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TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-001059-WC

MEUTH CONCRETE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-11-0079

DEREK KINDLE; HON. JOSEPH W. JUSTICE,  
Administrative Law Judge; and WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

COMBS, JUDGE: Meuth Concrete petitions for review of an opinion of the  
Workers' Compensation Board that vacated and remanded the decision of the  
Administrative Law Judge (ALJ). The ALJ had dismissed a claim filed by Derek

Kindle. Meuth Concrete contends that the Board erred when it concluded that the ALJ failed to make sufficient findings of fact and to account properly for rejecting the opinion of a university evaluator with respect to causation. We disagree with both contentions. Therefore, we affirm the Board's decision remanding the claim for additional consideration.

In 2008, Kindle began driving a six-axle, concrete truck for Meuth Concrete. In a deposition taken on April 13, 2011, Kindle testified that he was pulling a poured-concrete septic tank from its form on November 23, 2009, when he fell on his back from the bed of the truck upon which he was standing. Kindle said that his right leg was pinned between the septic tank and the frame of the truck and that his left leg was pinned beneath his body. His right knee was fractured. He sought immediate treatment from an urgent care center. After treatment, he was able to walk with crutches; he received physical therapy for four weeks. Kindle was paid temporary, total disability benefits until December 27, 2009.

After Kindle returned to work, he began to suffer with extreme shortness of breath and numbness in his left leg. As a result of the injuries he sustained on November 23, 2009, his doctors told Kindle in February 2010 that he had developed pulmonary emboli (blood clots in his lungs). A filter was implanted in Kindle's right leg to intercept some of the blood clots, and he underwent a pulmonary thromboendarterectomy on September 3, 2010, at the University of California, San Diego. Although Kindle was unable to return to work after he

became aware of the pulmonary emboli, Meuth Concrete denied his request for temporary, total disability and medical benefits.

On January 19, 2011, Kindle filed an Application for Resolution of Injury Claim and a separate Application for Resolution of Occupational Disease Claim. Kindle indicated that he had suffered an injury to his right lower extremity as a result of a fall at work and that he had been diagnosed with chronic thromboembolic pulmonary hypertension and pulmonary embolism. He explained that he suffered with chronic coagulation issues for which he had received medical treatment in Nashville, San Diego, and Philadelphia. The Department of Workers' Claims scheduled a university evaluation for February 25, 2011.

On April 6, 2011, Meuth Concrete requested that Kindle's occupational disease claim be dismissed. Meuth Concrete argued that Kindle's vascular conditions were alleged to have resulted from the work injury sustained on November 23, 2009, and not from a hazardous occupational exposure. Meuth Concrete also contested the compensability of the pulmonary emboli, arguing that they did not develop as the result of the right lower extremity injury described in the Application for Resolution of Injury Claim but rather from a left lower extremity condition.

The university evaluation report was filed on April 15, 2011. Meuth Concrete raised no objection. In the report, university evaluator, Dr. Rafael Perez, indicated that Kindle had been diagnosed with pulmonary thromboembolism.

With respect to causation, Dr. Perez noted as follows:

On the basis of my interview, examination, and review of outside records and studies, my conclusion is that Mr. Kindle had chronic thromboembolic disease developing before the event of November 23, 2009. The disease burden was low and impairment was minimal allowing him to continue his occupational and other physical activities satisfactorily. Following the event of November 23, 2009, Mr. Kindle had a dramatic decrease in his abilities to perform any physical activity as demonstrated by his symptoms and the objective studies noted above. I conclude that the injury sustained on November 23, 2009 increased the amount of thrombus, or blood clots, in the injured extremities in an individual predisposed to this problem due to his popliteal venous aneurysm. A series of thromboembolic events to the lungs was sufficient to produce the severe pulmonary hypertension found after the injury.

Dr. Perez concluded that Kindle had injured both legs in the work-related accident and that, as a result, he no longer had the respiratory capability to perform work requiring physical activity. Dr. Perez assigned a 90% whole person impairment to Kindle.

