RENDERED: APRIL 1, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001362-WC

KELVIN CORPORATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-95291

ALEJANDRO NAVA-GARCIA; HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Kelvin Corporation petitions for review of an opinion and order of the Workers' Compensation Board affirming an Administrative Law Judge's (ALJ) finding that Kelvin had failed to prove an affirmative defense under

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

Kentucky Revised Statutes (KRS) 342.035(3). Kelvin asserts that its former employee, Alejandro Nava-Garcia, unreasonably refused to have additional surgery and was therefore not entitled to receive workers' compensation benefits based on a 12% impairment rating.

Alejandro Nava-Garcia was employed as a laborer for Kelvin, a cooperage company, unloading whiskey barrels which weigh approximately 150 pounds. On February 18, 2008, his right hand was crushed and the tip of the index finger amputated when some barrels rolled from a trailer and pinned his hand against another barrel. Nava-Garcia was immediately taken to Jewish Hospital in Louisville where Dr. Huey Tien, an orthopedic hand specialist, performed emergency surgery. Nava-Garcia underwent physical therapy following the surgery. He missed approximately sixteen days of work before returning to a one-handed position. On October 10, 2008, Dr. Tien released him to return to his regular job without any restrictions. Nava-Garcia was terminated from his employment in mid-January 2009 when Kelvin learned that he was an illegal immigrant.

Nava-Garcia continued to experience pain and limited finger flexion. He was last treated by Dr. Tien on December 5, 2008. Dr. Tien's notes stated that Nava-Garcia had some loss of grip strength and that he might need surgery in the future to improve his range of motion. Dr. Tien discussed the possibility of a second surgery with Nava-Garcia. He stated that if Nava-Garcia decided not to

have surgery, the assessment of a permanent impairment rating would be appropriate.

Nava-Garcia underwent an independent medical evaluation (IME) with Dr. Warren Bilkey on February 5, 2009. Dr. Bilkey stated that

> [t]oday's evaluation does not point to any further treatment need for Mr. Garcia. . . . It is pertinent however to point out that Dr. Tien has advised there may be future need for surgery to try to improve range of motion of the fingers. One cannot at this point in time project accurately when or the extent to which such health care services will be necessary.

Dr. Bilkey testified that there are risks associated with any surgery and that no physician could guarantee a 100% success rate. He stated that if the additional surgery was successful, it should decrease Nava-Garcia's current impairment rating. He further testified that, in reviewing Dr. Tien's notes, he did not find any statements specifically recommending another surgery.

Nava-Garcia also underwent an IME with Dr. Richard DuBou, a hand surgeon, on February 12, 2009. Dr. DuBou assigned Nava-Garcia a 12% whole person impairment rating. He recommended that Nava-Garcia should undergo a tenolysis and joint release of his middle and ring fingers. Dr. DuBou stated that the surgery was low risk and had the possibility of significantly improving Nava-Garcia's condition. Dr. DuBou opined that if the surgery was successful, it was likely to reduce Nava-Garcia's impairment rating to 8%.

A final hearing was held on April 9, 2009. Nava-Garcia testified that he did not want to undergo the surgery because no physician could guarantee that it will

resolve his remaining complaints. He also stated that Dr. Tien told him that, by and large, another surgery would be "useless" and would not necessarily result in his hand getting "any better."

The ALJ ruled in Nava-Garcia's favor, determining that the injury had resulted in a permanent partial disability rating of 12% under Kentucky Revised Statutes (KRS) 342.730(1)(b). The ALJ further found that Nava-Garcia lacked the physical capacity to return to the type of work he was performing at the time of the injury. Noting that Nava-Garcia has only a sixth-grade education, the ALJ ordered his award to be enhanced by the 3.4 multiplier under KRS 342.730(1)(c)1 and (c)(3).

Kelvin argued that the injury was not compensable under KRS 342.035(3) because Nava-Garcia unreasonably refused to have the additional surgery. The statutory provision states in pertinent part as follows:

> No compensation shall be payable for the death or disability of an employee if his or her death is caused, or if and insofar as his disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.

KRS 342.035(3). Kelvin argued that Nava-Garcia's award of benefits should be based on the 8% impairment rating he would likely have if he underwent the surgery successfully.

The ALJ rejected Kelvin's attempt to raise the affirmative defense and explained his reasoning as follows:

> The Administrative Law Judge notes that there are always risks associated with even the simplest surgeries and there is no guarantee of a successful outcome. Within this context, it is determined plaintiff has not unreasonably refused the recommended surgery because of the inherent risks coupled with the uncertainty of success.

Kelvin appealed this ruling to the Workers' Compensation Board, which held that the ALJ had not reviewed the facts under the appropriate standard and that "[a] wholesale application of the ALJ's reasoning would render the refusal of a surgical procedure, *pro facto*, reasonable." The Board outlined the elements necessary to establish an affirmative defense pursuant to KRS 342.035(3). The employer must show 1) that the claimant failed to follow medical advice; 2) the failure to follow the advice was unreasonable; and 3) whether such unreasonable behavior had in fact caused the disability. *Luttrell v. Cardinal Aluminum*, 909 S.W.2d 334, 336 (Ky.App. 1995). The Board remanded the matter to the ALJ for further findings and analysis in conformity with this standard.

