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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000082-WC

BAPTIST HOSPITAL EAST

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-79966

AUGUST POSSANZA; HON. GRANT S.
ROARK, ADMINISTRATIVE LAW JUDGE,
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Baptist Hospital East (hereinafter "Baptist") appeals the decision of the Workers' Compensation Board (hereinafter "the Board") reinstating August Possanza's claim for benefits. The Board found that the Administrative Law Judge (hereinafter "ALJ") had misinterpreted provisions of KRS 342.165 in dismissing the claim. Baptist argues that the ALJ was correct in his interpretation

and that the Board misinterpreted the ruling. Baptist now asks that the original decision of the ALJ be reinstated. After careful review, we affirm.

In April 2005, August's treating physician, Dr. Mladen Djurasovic, noted a history of low back and sciatic pain for which August had undergone a microdiscectomy at L4-5 seven or eight years earlier. August had done well until he developed increasingly severe back pain and right leg radiculopathy. An MRI revealed post discectomy collapse and severe degenerative disc disease at L4-5. In July 2005, Dr. Djurasovic performed a fusion at L4-5. On March 22, 2006, the medical records indicated that August was doing well and was looking for a new nursing job that did not involve a great deal of heavy lifting. Dr. Djurasovic included an addendum to the record that day which stated:

August used to work in a psychiatry unit as a nurse and this involved a lot of lifting, a lot of physical restraint of patients. I do not think he should get back to his kind of work, although he is doing fairly well with his back now. If he goes back to a job that involves a lot of manual lifting or heavy work with his back, I think he would flare up his symptoms again. I think he needs to look for a job that does not involve a lot of heavy lifting, probably no greater than 20 pounds, and certainly no job that would involve altercations with patients. I think this would be the best thing for him long term in terms of managing his back symptoms.

On August 10, 2007, August presented with right arm numbness, tingling, and intermittent pain that radiated from the shoulder into the first finger, related to a work injury during which he twisted his neck. August also reported right leg numbness and slow return of lumbar symptoms. X-rays revealed no

evidence of loosening or fatigue in the lumbar instrumentation. A cervical x-ray revealed a bit of retrolisthesis at C4-5. A cervical MRI revealed multi level broad based disc protrusions, greatest at C4-5 and C5-6 where there was moderate to severe central stenosis. Dr. Djurasovic stated, “[g]iven the level of cervical stenosis that he has, I think he would be at risk for a possible neurologic injury with any further kind of twisting accidents such as he had.” Dr. Djurasovic indicated that the stenosis was exacerbated by the work injury. In November 2007, Dr. Djurasovic performed an ACDF from C4-C6.

In a letter dated March 25, 2008, Dr. Djurasovic asserted that August’s lower back problem did not play a role in his neck problem or disqualify him from working part-time as a nurse for Baptist. Dr. Djurasovic said that the March 2006 recommendation for a twenty pound lifting restriction was “more of a temporary suggestion.” Dr. Djurasovic stated, “August’s back is solidly healed and he is feeling good, so I do not think that he has any specific restrictions on his back any longer and these restrictions only applied to his lower back, not his neck.”

Dr. Djurasovic testified that he released August from his care for lumbar problems on March 22, 2006. With regard to the office note, Dr. Djurasovic testified that as per his standard procedure, he would have discussed with August the recommendations in the addendum. Dr. Djurasovic said he often did not provide restrictions to patients who were doing well after low back fusion. However, he generally warned them that their symptoms might flare up if they

returned to a job that involved repetitive or occasional lifting, bending, twisting, and stooping. On the other hand, Dr. Djurasovic agreed that he did not indicate that he was assigning a temporary restriction or suggestion and that he was telling August what he did not want him to do at that point. Dr. Djurasovic speculated that he could have dictated that addendum in response to questions August may have posed.

In October 2007, following August's neck injury at Baptist, Dr. Djurasovic referred August to Dr. John Harpring, who recommended surgery. On October 4, 2007, Dr. Harpring released August from work. In December, Dr. Harpring indicated that August would be unable to return to work until February 13, 2008. In March 2008, Dr. Harpring asserted that August's prior low back problems were not related to the cervical injury. Dr. Harpring stated that August would not reach maximum medical improvement until one year after surgery, at which time he could assign an impairment rating that would fall between 25% and 28%, depending on the residual symptoms.

August testified that on March 22, 2006, he told Dr. Djurasovic that he was looking for nursing work and that Dr. Djurasovic did not tell him he could not perform nursing work and did not provide any verbal or written restrictions or limitations. August did not recall Dr. Djurasovic telling him not to return to the type of nursing he did at his previous job or not to lift more than twenty pounds.

August stated that he first became aware of the addendum to the March 22 office note when he received a claim denial letter in September 2007.

