RENDERED: DECEMBER 9, 2005; 10:00 A.M.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002637-WC

KEVIN JAMES STOCTON — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-96811

J. L. FRENCH; HON. IRENE STEEN, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

VANMETER, JUDGE: Kevin James Stocton petitions for the review of an opinion of the Workers' Compensation Board (Board) affirming the decision of an Administrative Law Judge (ALJ) to dismiss his claim in its entirety, after finding that Stocton's injury was not work related. For the reasons stated hereafter, we affirm.

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

Stocton began working as a machine operator in J.L. French's (French's) automotive parts manufacturing facility in October 2001. Stocton initially operated a "C dial" machine, which required him to load and unload five to six pound parts, but then he was transferred to a position where he tested oil pans for air leaks, which required the lifting of ten to twelve pound parts. In approximately January 2002, Stocton was moved from the B oil pan line to the A line, which required him to perform the exact same tasks, except with his right hand instead of his left. Stocton testified that after he worked on the A line for approximately two weeks, he reported to his supervisor, Bobby Mann, that he was experiencing pain in his neck, right shoulder, and right arm, as well as numbness in his right thumb, index finger, and middle finger, due to the flaring up of injuries sustained in a 2000 auto accident. Stocton continued to work on the A line for approximately six more weeks and then was transferred to the "crankshaft area," where he was required to lift twenty-eight pound parts. Although Stocton testified that he was transferred to the crankshaft area as light duty work to accommodate his injury, Mann testified that the transfer was merely temporary and not intended to accommodate Stocton's injury, which Stocton had previously informed Mann was related to an automobile accident and not work related.

After only a couple of shifts in the crankshaft area, Stocton awoke one morning to find that he could not hold his head upright. Mann suggested that it was just a "crick" that would go away in a few days, but when the symptoms continued for several days, Stocton informed French's human resources assistant, Radonna Jewell, on April 23, 2002, that he was going to the doctor and wanted to request a medical leave and short-term disability. As Stocton did not fully understand the Accident & Sickness Claim Statement, Jewell assisted him in completing the form by reading the questions and marking his answers. Although Stocton testified that he informed Jewell that the injury was work related, Jewell testified and the form reflected that he told her that it was not. Jewell testified further that her job required her to process forms regarding employee attendance, vacation, sickness and medical leave, and insurance, but that employees who reported work-related injuries to her were referred to a company nurse, Angie Read.

Stocton testified that later the same day he was examined at the office of his long-time family physician, Dr. Bobby Brooks, where he reported that after throwing horseshoes, he awoke from a nap with spasms in his right neck and shoulder, as well as numbness in his right thumb. Over the course of several office visits, Dr. Brooks ordered an x-ray of Stocton's cervical spine, which showed mild disc space narrowing at C5-6.

Dr. Brooks also prescribed medications and physical therapy, ordered an MRI which revealed a large right paramedian disc protrusion at C5-6, and referred Stocton to a neurosurgeon who ultimately performed an anterior cervical discectomy and fusion in late May 2002. Dr. Brooks' office's response to questions asked on French's Accident & Sickness Claim Statement indicated that the injury was not work-related.

Stocton returned to light duty work at French approximately eight weeks after his discectomy and fusion. However, two weeks later on August 17, 2002, he suffered a nonwork-related neck injury when he fell off a deck.[2] Stocton's employment with French was ultimately terminated on September 9, 2002.

To support his workers' compensation claim, Stocton submitted a narrative report from Dr. Brooks which opined that Stocton's neck problem was work related and not in any way related to an April 2000 car accident. Stocton also submitted an independent medical evaluation from Dr. Vickie Whobrey, who assigned Stocton a 25% permanent impairment rating relating to his work at French. Nevertheless, after a benefit review conference, the ALJ dismissed Stocton's claim in its entirety, stating:

[2] Ensuing medical x-rays revealed that the preceding C5-6 fusion was solid and not exacerbated by Stocton's fall off the deck.

> There is ample evidence from Plaintiff's previous medical records and his long-time treating physician, Dr. Bobby Brooks, that Plaintiff's problems are as a result of non-work related activities and accidents. I am not at all persuaded that Plaintiff thought he was filling out workers; [sic] compensation forms, when he signed up for the Sickness and Accident policy. Dr. Brooks felt that Plaintiff would have long-term, if not lifetime effects of the automobile accident, and for him to later make a complete turnaround regarding causation of Plaintiff's obvious problems, is simply not persuasive. Besides, I do not find that notice was complete. Thus, for the within reasons, Plaintiff's claim shall hereinafter be dismissed in its entirety.