On remand, the ALJ again ruled in Nava-Garcia's favor, finding that his refusal to have surgery was not unreasonable. The ALJ's opinion stated in pertinent part as follows:

> The record establishes that medical experts are in general agreement in favor of the additional hand surgery proposed by Dr. Tien, and they have opined it offers a reasonable prospect of relief of plaintiff's disability. . . . However, although Dr. DuBou and Dr. Bilkey indicated the proposed surgery is low risk, neither would go so far as to testify that it is free from danger to life and health, and there is no other medical opinion of record establishing the proposed surgery is free from danger to life and health, which is an essential element of the

> defendant's affirmative defense. . . . Given that there is no evidence that the proposed surgery is free from danger to plaintiff's life and health, and given plaintiff's own testimony that he is simply not comfortable undergoing a second surgery when the first one did not eliminate his pain, it is determined that the defendant has not carried its burden of proof on its affirmative defense as the Administrative Law Judge remains unconvinced the proposed surgery is wholly free from danger.

Kelvin again appealed the ALJ's decision to the Board. The Board ruled that, because the ALJ had applied the correct standard on remand, it was required to employ the highly deferential standard of review which is accorded to an ALJ's findings of fact. The Board concluded:

> Based on our review of the evidence, the ALJ was correct in his determination there is no direct medical testimony characterizing the second surgical procedure to be wholly "free from danger to life and health and extraordinary suffering." *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d at 336. While the ALJ might have reasonably inferred that finding from expert depictions of the proposed surgery as being relatively "low risk," given his wide ranging discretion to interpret the evidence as fact finder, we cannot say he was compelled to do so as a matter of law. Rather, in the absence of any direct testimony addressing the question, we believe the ALJ was free to reasonably reject the medical testimony downplaying the extent of the danger involved, thereby concluding Kelvin failed to satisfactorily prove an essential element of its affirmative defense as required pursuant to 342.035(3).

On appeal, Kelvin argues that the Board and the ALJ disregarded precedent which holds that the fact-finder cannot disregard expert medical opinions, in this case, that the surgery posed little risk; and that the Board committed an error

amounting to gross injustice by allowing the ALJ to reach a conclusion that contradicted his specific factual findings.

Our standard of review requires us to show deference to the rulings of the Board.

> The function of further review of the WCB in the Court of Appeals 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, 687-688 (Ky. 1992).

Kelvin argues that the ALJ's decision on remand cited no testimony nor made any factual findings from the medical evidence that the proposed surgery presented any special or unusual risk other than that normally associated with any surgical procedure. Consequently, Kelvin argues, the ALJ's second decision was basically the same as the first -- that because no surgery is ever risk free, the refusal of surgery can never be deemed an unreasonable failure to follow competent medical advice. Kelvin asserts that the potential damage to health and life must be greater than that inherent to any surgery.

We are unaware of any requirement that the proposed surgery must present a special or unusual risk in order to be deemed unreasonable. Our review of the caselaw shows that the Board's opinion, which was based on deference to the ALJ's role as the fact-finder and the absence of evidence regarding the possible dangers of the surgery, was well founded.

> The determination of whether the failure to follow medical advice is unreasonable is a question of fact for the ALJ. *Fordson Coal Co. v. Palko*, 282 Ky. 397, 138 S.W.2d 456 (1940). Refusal to submit to treatment is unreasonable if it "is free from danger to life and health and extraordinary suffering, and, according to the best medical or surgical opinion, offers a reasonable prospect of restoration or relief from the disability." *Id*.

Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334, 336 (Ky.App. 1995).

In Nava-Garcia's case, there was no direct medical testimony characterizing the surgery as "free from serious suffering or danger." *United Elec. Coal. Co. v. Adams*, 299 S.W.2d 246, 247 (Ky. 1956). Furthermore, as Nava-Garcia has pointed out, there was even some disagreement among the medical experts as to the extent of the proposed surgery, with Dr. DuBou recommending a more intensive procedure than that discussed by Dr. Tien.

"[A]n injured employee's refusal to submit to an operation is unreasonable if it appears the operation is of a simple character, not involving serious suffering or danger and will result in substantial physical improvement." *Id*. In this case, there was no consensus that the surgery would result in a substantial improvement. Dr. DuBou stated only that there was a "possibility" of significant improvement as a result of the surgery. Kelvin has stressed that before his termination, Nava-Garcia had returned to work at his regular job where his performance was "capable." Nor was there any medical evidence that the surgery was free from danger to life and health.

Under our deferential standard of review, we cannot say that the Board misconstrued the statutes or that its assessment of the evidence was so flagrant as to cause gross injustice.

Accordingly, we affirm the opinion of the Board.

CLAYTON, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KELLER, JUDGE, CONCURRING: I concur with the majority's well-reasoned opinion. However, I write separately to reiterate the evidence cited by the Board in its first opinion that:

> Dr. Tien limited his explanation for the recommended surgery to being that of a "possible option," the election of which was left solely within the discretion [of] his patient. While Dr. DuBou recommended that Nava-Garcia undergo additional surgery, he couched the entirety of his testimony in terms of the "possibility" of success and improvement. While Dr. Bilkey conceded that surgery would not be unreasonable, he likewise stated that based on the results of his evaluation Nava-Garcia was at maximum medical improvement, he saw no need for further treatment and he saw nothing in Dr. Tien's medical notes specifically recommending another surgery.

Faced with that medical evidence, Nava-Garcia's refusal to undergo additional surgery was not unreasonable. Therefore, the ALJ's opinion, although perhaps couched in other terms, is supported by evidence of substance and cannot be disturbed on appeal. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

BRIEF FOR APPELLANT:

C. Patrick Fulton
Louisville, Kentucky

BRIEF FOR APPELLEE:

Ched Jennings
Louisville, Kentucky