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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001713-WC

COOPER TIRE AND RUBBER COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-91543

JESSICA DEATON; HON. LAWRENCE F.
SMITH, ADMINISTRATIVE LAW JUDGE;
AND THE WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

VANMETER, JUDGE: Cooper Tire and Rubber Company petitions for the review of a Workers' Compensation Board opinion affirming in part, and reversing and remanding in part, an Administrative Law Judge's (ALJ's) opinion awarding Jessica Deaton occupational disability benefits based upon a 17% impairment rating. Cooper Tire argues on appeal that the ALJ erred by finding that Deaton provided timely notice of her injury

and timely filed her claim. Cooper Tire also argues that the evidence was insufficient to sustain the ALJ's award. For the following reasons, we affirm.

I. Facts

While working as a Cooper Tire assembler on August 1, 2003, Deaton lifted some boxes and experienced low back pain (“back injury”). She went to the hospital after work, where she was told that the back pain was related to her pregnancy. Deaton's pain continued, and a doctor eventually told her in August 2004 that her pain was work related. Within a week, she notified her employer of the work-related injury.

In February 2006 Deaton filed an application for resolution of injury claim. That claim also addressed a second injury, which she alleged she sustained on April 22, 2005, while pulling rubber hoses out of a basket at work. Deaton alleged that this injury caused pain in her neck and shoulder (“neck injury”).

Evidence was submitted from the parties on both of these claims, including medical evidence from several doctors, which we now summarize, quoting on occasion from the ALJ's opinion and award.

Dr. Richard A. Lingreen initially treated Deaton on August 31, 2004, and ultimately diagnosed “lumbago, lumbar herniated nucleus pulposus, lumbar degenerative disc disease, cervicalgia, cervical radiculopathy and tension headache.” An MRI “revealed a L5-S1 tear with herniated nucleus pulposus.” After reviewing a second MRI, Dr. Lingreen “opined there was very mild degenerative disc disease at C2-C3, C3-C4,

and C4-C5 and C5-C6.” Dr. Lingreen instructed Deaton in home exercises and discussed the possible use of injective therapy. He prescribed Ultracet and Zanaflex.

After performing an independent medical evaluation (IME) on Deaton, Dr. Robert C. Hoskins diagnosed “L5-6 disc herniation, L3-4, L4-5, and L5-6 disc bulging, lumbar instability at L5-S1, lumbosacral sprain/strain, bilateral lumbosacral radiculitis, cervical spondylosis, degenerative disc disease at C2-3 through C5-6, cervical sprain/strain, cephalgia, and left shoulder girdle strain/myofascial pain.” Dr. Hoskins opined that Deaton's complaints “were caused by the cumulative trauma and repetitive strain associated with the physical job demands she encountered through her employment at Cooper Tire.” Dr. Hoskins assigned a 17% permanent whole body impairment and placed upon her several work restrictions.

Dr. John M. Kelly performed an IME on Deaton and opined that her exam revealed no objective findings. Rather, her exam revealed “inconsistencies that are incompatible with normal anatomical functioning.” Dr. Kelly concluded that Deaton's longstanding history of anxiety played a major role in her symptomatology, and he assigned zero permanent partial impairment to the body as a whole.

The parties also submitted several doctors' notes regarding treatment Deaton received prior to being informed that her injuries were work-related. More specifically, the parties submitted the medical records from Dr. Mary L. Eastham, Deaton's treating obstetrician. Dr. Eastham noted that Deaton was experiencing “lower quadrant discomfort” in late May 2003, low backache in late June 2003, and right hip

pain in July 2003, for which she was taken off work. Deaton returned to work although she was still experiencing some discomfort, but she was ultimately ordered to discontinue work on August 4, 2003.¹ Next, Dr. John L. Doyle's notes indicated that he saw Deaton in April 2004, when she complained of numbness of her back and leg. Dr. Doyle diagnosed sciatica of the left SI joint. Finally, Dr. Usha S. Polisetty evaluated Deaton in April 2004 and issued a report that the “EMG/NCV was within normal limits revealing no evidence of lumbosacral or cervical radiculopathy.” He diagnosed lumbar and cervical sprains, recommended physical therapy, and prescribed Skelaxin and Naproxen.

Having reviewed all of the evidence, the ALJ found credible the opinions of Dr. Hoskins and Dr. Kelly. However, he ultimately was persuaded by Dr. Hoskins' opinions that Deaton sustained a work-related injury caused by cumulative trauma, had a 17% impairment rating, and was able to return to work with restrictions. The ALJ further held that Deaton was not aware that her back injury was work related until August 2004, that she “provided notice thereafter as soon as practicable[,]” and that her claim was brought within the two-year statute of limitations. The ALJ awarded Deaton benefits accordingly. The Board affirmed the ALJ's decision on the issues pertinent to the petition for review now before us.²

¹ Deaton returned to work six weeks after she gave birth to her son on September 17, 2003.

² The ALJ also addressed an issue regarding the payment of temporary total disability (TTD) benefits. The Board reversed the ALJ's decision in this regard. However, we need not address the TTD issue as the parties have not raised it in the matter now before us.

II. Standard of Review

First, we note that a workers' compensation claimant has the burden of proving his claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). Because Deaton met her burden below, the issue on appeal is whether the ALJ's decision was supported by substantial evidence.³ *Id.* Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

Further, an ALJ has the sole authority to judge the weight, credibility, and inferences to be drawn from the evidence. *Miller v. East Ky. Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). He also has the sole discretion to determine the quality, character, and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). And he is free to reject any testimony, and to believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

III. Back Injury

Cooper Tire argues that substantial evidence did not support the ALJ's decision that Deaton's back injury was caused by cumulative trauma. We disagree.