On April 18, 2011, Kindle filed a motion to amend his Application for Resolution of Injury Claim and Application for Resolution of Occupational Disease Claim. He sought to include as part of his claim the injury to his left leg, which contributed to the pulmonary hypertension, pulmonary embolism, and chronic coagulation issues.

Kindle submitted to an independent medical evaluation conducted by Dr. Bruce Broudy on April 29, 2011. Dr. Broudy was convinced that a thrombosed left popliteal aneurysm was the source of Kindle's pulmonary emboli. However, he did not believe that the aneurysm was caused by the work-related injury of

November 23, 2009. During his deposition, Broudy explained that the aneurysm was likely of longstanding duration and may even have been congenital. Dr. Broudy acknowledged that the aneurysm may have been the result of a traumatic injury or infection. However, he said that there was no evidence to indicate that it had begun during the time period involving the medical records that he had reviewed. Dr. Broudy was asked about the significance of Kindle's apparent failure to report an injury to his left lower extremity immediately following his fall at work. He explained as follows:

Well, injuries to the lower extremities can cause damage to the vessels and result in clot formation. In this case there was injury to the right lower extremity but no reported injury or evidence of injury to the left lower extremity, yet the venogram showed that the clot was in the left lower extremity and the right lower extremity did not have a clot. Therefore it appeared that there was no relationship between the injury and subsequent clot formation.

On cross-examination, Dr. Broudy indicated that it was entirely possible that because Kindle's right leg injury was initially more painful than the left leg injury, the left leg injury had not been considered or addressed in the earliest medical reports. Dr. Broudy also admitted that an extreme contortion could have resulted in the vessel's being damaged in Kindle's left leg. Finally, Dr. Broudy recounted that pulmonary embolism cases requiring thromboendarterectomy are exceedingly rare and that he had seen them only a couple of times over the course of his extensive career.

After analyzing the evidence, the ALJ succinctly concluded that the issue central to the claim was “whether the fall precipitated the thrombosis from the aneurism in the left leg.” Opinion and Order at 3-4. The ALJ noted that “[t]he two physicians that weighed in on this issue are Drs. Perez and Broudy.” *Id.* at 4.

With respect to Dr. Perez, the ALJ found that his appointment as university evaluator had been erroneous since the claim should not have been pursued as an occupational disease claim but as an injury claim instead. Consequently, the ALJ determined that Dr. Perez’s report was not entitled to presumptive weight under the statutory directive. The ALJ noted that he was “not persuaded by either physician as to causation of the pulmonary emboli emanating from the aneurysm.” Opinion and Order at 13.

Furthermore, the ALJ found that Dr. Perez’s opinion and assessment had been “influenced by the incorrect history given him by [Kindle].” Opinion and Order at 12. The ALJ explained as follows:

The history given him was that [Kindle] was experiencing severe dyspnea [shortness of breath] in December, 2009, the exact date not being mentioned. If [Kindle] sustained an injury in a fall and almost immediately began experiencing symptoms of pulmonary emboli from a pre-existing aneurysm, the ALJ probably could infer causation from the fall. The number one factor mentioned by Dr. Perez in his assessment of causation (sic) that [Kindle’s] dyspnea symptoms “occurred only after the injury.” The evidence seems clear that it was February 22, [2010] when he began experiencing breathing symptoms, two months following the injury.

It being the consensus that the emboli came from the pre-existing aneurysm in the left knee, [Kindle] then moved to amend his claim to allege an injury to the left lower extremity, even though there was no history given to any treating physician of any injury to the left leg. Dr. Perez stated [Kindle] had a pre-existing chronic thromboembolic process in March 2007 and sometime in 2008. Dr. Perez's report and conclusion of causation was flawed by the inaccurate history of when the dyspnea began following the fall.

Opinion and Order at 13. The ALJ dismissed the claim.

Kindle's petition for reconsideration focused on the opinion of Dr. Perez. Kindle argued that Dr. Perez's opinion was based upon a complete and accurate medical history and that it was entitled to presumptive weight. The ALJ denied the petition. On appeal, the Workers' Compensation Board vacated the ALJ's decision and remanded for further consideration.

