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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001645-WC

DALLAS NATIONAL INSURANCE COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-00698

JEFFREY BOARD; BRUCE STULL,
D/B/A J.B.T. TRUCKING; VANCE
TRUCKING COMPANY, INC; HON. JAMES L.
KERR, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Dallas National Insurance Company appeals from an opinion and order of the Workers' Compensation Board affirming the decision of the Administrative Law Judge (ALJ) awarding permanent total disability benefits

to Jeffrey Board and assessing sanctions pursuant to KRS 342.310. Dallas presents four issues: (1) whether Dallas provided insurance coverage to Bruce Stull, D/B/A J.B.T. Trucking (Stull), Board's employer; (2) whether Kentucky had jurisdiction over Board's claim; (3) whether Board was entitled to permanent total disability benefits; and (4) whether sanctions were appropriate. We conclude there was no error and affirm.

Board, a Kentucky resident, was born on October 11, 1963. After graduating high school, he obtained a CDL. His work history includes employment as a grocery stocker, general laborer, machine operator and truck driver. At the time of his work-related injury, Board had been employed by Stull for three years.

On January 13, 2010, Board was driving a tractor trailer hauling tobacco for Vance Trucking Company, Inc. from Glasgow, Kentucky, to North Carolina when the tractor trailer turned over into a ditch in North Carolina. Board was hospitalized in North Carolina where he underwent surgery on his right hand. Upon his return to Kentucky, Board was treated by Drs. William O'Neill and Harry Lockstadt of Bluegrass Orthopedics in Lexington.

Dr. O'Neill first examined Board on January 25, 2010, when he opined that as a result of his accident, Board suffered a fractured nose, facial lacerations, three broken ribs and three broken vertebra. He recommended a daily whirlpool and prescribed pain medication. On April 5, 2010, following surgery on Board's right hand, Dr. O'Neill referred him to physical therapy and instructed him

to exercise at home. Dr. O'Neill placed physical restrictions on Board and, on June 21, 2010, released Board to light duty work.

Dr. Lockstadt first treated Board on February 4, 2010. He noted probable compression fractures at T-8, T-9, T-10, and possibly T-11 and recommended surgery for a compression fracture at T-12. Dr. Lockstadt also noted that Board had multiple rib fractures. On February 24, 2010, Dr. Lockstadt performed back surgery on Board. Board was again seen on March 3, 2010, with good results. However, physical restrictions were placed on Board, including no use of his right hand and he was limited to occasional sitting, walking, bending, squatting, and stair climbing.

An independent medical evaluation was conducted by Dr. Warren Bilkey. He diagnosed Board with multiple rib fractures, fractures in his back and cervical strain. Additionally, he diagnosed multiple fractures in Board's right hand with residual contracture and sensory loss. Dr. Bilkey noted that facial lacerations and bilateral pulmonary contusions had been resolved. Dr. Bilkey opined that Board was at maximum medical improvement and, pursuant to the Fifth Edition of the AMA Guides, had a forty-eight percent whole person impairment. He restricted Board from repetitive bending, prolonged sitting, and instructed him to avoid situations where he is vibrated or jarred.

Dr. William Lester also performed an interdependent medical evaluation and diagnosed Board's physical conditions consistent with that made by Dr. Bilkey. However, he opined that Board would not reach maximum medical

improvement until he completed physical therapy and a work conditioning program. Dr. Lester assessed a forty-percent impairment pursuant to the AMA Guides.

Bruce Stull testified that his business is located in Waynesburg, Kentucky, and that he had a contract with Vance to haul tobacco from Kentucky to North Carolina. He testified that after contacted by Vance to provide trucking services, he would contact Board or another driver to deliver the load in a Stull truck. The driver would then pick up a tractor trailer from Stull's Kentucky business location and return it to that location after the assignment was completed.

Because Dallas denies its responsibility for workers' compensation coverage and Kentucky's jurisdiction over Board's claim, Stull and Vance's contractual relationship is pertinent. Pursuant to a "Contractor Operator Agreement" executed on November 10, 2009, Vance agreed to withhold payments due Stull to pay for workers' compensation insurance for Stull employees. The agreement further established that Stull employees would remain Stull employees and were not Vance employees. Appendix A to the contract indicated payments to Stull would be reduced for payment of the workers' compensation premium.

A certificate of insurance was issued by Dallas effective June 20, 2009, through June 20, 2010, providing coverage and listing Board as the insured. Board and other Stull employees were listed on invoices for workers' compensation insurance premiums for December 2009 and January 2010 paid by Vance to Dallas.

The standard for appellate review of a decision by a workers' compensation ALJ "is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009) (citing *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)). We review an award by the ALJ to determine whether the findings were reasonable under the evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). The ALJ is the fact finder and has the sole authority to determine the quality, character, and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citation omitted).

