a harmful change in Dishman's condition. We direct no particular finding on that matter.

.....

On remand, the ALJ must make specific findings as to whether the 1982 injury in and of itself without consideration of the events of 2003 produced Dishman's condition as it existed in February, 2003 and necessitated the surgery. If the ALJ is not convinced that the 1982 injury is solely responsible for Dishman's condition, he must rule on the notice issue. If he finds notice was timely given he must determine whether Dishman's work in 2003 was responsible for the exacerbation and produced a temporary harmful change in the human organism, the ALJ shall award TTD benefits and at least a period of medical benefits including the surgery to be paid by Alltel. If the ALJ determines the 2003 work incident produced a permanent change, the ALJ must determine whether the 2003 incident produced any permanent impairment. We reiterate that GTE cannot be assessed liability for the TTD benefits since the period of TTD predates the filing of Dishman's motion to reopen.

We agree with the Board that this case should be remanded to the ALJ for more specific findings of fact. The ALJ's findings of fact were not sufficient. For instance, the ALJ failed to make a specific finding of fact upon whether the 1982 injury solely caused Dishman's February 2003 injury or whether the February 2003 injury was separately caused by work and produced a temporary condition. We believe the ALJ

must make specific findings of fact so as to permit a meaningful review by the Board and by this Court. As a reviewing body, neither this Court nor the Board may “supplant” essential findings of fact not made by the ALJ. *See Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky.App. 2007). Accordingly, we conclude that the Board properly vacated the ALJ's opinion and remanded for more specific findings of fact. Upon remand, the ALJ should follow the Board's opinion and make the necessary findings of fact.

For the foregoing reasons, the Board's opinion is affirmed.

ALL CONCUR.

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