The ALJ has the sole discretion to determine the quality, character, and substance of the evidence and 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 party's proof. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). If the party with the burden of proof and risk of persuasion is unsuccessful before the ALJ, the question on appeal is whether the evidence was so overwhelming as to have compelled a finding in his favor. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). The Board is charged with deciding whether the ALJ's finding "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." *Ira A. Watson Department Store*

*v. Hamilton*, 34 S.W.3d 48 (Ky. 2000); KRS 342.285. When reviewing the Board's decision, we reverse *only where it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992).

In this case, the Board carefully evaluated the evidence and considered the controlling law. The Board noted that Dr. Perez had specifically determined that Kindle's medical condition was causally related to his work environment and further explained as follows:

[T]he ALJ's authority is not without certain limits. Concerning the content of his opinion, the ALJ is required to render findings of fact sufficient to apprise the parties of the basis for his decision and to permit informed review of that decision on appeal. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky.App. 1982). The parties are entitled to reasonable assurance that the ALJ's decision was a product of a thorough and accurate understanding of the evidence. Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985). *See also* KRS 342.275.

The Board concluded that the ALJ had failed to render adequate findings of fact since he failed to state whether he was persuaded that the work-related injury resulted in any physical trauma to Kindle's *left* leg. The Board believed that this issue was critical since Dr. Broudy did not believe that the emboli were connected to the work-related accident because Kindle did not report any left leg complaints in the contemporaneous medical reports.

The Board also concluded that the ALJ misunderstood the evidence regarding whether Kindle's condition arose from the work injury, explaining as follows:

It appears the ALJ believed that, if the work incident was involved in accelerating the release of emboli from the site of the aneurysm, the effect should have been immediate. In determining Dr. Perez received inaccurate history, the ALJ also appears to interpret Dr. Perez'[s] statement that, following the event of November 23, 2009, there was a "dramatic decrease" in Kindle's ability to perform activities as meaning immediately following the incident. Dr. Perez actually stated there was "a dramatic decrease in his ability to perform any physical activity as demonstrated by his symptoms and the objective studies noted above." The studies referred to include those done in February 2010.

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[T]he ALJ also stated "[t]he number one factor mentioned by Dr. Perez in his assessment of causation [is] that [Kindle's] dyspnea symptoms 'occurred only after the injury.'" It is clear from Dr. Perez'[s] report he believed Kindle had an ongoing process prior to the work incident and that process was accelerated by the work injury. Dr. Perez actually stated the debilitating symptoms and high pulmonary arterial pressures occurred only after the injury. It was the increased clot burden after the date of injury that produced severe symptoms. . . . The clear import of his report is that the work injury involved the left leg, accelerating the thromboembolic process culminating in severe problems in February, 2010 when the debilitating symptoms arose and objective studies confirmed the condition.

Opinion at 27- 29.

Finally, the Board determined that since Dr. Perez, a university evaluator, provided the opinion, the opinion was entitled to presumptive weight. On remand,

the Board directed the ALJ to render findings of fact “sufficient to apprise the parties of the basis for his decision and to permit informed review of that decision on appeal.” Opinion at 31.

In its petition for review, Meuth Concrete contends that the Board erred by concluding that the ALJ failed to make sufficient findings of fact adequately supported by the evidence and that his rejection of Dr. Perez’s opinion with respect to causation was improper. It also argues that the Board erred by concluding that Dr. Perez’s opinion had to be rebutted by clear and convincing evidence.

Kindle concedes in his brief that the Board was incorrect in stating that the university evaluation report had to be rebutted by “clear and convincing evidence.” Aware of this concession, we nonetheless believe that this statement alone has no bearing upon our disposition of the appeal. Therefore, we decline to discuss that issue further. Instead, we shall analyze whether the Board erred by concluding that the ALJ’s opinion and order were deficient.

Recently, in *Arnold v. Toyota Motor Mfg.*, 375 S.W.3d 56 (Ky. 2012), 2012 WL 3632439, the Supreme Court of Kentucky carefully considered the content and posture of the opinion of an ALJ in a workers’ compensation claim. After outlining the statutory and regulatory changes governing the issuance of opinions in workers’ compensation cases, the Court concluded that the provisions of Kentucky Revised Statutes (KRS) 342.275(2) and KRS 342.285 “contemplate an opinion that summarizes the conflicting evidence concerning disputed facts; weighs that evidence to make findings of fact; and determines the legal

significance of those findings.” *Id.* at 61-2. Further, the Court observed as

follows:

Only when an opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ’s finding does it enable the Board and reviewing courts to determine in the summary manner contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable.