August asserted that he was neither aware of any specific weight lifting restriction with regard to his lower back, nor was he informed of any lifting restriction when he was interviewed by Dale Noland or Karen Sparks Barnett for the job with Baptist. August testified that neither Noland nor Barnett asked him why he had been off work for a year or if he had any restrictions. August further stated that he apprised Noland and Barnett of his prior low back problems and provided them with a list of his medical problems, medication, and surgeries the first day of work. August did not miss any work due to lower back problems between the date he was hired and the date on which he was injured.

Nolan, who interviewed and hired August in the spring of 2006, testified that August indicated during the interview that he was capable of performing the essential functions of the job with or without reasonable accommodations. Nolan testified that August informed her that he was leaving his previous employment because he was knocked unconscious by a patient there. August did not during the course of the interview inform Nolan that he had any physical limitations or restrictions. Nolan stated that she would not have hired August if she had known he had been restricted from lifting more than twenty pounds. Baptist filed into evidence a form on which August indicated that he did not have any physical limitations that would prevent him from performing the job for which he was applying as outlined in the job description.

In this claim, there is no dispute that August injured his neck at work on July 31, 2007. Moreover, the parties are not that far apart on their impairment

ratings attributable to that injury. Instead, the main issue in this claim, and one that is a threshold for coverage under KRS 342.165(2), is whether August made a material misrepresentation of his physical condition in his application process with Baptist which, if known, would have prevented him from being hired and which led to his July 31 neck injury.

The ALJ found that August did materially misrepresent his condition and thus dismissed the claim. The ALJ specifically reasoned that:

[Nolan] would not have hired [August] if she had known of the restrictions indicated in Dr. Djurasovic's March 22, 2006, addendum. Those restrictions would not appear to allow the kind of work described. It is also determined that a causal nexus exists because if [August] had not been hired, he would not have been placed in the job that required him to assist moving heavy patients and, as such, he would not have been injured on July 31, 2007.

...

[August] should have disclosed [the restrictions from Dr. Djurasovic's March 22 addendum] in his application, especially in response to the question which asked for limitations on his ability to perform the job as set forth in the job description.

August filed a petition for reconsideration seeking additional findings concerning the third prong set forth in KRS 342.165(2)(c) related to the causal connection between the false representation and the injury for which compensation had been claimed. By order dated August 20, 2008, the ALJ denied the petition for reconsideration without further explanation.

August then appealed to the Board from the decision of the ALJ dismissing his claim. He argued that Baptist failed in its burden of proving he made a false written representation of his physical condition. He additionally alleged that the ALJ erred in his findings regarding the three prongs set forth in KRS 342.165(2). The Board found that there was substantial evidence to support the ALJ's finding that August knowingly made a false written representation of his physical condition or medical history and that the testimony of Nolan establishes the employer relied upon the misrepresentation in the hiring of August. The Board, however, concluded that the ALJ improperly used Baptist's reliance on the misrepresentation to satisfy both the second and third prongs of KRS 342.165(2). The Board stated that "[i]f the employer's reliance in hiring satisfied both prongs, there would be no purpose in having the third prong since the second prong would be determinative." The Board then reversed the decision of the ALJ and remanded it for a decision on the merits.

Baptist now appeals the opinion of the Board. Baptist argues that the Board erred in its interpretation and application of KRS 342.165(2).

When this Court reviews a decision of the Board, our function "is to correct the Board only where [we] perceive [] the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). There is no question as to whether the

Board committed an error in assessing the evidence. Therefore, we need only address whether the Board properly construed KRS 342.165(2) in its analysis.

KRS 342.165(2) states that:

No compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable falsely represents, in writing, his physical condition or medical history, if all of the following factors are present:

- (a) The employee has knowingly and willfully made a false representation as to his physical condition or medical history;
- (b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring; and
- (c) There is a causal connection between the false representation and the injury for which compensation has been claimed.

The Board concluded that the ALJ improperly used Baptist's reliance on the misrepresentation to satisfy both the second and third prongs of KRS 342.165(2). Baptist contends, however, that the causal connection does not arise out of the fact that August would not have been hired and thus would not have sustained his injury. Baptist instead claims that the connection arises out of the fact that August would not have been moving a heavy patient, because it was outside his medical restrictions, and would not have sustained his injury had he been honest about his physical condition at the time he took the job. This,

however, is just a more complicated way of saying he would not have been hired for this job had he not materially misrepresented his physical restrictions.

There is no dispute that August's claim is for a neck injury and the misrepresentation related to a low back condition. Drs. Harpring and Djurasovic both testified that there was no relationship between the back condition and the neck injury. As the Board correctly analyzed,

if the facts established an applicant with a cervical injury resulting in a weakened upper extremity misrepresented his condition at the time he was hired then later, as a result of lifting more than his restrictions would permit, drops an object on his foot because of weakness in the upper extremity, an ALJ could find the foot injury noncompensable. Here, no such link exists.

KRS 342.165(2) requires all of the factors in the three prongs to be present before compensation will be denied. Baptist has failed to show a causal connection as required by KRS 342.165(2)(c).

We accordingly affirm the opinion of the Board reversing the decision of the ALJ and remanding the matter to the ALJ for a decision on the merits.

ALL CONCUR.

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