

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002092-WC

ALL PROFESSIONAL TREE SERVICE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-82657

RICHARD PENNINGTON; HON. GRANT
S. ROARK, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: VANMETER, ACTING CHIEF JUDGE; COMBS AND KELLER,
JUDGES.

COMBS, JUDGE: Richard Pennington filed a motion to reopen his workers'
compensation claim. An Administrative Law Judge (ALJ) denied his motion. On
appeal, the Workers' Compensation Board concluded that the ALJ may have

misunderstood the medical testimony that had been presented. Consequently, it vacated the decision of the ALJ and remanded the matter for further consideration. Pennington's former employer, All Professional Tree Service (APTS), now appeals the Board's opinion and argues that the Board exceeded its authority by vacating the ALJ's decision. After our review, we find no error. Therefore, we affirm.

In April 2004, Pennington suffered a severe, work-related injury to his left shoulder. The injury required surgery to reattach his subscapularis tendon to the bone. The surgery had to be repeated after Pennington reinjured his shoulder during the initial recovery period.

APTS paid Pennington's medical expenses and provided him with temporary total disability benefits. A few months after APTS terminated its payment of income benefits, the parties reached a settlement. Pennington agreed to accept a lump sum payment for his permanent disability and a buyout of vocational rehabilitation benefits from APTS. The settlement agreement provided that medical expenses were to remain payable (per the applicable statute).

In 2008, Pennington filed a motion to reopen the claim. He claimed that he had re-torn his subscapularis tendon and that he would have to undergo a surgical repair of the shoulder reconstruction that had been performed as a result of the 2004 work-related injury. APTS objected and alleged that it was not responsible for the medical expenses since the surgery was associated with a fall that Pennington had taken at home and was not related to the 2004 workplace injury. The claim was assigned to ALJ Roark for a decision on the merits.

In support of his motion to reopen, Pennington filed numerous medical records and reports. These records and reports indicated that Pennington's 2004 injury and the surgeries that followed had made a direct impact upon the severity of the injury that he sustained at home in 2008 and that at least some portion of the 2008 injury was very likely related to the compensable work-related injury of 2004. APTS filed medical records and reports to challenge Pennington's position.

After considering the evidence, the ALJ found that Pennington's 2008 injury was new and distinct from the 2004 work-related injury. The ALJ relied on the opinion of Dr. Thomas Loeb, an orthopaedic surgeon who had undertaken independent medical examinations of Pennington in June 2005, in May 2006, and again in October 2008. The ALJ found that Pennington's fall at home in 2008 was sufficient -- in and of itself, regardless of the 2004 injury -- to cause his latest left shoulder injury. Pennington contended that scar tissue or osteoarthritis associated with the 2004 work-related injury caused his left shoulder to be more susceptible to re-injury or to a new subscapularis tear. In rejecting that argument, the ALJ concluded that APTS was not liable for the payment of medical benefits associated with Pennington's 2008 injury; denied his motion for temporary, total disability benefits; and denied additional permanent, partial or permanent, total disability benefits.

Pennington did not file a petition for reconsideration of the ALJ's opinion and order. Instead, he appealed directly to the Board, asserting that the

undisputed medical evidence indicated that the 2004 injury caused his shoulder to be more susceptible to subsequent injury and that the 2008 injury was the direct and natural consequence of the compensable 2004 injury. APTS challenged Pennington's characterization of the evidence and asserted that Pennington's failure to file a petition for reconsideration caused the Board's authority on review to be narrowly circumscribed.

Despite the contention of APTS with respect to the limited scope of its review, the Board undertook a thorough analysis of the medical evidence presented to the ALJ. The Board issued its opinion on October 14, 2009. It determined that the ALJ's findings and conclusions in reliance upon Dr. Loeb's testimony could not be reconciled with that testimony. The Board concluded that the ALJ's decision may have been based upon an erroneous understanding of the medical evidence presented. It also held that a petition for reconsideration was not required under these circumstances. The Board vacated the decision of the ALJ and remanded the matter for further consideration. This appeal followed.

APTS argues to the court that the Board erred by substituting its opinion for that of the ALJ as to the weight of the evidence on a question of fact in contravention of the provisions of Kentucky Revised Statute(s) (KRS) 342.285. APTS contends that the ALJ's finding is adequately supported by the medical evidence and must be upheld. Moreover, APTS contends that Pennington's failure to file a petition for reconsideration is fatal under the circumstances.

APTS correctly observes that the ALJ has the sole discretion to determine the quality, character, and substance of the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). Furthermore, an ALJ may be selective in choosing the portions of the evidence upon which he relies. “The fact finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party’s total proof.” *Magic Coal v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

If the party with the burden of proof fails to persuade the ALJ of his position, that person bears a heavy burden on appeal to establish that the evidence was so overwhelming as to compel a finding in his favor. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). In a post-award, medical fee dispute, however, it is the employer who bears the burden of proving that the contested medical expenses are unreasonable or unnecessary. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). It is the burden of the claimant to prove work-relatedness. *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky.App. 1997).

The nature of our review of a decision of the Workers’ Compensation Board has been plainly set forth and is narrowly circumscribed. On review, our function “is to correct the Board only where the . . . Court perceives 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).

In this matter, the Board correctly determined that Pennington was not required to file a petition for reconsideration in order to preserve his right to appeal. KRS 342.281 **permits** a party to file a petition for reconsideration of an ALJ's decision within 14 days from the date of an award, order, or decision, but it limits the ALJ to correcting "errors patently appearing on the face of the award." Thus, the ALJ is prohibited from undertaking a reconsideration of *the merits* of his decision on the basis of a petition for reconsideration. *Bullock v. Goodwill Coal Co.*, 214 S.W.3d 890 (Ky. 2007); *see also Francis v. Glenmore Distilleries.*, 718 S.W.2d 953 (1986).

As to the merits of the appeal, the Board observed in its opinion that a claimant is entitled to have his claim decided upon the basis of correct findings of the basic facts. *Cook v. Puducah Recapping Service*, 694 S.W.2d 684 (Ky. 1985). Following its review of the evidence, the Board concluded that the ALJ's findings might not have been based on a thorough understanding of Dr. Loeb's medical testimony, which left no room for speculation or essentially any conclusion other than that the 2008 shoulder injury was causally related to the 2004 injury. We are persuaded that the Board did not err at all in its assessment of the evidence -- much less to such a degree as to cause gross injustice in this case.

In summary, we hold that the error perceived by the Board was an error that the ALJ had no authority to correct on a petition for reconsideration because his additional review would have required a reconsideration of the merits as prohibited by the provisions of KRS 342.281. The Board did not overlook or

misconstrue controlling law by concluding that a petition for reconsideration was not required in order to preserve the error. Nor did it err by concluding that Pennington was entitled to have his claim decided upon the basis of correct findings of fact. The Board did not substitute its opinion for that of the ALJ as to the weight of the evidence in contravention of the provisions of KRS 342.285. Instead, the Board concluded that it could not tell from the record whether the ALJ misunderstood the nature of the uncontradicted medical testimony and thus remanded the matter for his further consideration before it undertook its review.

The decision of the Workers' Compensation Board is affirmed, and the claim is remanded to the ALJ for further consideration.

ALL CONCUR.

BRIEF FOR APPELLANT:

Judson F. Devlin
Brent E. Dye
Louisville, Kentucky

BRIEF FOR APPELLEE RICHARD
PENNINGTON:

Eric J. Hander
Louisville, Kentucky