

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001236-WC

DEBORAH ANGEL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-00711

BLUEGRASS HEALTH NETWORK;
HON. THOMAS A. DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; KNOPF,¹ SENIOR JUDGE.

ACREE, JUDGE: Deborah Angel appeals from a decision of the Workers'

Compensation Board affirming the Administrative Law Judge's finding that she is not

entitled to additional benefits for an alleged work-related injury. The ALJ reviewed the

evidence and determined that Angel had suffered no more than a temporary exacerbation

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

of a previous back injury. The ALJ found the Kentucky Supreme Court's decision in *Robertson v. United Parcel Service*, 64 S.W.3d 284 (Ky. 2001) controlling. Angel argues that *Robertson* has no precedential value in her case because of factual differences between her injury and the injury suffered by the employee in *Robertson*. We disagree and affirm the Board's decision.

Angel is employed by Bluegrass Health Network as a registered nurse case manager. Her job duties are primarily sedentary, requiring her to talk to doctors, patients, employers and insurance companies to coordinate benefits. She has been in this position since April 2002. The alleged injury that is the subject of this complaint occurred in July 2003 when Angel bent down and reached under her desk to turn on her computer. She immediately felt pain in her back and left leg. Angel reported the injury, continued to work and sought treatment with her family physician, Dr. Phillip Bressound. She did not begin to miss work until January 2004.

During 2004, Angel was unable to work and received temporary total disability benefits for the following dates: January 9-13, 19-20, January 26 through February 1, August 4-8, 11-15, and September 22 through October 3. Since then, she has continued performing her regular duties, earning the same or greater wages. Her employer, after voluntarily paying her medical expenses through October 2004, has denied requests to reimburse her for subsequent expenses.

Angel filed a claim seeking additional temporary total disability benefits, permanent partial disability benefits and medical benefits. After reviewing all of the

evidence, the ALJ found Angel failed to prove that her July 2003 work injury caused a permanent harmful change to her spine. Although her testimony was deemed persuasive, the ALJ determined that Angel's back pain was really a temporary exacerbation of a more serious injury sustained in 2001. Her petition for reconsideration was overruled, and the Board affirmed the ALJ's decision. This appeal followed.

Angel presents essentially two arguments on appeal. The first is whether the ALJ's decision to deny her request for benefits was proper given that the alleged injury was stipulated. Second, she claims the ALJ's reliance on *Robertson* was misplaced. We will address these arguments one at a time. Angel correctly points out that an employee who sustains a work-related injury in Kentucky is entitled to benefits under the Kentucky Workers Compensation Act. Angel claims her employer stipulated that she suffered a work-related injury. Therefore, she argues the law required the ALJ to award such benefits. In so doing, she misunderstands the portion of the ALJ's order dealing with the parties' stipulations and contested issues.

In its opening paragraph, the ALJ's opinion lists the contested issues as **"whether the injury was a temporary exacerbation of a pre-existing active condition, extent and duration and entitlement to medical benefits."** (Emphasis added.) Angel's employer stipulated that she suffered an **alleged** work-related injury on July 21, 2003, and that the employer received timely notice of the incident. Kentucky Revised Statute 342.0011(1) defines injury as

any work-related traumatic event . . . 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. "Injury" does not include the effects of the natural aging process. . . .

A stipulation that Angel notified her employer in a timely fashion that she hurt her back on the job does not equal an admission that she sustained an injury as defined by statute. Thus, she was required to furnish the ALJ with objective medical evidence that reaching under her desk to turn on her computer was the proximate cause of her back injury. This was not stipulated.

The ALJ found that Angel failed to meet her burden of proving that she suffered a permanent impairment as a result of her back injury in 2003. Rather, he concluded that Angel's symptoms were a temporary exacerbation of a more serious back injury sustained in 2001. As fact finder, the ALJ decides which evidence to accept and may even disbelieve portions of a party's evidence while believing other parts of the same evidence. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Further, it is not the function of an appellate court to second guess the ALJ's judgment with regard to the weight of the evidence. *Whitaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). Angel can only prevail on appeal if she can prove the evidence compelled a finding in her favor. *Special Fund v. Francis*, 708 S.W.2d 641,644 (Ky. 1986). In order for evidence to be deemed compelling, it must be such that no reasonable person could reach the same conclusion as the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224, 226 (Ky.App. 1985).

The evidence reviewed by the ALJ included testimony from Angel, as well as medical reports from several doctors who examined her. Angel's medical history included a car accident in 1993 in which she suffered a whiplash and a herniated disc in her neck. She worked as a nurse's assistant from 1998 to 2000 at which time she became a registered nurse. Before working for Bluegrass Health, Angel was employed at Suburban Hospital in Louisville as a floor nurse. In 2001 she injured her back while moving a hospital bed by herself. She did not file a claim for benefits despite being unable to continue at her job. An MRI done after that injury showed a broad-base disc bulge at the L4-5 level consistent with an acute tear of the annulus fibrosus. According to Angel's medical records, she continued to seek treatment for back pain through at least February 2002. She admitted that, to and including the time of the July 2003 injury, she still suffered back pain after a strenuous day at work.

At the time of her injury on July, 21, 2003 , Angel was a forty-two year-old woman who was five feet, nine inches tall and weighed two hundred eighty-five pounds. She described the onset of back pain as occurring when she reached under her desk to turn on her computer. The pain radiated down into her left hip and leg and, by the end of the day, Angel could not lift her leg. She sought treatment with Dr. Bressound, her family physician, a few days later. An MRI performed on December 13, 2003, showed the same disc bulge at L4-5, but also showed a second broad-based disc bulge at L3-4. A third MRI in September 2004 showed some loss of nerve signal in the intervertebral disc at L4-5.