Despite the contractual provision and that Vance paid workers' compensation premiums to cover Board, Dallas maintains that it is not the insurance provider. The ALJ found to the contrary. In its order on petition for reconsideration, the ALJ found that at the time of Board's work-related accident, Stull was Vance's subcontractor and obtained workers' compensation insurance for Board with Dallas by its contract with Vance. The ALJ further found that Stull did not have a separate workers' compensation insurance policy covering Board. The Workers' Compensation Board affirmed.

Dallas contends that because Stull was Vance's subcontractor and Board was Stull's employee, it is not responsible for coverage. It relies on KRS 342.610 that provides that a contractor is responsible for payment of compensation

only if the subcontractor has not provided workers' compensation coverage for its employee. Dallas's contention is negated by the ALJ's specific finding that Stull did not have a separate insurance policy but had procured insurance through its contract with Vance. The Vance-Stull contract and related evidence presented demonstrate that Vance agreed to provide workers' compensation for Stull's drivers, obtained coverage with Dallas, and deducted the premium from payments due Stull. Following an extensive analysis of the factors set forth in *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965), the ALJ found that Board was Stull's employee and, therefore, Dallas was the responsible workers' compensation carrier.¹

Dallas points out that the Certificate of Insurance issued by a North Carolina agency recites that the holder is Vance, a North Carolina entity, and lists the insured as Board, a Kentucky resident, but does not specifically state that it is providing Kentucky workers' compensation coverage. Dallas ignores that the certificate plainly states that it is providing workers' compensation coverage for Board and does not limit coverage to any particular state. Moreover, although the contract between Vance and Stull states that its interpretation and performance shall be governed by North Carolina law, the choice of law provision does not refer to a workers' compensation injury.

¹ If Stull did not have coverage, as a contractor, Vance would be liable for payment of compensation to Stull's employee and, consequently, Dallas would be liable.

The next argument presented is equally unpersuasive: Did North Carolina have exclusive jurisdiction over Board's claim? Dallas argues that North Carolina had jurisdiction over the claim based on the choice of law provision in the Vance-Stull contract and KRS 342.670. We have previously discussed the fallacy of Dallas's reliance on the choice of law provision that does not refer to a workers' compensation injury.

KRS 342.670 provides that Kentucky has extraterritorial workers' compensation jurisdiction when, at the time of the injury, a person's employment is "principally localized" in Kentucky. A person's employment is principally located in this state when:

1. His or her employer has a place of business in this or the other state and he or she regularly works at or from that place of business, or
2. If subparagraph 1. foregoing is not applicable, he or she is domiciled and spends a substantial part of his or her working time in the service of his or her employer in this or the other state;

KRS 342.670(5)(d). The Board correctly noted that North Carolina may have been an appropriate forum for bringing the claim because the accident occurred in that state but it did not have exclusive jurisdiction. The ALJ properly considered the jurisdiction question and found that Stull maintains his business in Kentucky and Board worked from that location. There was no error.

We have concluded that the ALJ properly found that Dallas was the responsible insurance carrier and Kentucky had jurisdiction over Board's claim.

Two issues remain.

Dallas contends that the ALJ erred in determining that Board was permanently and totally disabled because there was no medical opinion that he is totally disabled. Again, we find its assertion meritless.

The ALJ properly considered the medical opinion, the restrictions imposed on Board's physical activities, his age, and education and work experience. It was within the ALJ's discretion to choose which evidence to believe. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). Because the ALJ's finding is supported by substantial evidence, it cannot be disturbed.

The final issue is whether the ALJ erred in assessing sanctions against Dallas for not paying temporary total disability benefits. KRS 342.310(1) provides:

If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted, or defended them.

The imposition of sanctions is permissive and solely within the ALJ's discretion. The ALJ's decision will not be reversed unless grossly unfair or unreasonable under the evidence. *Peabody Coal Co. v. Goforth*, 857 S.W.2d 167, 170 (Ky. 1993).

Although Dallas began paying medical benefits in March 2010, Dallas did not pay Board temporary total disability benefits. Bruce Stull testified that he was contacted by Dallas soon after the accident and provided Board's wage records. However, even after it was made a party to Board's workers' compensation claim in June 2010 and provided notice of the benefit review conference held on November 5, 2010, Dallas did not pay income benefits to Board and did not appear in the action to assert any defense to payment until after the ALJ's opinion and award. Under the circumstances, the ALJ did not abuse its discretion.

Based on the foregoing, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carl Grayson
Edgewood, Kentucky

BRIEF FOR APPELLEE, JEFFREY
BOARD:

Mark D. Knight
Somerset, Kentucky

BRIEF FOR APPELLEE, BRUCE
STULL:

Mark J. Hinkel
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