

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002270-WC

GSi COMMERCE SOLUTIONS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-74737

TAMMY GORDON;
R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND NICKELL, JUDGES; LAMBERT,¹ SENIOR JUDGE.

NICKELL, JUDGE: GSI Commerce Solutions (GSI) has petitioned for review of an opinion of the Workers' Compensation Board (Board) entered on November 6,

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

2009, which affirmed the Administrative Law Judge's (ALJ) May 15, 2009, opinion, order and award of benefits to Tammy Gordon. We affirm.

Gordon was employed by GSI as a laborer. Her duties involved selecting products from a list, retrieving the parts, and placing them in bin boxes for delivery to other workers. On August 31, 2007, Gordon sustained a work-related injury when she cut her left arm on a wooden pallet while reaching for a box. Gordon immediately cleaned the wound, bandaged it, returned to work, and notified her supervisor of the incident. The wound became infected and Gordon sought treatment at Baptistworx on September 4, 2007. She was diagnosed with contact dermatitis and was referred to Dr. Stephen Smith, a dermatologist.

Dr. Smith observed that Gordon had developed oozing and crusting of the skin in the area of the initial wound. Following testing, he found Gordon to have allergic skin reactions to several substances found in industrial products, wood preservatives, adhesives, and rubber products. He opined Gordon should refrain from the use of normal bandages as they contained some of the substances to which Gordon was allergic. Dr. Smith surmised that Gordon had an initial contact dermatitis resulting from the treatment of the initial injury. He noted a rash and scaly patches of skin on Gordon's left arm near the original injury site, as well as on her back and abdomen. Dr. Smith also noted Gordon tested positive for MRSA, a serious staphylococcus infection. He referred Gordon to Dr. Joseph Fowler for a second opinion.

Following a visit on October 24, 2007, Dr. Fowler found Gordon to have positive skin reactions to neomycin, bacitracin, and benzalkonium chloride, all of which are found in antibiotic creams, ointments, or sterilizing agents. Dr. Fowler referred Gordon to Dr. Duane Banet of the Dermatology Center.

Dr. Banet noted Gordon had a rash near the wound which had persisted for five months and was spreading up her arm to her torso. He found her to have weeping erosions and edematous. He diagnosed Gordon with contact dermatitis and underlying cellulitis secondary to MRSA. He believed the dermatitis was caused by an allergic reaction to the topical antibiotic applied to the initial wound. However, Dr. Banet opined her cellulitis resulted directly from the original injury. After a series of treatments, Gordon's wound began to improve under his care. Gordon was additionally diagnosed with scabies and was treated for this malady by Dr. Banet.

Because her symptoms were not resolving properly, Gordon was referred to University Radiological Associates for an x-ray examination which was conducted on June 10, 2008. The films were deemed as normal and a three-phase bone scan was recommended. Dr. Jules Barefoot interpreted the results of the bone scan as being consistent with complex regional pain syndrome (CPRS), also known as reflex sympathetic dystrophy (RSD).² Following his physical

² The condition currently known as CRPS was first described during the American Civil War and named causalgia. The disorder was renamed as RSD sometime in the early 1940's to reflect the then-current theories and understanding of the condition. Based on a better understanding of the underlying pathophysiology, the condition was renamed CRPS in 1993 with causalgia and RSD as subtypes of the disorder.

examination of Gordon, he diagnosed her with RSD, which he attributed to Gordon's work-related injury. Dr. Barefoot assigned Gordon a fifty-three percent whole-body impairment based on his diagnosis.

Dr. Richard DuBou, a hand surgeon and RSD expert, performed an independent medical examination (IME) of Gordon on October 7, 2008. Dr. DuBou disagreed with Dr. Barefoot's diagnosis, finding it was not supported by the objective criteria set forth in the American Medical Association's Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He found no radiographic evidence of RSD and likewise noted the absence of atrophy or osteoporosis in her left upper extremity, all of which he believed should be present to support a diagnosis of CPRS. However, because of Gordon's self-limited range of motion based on her pain complaints, Dr. DuBou assigned her a four percent whole-body impairment rating.

At a Benefit Review Conference, the parties stipulated to: coverage under the Workers' Compensation Act; existence of the employment relationship; existence of the injury; proper notice to the employer; payment of temporary total disability (TTD) benefits from September 11, 2007 to March 18, 2008; payment by the employer of certain medical expenses; Gordon's average weekly wage; Gordon had not returned to work; and personal information about Gordon including her birthdate and that she was a high school graduate with no specialized training. The contested issues were: whether Gordon suffered an "injury" as defined by the Act;

work-relatedness and causation of her injury; entitlement to additional TTD benefits; entitlement to medical benefits; extent and duration of Gordon's disability; and the application of any statutory multipliers.

Gordon testified by deposition and in person at the final hearing. She admitted to having suffered from skin conditions for which she had received treatment. However, she stated all of her prior issues had resolved in due time and none were active at the time of her injury on the job. She described how the injury occurred and stated that the following morning her arm was broken out in a rash. She stated she still suffered from the effects of the injury, including continued severe pain in her left arm, problems gripping or using the arm for any purpose, and continuing to require the use of pain medication. She stated her condition was not improving.