The opinion of the Workers' Compensation Board provides us with an excellent discussion of the medical evidence, including the conclusions reached by the doctors who examined Angel after her injury at Bluegrass Health.

Angel was evaluated by Dr. Leonard Goddy on May 26, 2005 at her attorney's request. . . . He diagnosed 1) degenerative disc disease, lumbar spine; 2) disc bulge at 2-3, 4-5 with annular tear; and, 3) motor vehicle accident in 1993 with cervical disc herniation. Dr. Goddy stated that based upon history and MRI reports of 2001, Angel had some preexisting degenerative disc disease in her lumbar spine with some early findings of facet arthritis. Dr. Goddy opined the 2001 injury left some minimally active disability. He described the injury at [Bluegrass Health] when turning on the computer while bending over in a cramped position as an aggravation of her preexisting condition. He admitted that while Angel previously had right sided pain, she now had some left thigh paresthesia. Dr. Goddy agreed Angel was not a surgical candidate. He stated she did have some partial impairment. While the episode of 2003 would not be expected to cause permanent impairment, Dr. Goddy felt it exacerbated a preexisting condition and thus caused an increase in Angel's degree of impairment. Dr. Goddy assessed a 10% impairment, apportioning 8% to a preexisting active condition caused by the 2001 injury and 2% to the 2003 injury and recommended work restrictions. Dr. Goddy, in a supplemental report, characterized Angel's condition as asymptomatic prior to the work injury of July 21, 2003.

Dr. Gregory Gleis evaluated Angel on July 28, 2006. With regard to the July 2001 injury, Dr. Gleis diagnosed lumbar strain with mild right leg referred symptoms. He stated Angel had to change jobs because of residual restrictions of a maximum lifting of about twenty-five pounds. Dr. Gleis stated Angel had a mild residual low back pain of 0-2 on a 10 point scale. Following the July 21, 2003 injury, Dr. Gleis diagnosed exacerbation of low back and left lateral thigh referred pain. He placed Angel in a DRE lumbar Category II and assessed an impairment rating of between 5% and 8%. Dr. Gleis was asked whether Angel had a ratable impairment prior to the July 21, 2003 work incident. He

reported that Angel did have an active symptomatic lumbar degenerative disc before July 21, 2003. She was still symptomatic from her July 2001 low back injury and had to change jobs because of restrictions. He assessed a 5% impairment due to the July 2001 injury. Dr. Gleis recommended temporary restrictions and believed Angel could return to her full duty job as a nurse case manager. He stated Angel would have the same restrictions that followed the 2001 injury, which prevented her return to work at Suburban Hospital.

Dr. Bart Goldman performed a utilization review on November 30, 2004 to address the necessity of chronic pain management. Dr. Goldman stated that within a reasonable degree of medical probability, Angel's current pain was an exacerbation of her preexisting problem. He stated there was not significant trauma in the incident as described to cause this kind of pain in a normal back. He noted Angel was significantly overweight and this, along with the natural effects of aging, was likely to be the main cause of her problem.

Dr. Michael Best performed a utilization review. . . . Dr. Best's impression was mild spondylosis at L2-3 and L4-5. He stated the medical records did not demonstrate a causal relationship between her work injury, where she knelt down beneath her desk to turn on her computer, and a progression of her degenerative changes of the lumbar spine. He explained the progression of the degenerative change is a normal aging phenomenon and has absolutely no relationship to the type of work injury reported.

At the time of her hearing before the ALJ, Angel had returned to work at Bluegrass Health where she was able to perform the same job duties, for the same or greater wages, as before her 2003 injury. Based on her physical condition at the time of the hearing and all of the medical evidence in the record, the ALJ concluded Angel had failed to prove that her work-related injury caused a permanent impairment. The opinion pointed out that only Dr. Goddy found a permanent impairment over and above Angel's

preexisting impairment. Drs. Gleis, Goldman and Best diagnosed Angel's symptoms as a temporary exacerbation of her 2001 injury. This is not the type of evidence that would compel a finding in Angel's favor. *REO Mechanical v. Barnes, supra*. Thus, she fails to show that the ALJ improperly dismissed her complaint in light of her employer's stipulation that she timely alleged a work-related injury.

Finally, we address Angel's contention that the ALJ's reliance on *Robertson v. United Parcel Service*, 64 S.W.3d 284 (Ky. 2001) was misplaced. The employee in *Robertson* worked as a hod carrier for a masonry company in addition to his job driving a truck for UPS. He was treated for pain for two years immediately preceding his 1998 work-related accident. Robertson was able to return to his job at UPS after missing only two days, but was unable to do masonry work for approximately three months. The Kentucky Supreme Court upheld the denial of his claim for workers' compensation benefits, stating

[T]he evidence and the ALJ's opinion make it clear that the only harmful change that the claimant experienced as a result of the work-related incident was a temporary flare-up of symptoms of the pre-existing, nonwork-related condition. In other words, the ALJ concluded that the claimant suffered a work-related injury but that its effect was only transient. It resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis.

Robertson, 64 S.W.3d at 286. Angel argues that, prior to her 2003 injury, she was asymptomatic for back pain and that she experienced different symptoms after her injuring herself at Bluegrass Health. Neither of these claims is supported by evidence

sufficient to overcome the ALJ's determination that the exacerbation of Angel's more serious 2001 injury was a temporary condition.

For the foregoing reasons, we affirm the opinion and order of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, BLUEGRASS
HEALTH NETWORK:

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