The Board unanimously affirmed, holding that it could not disturb the ALJ's decision given the ample evidence which contradicted the doctors' opinions as to causation. In so holding, the Board noted that an "ALJ is free to disregard even unrebutted medical testimony so long as she sets out a reasonable basis for doing so. *Cf.* Mengel v. Hawaiian Tropic Northwest & Central Distributors, Inc., Ky.App., 618 S.W.2d 184 (1981)[.]" The Board further found the notice issue to be moot. This appeal followed.

On appeal, Stocton proffers that the ALJ erroneously substituted her opinion in place of unrebutted, substantial evidence regarding medical causation, and that the board therefore erred as a matter of law by affirming the ALJ's opinion. We disagree.

In a workers' compensation claim, the claimant has the burden of proving "every element of his claim, including causation."[3] Specifically, a claimant must prove medical causation "to a reasonable medical probability with expert medical testimony[,]" although not necessarily with objective medical findings.[4] On appeal, a losing claimant must prove that "the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor."[5] The role of this court on appeal "is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice."[6]

In *Magic Coal Co. v. Fox,*[7] the Kentucky Supreme Court stated that "[w]here the question at issue is one which properly falls within the province of medical experts, the fact-finder may not disregard the uncontradicted conclusion of a medical expert and reach a different conclusion." We find this proposition inapplicable to the case at bar, however, because

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[3] *Dravo Lime Co. v. Eakins*, 156 S.W.3d 283, 288 (Ky. 2005).

[4] *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004).

[5] *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984).

[6] *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky.App. 2004) (internal citations omitted).

[7] 19 S.W.3d 88, 96 (Ky. 2000) (citing *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184 (Ky. 1981)).

here the medical testimony regarding causation is not uncontradicted.

Although the record includes the reports of Dr. Brooks and Dr. Whobrey which opined that Stocton's injury was work related, the record also includes a report by Dr. Brooks, written approximately two weeks before Stocton commenced work at French, which discussed the pain Stocton experienced in his neck, right shoulder, and low back following an April 2000 car accident:

> I am happy to report that he has made significant progress now and hopefully, quite soon can resume a normal life both from an employment standpoint and any enjoyment of personal pleasures.
>
> This young man was absolutely rendered totally incapacitated for at least a year following this accident. . . . He is still going to be limited as to lifting or pushing heavy items and he will be limited as far as flexibility of his neck and lower back as to bending, turning and squatting.
>
> He has had some residual neurological deficits of his right upper extremity which can adversely effect fine manipulative work activities with this extremity. He has continuing discomfort in several areas and will require some degree of analgesia along with possible muscle relaxers, which in itself will limit his work activities, particularly from a standpoint of climbing and operating machinery. I feel like many of these limitations will continue for quite some time and possibly the rest of his life.

Moreover, Dr. Brooks' records indicate that Stocton initially attributed his injury to throwing horseshoes, and the responses of Dr. Brooks' office to questions asked on French's claim statement indicated that the April 2002 injury was not work related. These inconsistent reports gave rise to a situation "[w]here the uncontradicted sequence of events casts doubt upon the correctness of the diagnosis of physicians, [and] such evidence presents an issue of fact to be determined by the [fact finder]."[8] Here, the ALJ was permitted to "reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof."[9] This is especially true in light of the fact that Radonna Jewell and Bobby Mann testified that Stocton never told them that his injury was work related, and the fact that Stocton's completed claim statement did not characterize his injury as being work related. In light of such evidence and the ALJ's "sole authority to judge the weight, credibility and inferences to be drawn from the record[,]"[10] we conclude that the ALJ did not err in finding that Stocton's injury was not work related.

[8] *Blue Bird Mining Co. v. Kelly*, 237 S.W.2d 530, 532 (Ky. 1951).

[9] *Garrett Mining Co. v. Nye*, 122 S.W.3d 513, 518 (Ky. 2003).

[10] *Southers*, 152 S.W.3d at 245 (citing *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997)).

Because we believe that the ALJ did not err in dismissing Stocton's claim after finding that his injury was not work related, we do not reach the issue of whether Stocton gave adequate notice of his alleged work-related injury.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE J. L. FRENCH:

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