Medical records were introduced from Dr. Smith, Baptistworx, Dr. Fowler, University Radiological Associates, the Family Health Center,³ Dr. Banet, Dr. DuBou, and Dr. Barefoot. GSI argued the medical records indicated Gordon suffered from pre-existing cellulitis for which she had received regular treatments and that the August 31, 2007, injury was a minor incident which had resolved. Thus, GSI believed Gordon's injury was noncompensable.

On May 15, 2009, after reviewing the medical records, the lay testimony and observing Gordon's injury at the final hearing, the ALJ entered his

³ Gordon was treated for her prior skin conditions at the Family Health Center. GSI introduced these records for the purpose of proving Gordon's pre-existing conditions and prior diagnoses of cellulitis.

opinion and award finding Gordon had met her burden of proving she suffered from a work-related injury on August 31, 2007, which had developed into CRPS as diagnosed by Dr. Barefoot. The ALJ rejected GSI's argument regarding Gordon's pre-existing condition, specifically finding a lack of proof that she had an active, ongoing condition on the date of her injury. The ALJ awarded Gordon TTD benefits from September 1, 2007, through August 11, 2008, permanent partial disability (PPD) benefits for 520 weeks beginning on August 12, 2008, applied the three-times multiplier pursuant to KRS 342.730(1)(c)(1), and awarded medical benefits. GSI's petition for reconsideration of the award was denied. GSI appealed to the Board which affirmed the ALJ's award in a twenty-nine page opinion entered on November 6, 2009. This appeal followed.

GSI now contends Gordon failed to meet her burden of proof, the ALJ erred in failing to properly weigh and consider Gordon's prior, pre-existing conditions, and the Board erred in affirming the ALJ's award. After a careful review of the record, we affirm.

Our function when reviewing a decision made by the Board "is to correct the Board only where the the (sic) 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 Hospital v. Kelly*, 827 S.W.2d 685, 684-88 (Ky. 1992). Thus, the "standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law." *McNutt*

Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001)
(citing *American Beauty Homes v. Louisville & Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 457 (Ky. 1964)).

It is undisputed Gordon suffered a work-related injury to her left arm. It is also undisputed she had pre-existing cellulitis. No evidence was produced indicating her degenerative changes were symptomatic prior to her work-related injury, nor that the changes were impairment ratable immediately prior to the incident. “[T]he burden of proving the existence of a pre-existing condition falls upon the employer.” *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky. App. 2007) (citing *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984)). It is well-established that “where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury.” *McNutt Construction*, 40 S.W.3d at 859. If an impairment is both asymptomatic and not impairment ratable prior to the work-related injury, it is classified as a pre-existing dormant condition. *Finley*, 217 S.W.3d at 265. When such a condition “is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable.” *Id.* This has been the law of the Commonwealth since 1924. See *Robinson Petit Co. v. Workers’ Compensation Board*, 201 Ky. 719, 258 S.W.2d 318 (1924).

Our review of the record compels us to hold the Board was correct in finding GSI failed to prove Gordon's pre-existing condition was active and impairment ratable immediately prior to her August 31, 2007, work injury. As correctly noted by the Board, the ALJ has sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence, *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985), and the ALJ may believe part of the evidence and disbelieve other parts, whether the evidence comes from the same witness or the same parties' total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). We also agree with the Board that the ALJ's decision was supported by substantial evidence and thus was not in error. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). The mere fact that evidence was introduced that would support a conclusion contrary to that of the ALJ is insufficient to mandate reversal of an award. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974). GSI's argument to the contrary is without merit. Thus, we are unable to conclude the Board erred in affirming the ALJ.

Finally, GSI contends Dr. Barefoot was not provided with Gordon's complete medical history prior to diagnosing her with RSD and that he was unaware of her previous problems with contact dermatitis and cellulitis or the treatments she had received for these issues. Thus, citing *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004), GSI argues Gordon has failed to adequately prove a causal connection between her on-the-job injury and her ultimate diagnosis. We believe *Cepero* is inapposite to the case at bar.

In *Cepero*, an injured employee failed to disclose—and, in fact, actively concealed—a prior non-work-related knee injury which had left him confined to a wheelchair for nearly two months. The physicians upon whose testimony the ALJ relied were unaware and unable to otherwise discover the employee’s prior injury. All of the doctors who were adequately informed attributed Cepero’s disability to the non-work-related injury. In affirming the Board’s reversal of the ALJ on the issue of causation, our Supreme Court stated

where it is irrefutable that a physician’s history regarding work-related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician on the issue of causation cannot constitute substantial evidence. Medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable. Furthermore, to permit a ruling of law to stand based upon such evidence that is not reliable, probative and material would be fundamentally unjust.

Here, it is undisputed that Dr. Barefoot was unaware of Gordon’s prior history when making his diagnosis. However, GSI has failed to show that his diagnosis was infirm and causation was not proven because of the incomplete medical history. Rather, after being given an opportunity to view Gordon’s complete medical records relating to her prior treatments, Dr. Barefoot clearly and plainly testified that his medical opinion was unchanged. He noted that in each prior instance, Gordon’s condition had fully resolved in a relatively short time period and that she was asymptomatic on August 31, 2007. Further, as noted by

the ALJ and referenced by the Board, Gordon's failure to disclose her prior medical issues did not rise to the level of active concealment present in *Cepero*. Thus, the ALJ did not err in relying on Dr. Barefoot's diagnosis and the Board correctly found *Cepero* to be inapplicable as causation was adequately proven.

Therefore, for the foregoing reasons, the November 6, 2009, opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
TAMMY GORDON:

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