³ Cooper Tire incorrectly argues that the standard applicable here is whether the evidence was so overwhelming as to compel a finding in its favor. However, that standard is applicable when an unsuccessful claimant appeals the ALJ's decision, *Wolf Creek Collieries*, 673 S.W.2d at 736, which did not occur here.

An “injury” is “any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.” KRS⁴ 342.0011(1). Here, the ALJ held that Deaton suffered an injury caused by cumulative trauma. This decision was supported by Dr. Hoskins' explicit opinion that Deaton's complaints were caused by cumulative trauma and repetitive strain. As medical causation is a matter for the medical experts, *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503, 507 (Ky. 2001), the ALJ's decision was supported by substantial evidence. Further, as the Board noted in its opinion, this decision was supported by Deaton's testimony that her job at Cooper Tire required repetitive motion.

Next, Cooper Tire argues that the ALJ erred by holding that Deaton gave timely notice of her back injury. We disagree.

Typically, KRS 342.185(1) requires a claimant to give “notice of the accident . . . to the employer as soon as practicable after the happening thereof[.]” However, the notice requirement in a cumulative trauma claim is triggered by a different event than in typical “traumatic event” workers' compensation claims. Indeed, the notice requirement in a cumulative trauma claim is not triggered until a physician informs the claimant that the cause of his condition is work-related. *Hill*, 65 S.W.3d at 507. The rationale is that medical causation is a matter for medical experts and claimants are not expected to self-diagnose the causes of their harmful changes. *Id.*

⁴ Kentucky Revised Statutes.

Here, Deaton lifted some boxes at work on August 1, 2003, and experienced low back pain. She sought treatment at the hospital after work and, based on medical advice, believed that her back pain was related to her recent pregnancy until August 2004, when a doctor told her that her pain was work related. Within a week of being so informed, Deaton notified her employer of the work-related injury. As such, substantial evidence supported the ALJ's finding that Deaton notified her employer of her injury, caused by cumulative trauma, as soon as practicable after being informed that her injury was work related.

Next, Cooper Tire argues that the ALJ erred by holding that Deaton timely filed her back injury claim. We disagree.

KRS 342.185(1), in addition to establishing the notice requirement as set forth above, provides the following statute of limitations: “no proceeding under this chapter for compensation for an injury or death shall be maintained . . . unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the office within two (2) years after the date of the accident[.]” Like the notice requirement, the statute of limitations in a cumulative trauma claim is not triggered until a physician informs the claimant that the cause of his condition is work-related. *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 620 (Ky. 2004) (claimant's gradual injury claim was timely when filed within two years of the date physician informed her that her problems were work related). Accordingly, Deaton's claim was timely when it

was filed in February 2006, which was within two years after her doctor informed her in August 2004 that her back pain was work related.

IV. Neck Injury

Cooper Tire also argues that substantial evidence did not support the ALJ's finding that Deaton suffered a neck injury. We disagree.

Again, in determining that Deaton had suffered a 17% impairment rating, the ALJ relied upon Dr. Hoskins' diagnosis that Deaton suffered “L5-6 disc herniation, L3-4, L4-5, and L5-6 disc bulging, lumbar instability at L5-S1, lumbosacral sprain/strain, bilateral lumbosacral radiculitis, cervical spondylosis, degenerative disc disease at C2-3 through C5-6, cervical sprain/strain, cephalgia, and left shoulder girdle strain/myofascial pain.” The ALJ further relied upon Dr. Hoskins' opinion that Deaton's “complaints were caused by the cumulative trauma and repetitive strain associated with the physical job demands she encountered through her employment at Cooper Tire.” Simply put, these opinions constitute substantial evidence supporting the ALJ's finding that Deaton suffered a neck injury.

Finally, Cooper Tire argues that the ALJ erred by failing to “carve out” a pre-existing active impairment for Deaton's neck injury. We note that since the employer has the burden of proving a pre-existing active impairment, *Finley v. DBM Techs.*, 217 S.W.3d 261, 265 (Ky.App. 2007), and the ALJ held that Cooper Tire did not meet that burden below, the standard on review is whether the evidence was so overwhelming as to compel a finding in Cooper Tire's favor, *Wolf Creek Collieries*, 673 S.W.2d at 736.

Cooper Tire raised this issue in its petition for reconsideration of the ALJ's opinion and award, to which the ALJ responded as follows:

Defendant next asserts that a patent error was committed by the failure to carve out a prior active impairment. This Administrative Law Judge has reviewed the record once more in order to correct this problem. I note that Dr. Hoskins had assigned a 17% permanent impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. I have found no previous judicial determination of permanent impairment and Dr. Hoskins was of the opinion that the plaintiff had no prior active impairment. I found his opinions more persuasive on this issue. Accordingly, on this issue, [Cooper Tire's] petition for reconsideration is **OVERRULED**.

We agree with the ALJ's reasoning. Ultimately, because it was within the ALJ's purview to rely upon Dr. Hoskins' opinion that Deaton had no prior active impairment, the evidence did not compel a finding in Cooper Tire's favor on this issue.

The Board's opinion is affirmed.

ALL CONCUR.

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