*Id.* at 62.

Applying those principles to the order and opinion issued in this case, we note that the parties stipulated that Kindle had suffered a work-related injury to his right leg as a result of his fall in November 2009. Whether he had sustained a work-related injury to his lower left extremity remained a contested issue, and resolution of that issue was central to a proper resolution of Kindle’s claim.

Evidence concerning this issue was conflicting, and, as the Board noted, the ALJ’s summary of the evidence was inaccurate in part. While the ALJ found it compelling that Kindle had failed to give to any treating physician a history of injury to his left leg, the ALJ noted in a preceding paragraph that Kindle had given that very information to a treating physician:

In fairness to Plaintiff [Kindle], he did later give a history to one of his treating physicians that he had hurt his left leg in the fall. It was not sufficient enough for him to mention or seek treatment for.

Opinion and Order at 10. Furthermore, in his summary of the evidence, the ALJ did not mention Dr. Broudy’s explanation as to why an injury to Kindle’s left leg might not have been immediately reported and that failure to report it immediately

would not have necessarily meant that he had not in fact sustained injury to his left leg.

As to his finding on causation, the Board further noted that the ALJ's opinion did not provide an evidentiary basis sufficient to enable a reviewing body to determine whether the finding was supported by substantial evidence and whether it was reasonable. We agree.

The evaluating doctors expressed their belief that injuries to the lower extremities could have caused damage to the blood vessels and resulted in disabling clot formation. Consequently, they based their opinions as to causation upon whether Kindle also suffered a left leg injury as a result of his accident in late November 2009. On the other hand, the ALJ focused his finding as to causation upon whether Kindle began to suffer with dyspnea (extreme shortness of breath) immediately after the fall from his work truck.

However, as Dr. Perez explained in his report, the clot burden began to increase in Kindle's body after the date of injury and produced severe symptoms that indicated an accelerating thromboembolic process by February of 2010. Dr. Perez did not indicate that Kindle would have begun to suffer with extreme shortness of breath immediately following a trauma causing the thromboembolic process to accelerate. The causal relationship between Kindle's work-related injuries and his aneurysm and pulmonary embolism was not readily apparent to a layman. Since we cannot determine whether the ALJ's opinion and order were based upon some evidence not summarized or upon a misunderstanding of the

evidence that was summarized, we cannot establish that the ALJ's findings were supported by substantial evidence and that they were, therefore, reasonable.

Finally, we agree with the Board that the ALJ failed to give a reasonable basis for disregarding the clinical findings and opinion of Dr. Perez.

The ALJ concluded that Dr. Perez's report and conclusion of causation was flawed by the inaccurate history given by Kindle of when the dyspnea began following his fall. As a result of what he perceived to be an inaccurate history, the ALJ concluded that he could not be persuaded by Dr. Perez as to the causation of the pulmonary emboli.

Again, it is not clear from the ALJ's opinion and order that his findings of fact were based upon a correct understanding of the record. There is simply no indication from the record that Dr. Perez's opinion was flawed by an inaccurate history given to him by Kindle. Moreover, as discussed above, there is no indication that the onset of dyspnea was critical to Dr. Perez's determination with respect to causation. In light of the ALJ's incorrect summary of the evidence, we hold that the Board did not err by concluding that it could not adequately review the findings of fact to determine whether they were supported by substantial evidence and that they were reasonable.

The Board did not err by concluding that the ALJ failed to make sufficient findings of fact adequately supported by the evidence. Nor did it err in determining that adequate evidence did not properly support the ALJ's rejection of Dr. Perez's opinion with respect to causation. The Board did not overlook or

misconstrue controlling law, nor did it so flagrantly err in evaluating the evidence that it caused gross injustice by remanding this claim to the ALJ.

We affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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