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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001838-WC

REM COMPANY INC., D/B/A ARTICLEAN

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-74810

ROBERT CUMMINS; HON. R. SCOTT
BORDERS, ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS AND MAZE, JUDGES.

ACREE, CHIEF JUDGE: We must determine if the Workers' Compensation Board correctly affirmed an Administrative Law Judge's (ALJ) decision not to apply the direct and natural consequences rule. We affirm.

Appellee Robert Cummins worked for Appellant REM Company, Inc. from 2008 until 2011. His job duties involved building, fabricating, and eventually installing ozone units at various businesses throughout the United States. Extensive travel was an integral and expected part of his job.

In 2004, prior to his employment at REM, Cummins was hit in the back and developed a bone spur. Dr. Timothy Kriss performed a two-level, left-sided, unilateral L4-L5 and L5-S1 discectomy surgery. Cummins returned to work with no restrictions and no significant symptoms.

Six years later, in 2009, Cummins sustained a work-related injury to the same region of his back. He was diagnosed with a right-sided, L4-L5 disc herniation. Neurosurgeon James Bean performed surgery in February 2010. Cummins returned to work two months later with no restrictions, no medications, and no symptoms. He entered into a settlement agreement with REM that provided for a lump sum payment for waiver of his right to future medical benefits.

A third injury to his back occurred in June 2011. Cummins and a co-worker embarked on a month-long trip to install ozone units first in Nevada and later California. While on the road, their trailer loaded with units shifted unexpectedly. When Cummins pulled on a unit to reposition it on the trailer, he felt pain in his low back. The pain worsened as the days went by. Cummins was travelling thirteen to fourteen hours per day, was unable to drive, and often had to recline his seat to obtain some measure of relief. Cummins's pain intensified while

installing units in California. Cummins described the pain as in his low back and like a knife stabbing him in the left buttocks. It radiated down his left leg and was extremely painful when he coughed. Cummins eventually made his way back to Kentucky and sought medical attention. He was given a shot at a local hospital that provided no relief. Cummins then scheduled an appointment with Dr. Bean for August 2011. Dr. Bean evaluated Cummins, recommended surgery, and advised Cummins to refrain from working.

On November 16, 2011, Cummins filed a Form 101 Application for Resolution of Injury Claim for the injury to his back, and requested preapproval for the surgery recommended by Dr. Bean. The ALJ bifurcated the claim to first determine: whether Cummins had suffered an injury as defined by the Workers' Compensation Act; causation; and the compensability of the proposed surgery. Cummins testified his back condition is deteriorating, he has difficulty sitting, standing, or walking, and the pain is, at times, unbearable. He described the events leading up to his injury as set forth above.

REM submitted a peer review report from Dr. Daniel Agnew. Dr. Agnew found no mechanism of injury to suggest that Cummins's spine was somehow damaged in June of 2011. He thought Cummins's recurrent disc herniation was related to and was a well-recognized complication of his 2009 injury and surgery.

At REM's request, neurosurgeon Timothy Kriss evaluated Cummins on May 7, 2012, and reviewed Cummins's medical history. Dr. Kriss found Cummins now has two levels of recurrent disc herniation on the left at both L4-L5 and L5-S1, causing nerve root compression in one or both levels and causing left L5 and/or left S1 lumbar radiculopathy. The doctor discussed causation at length, but ultimately concluded Cummins's condition was work-related if his account of how the injury occurred is factually accurate.

Dr. Bean testified by way of deposition. He diagnosed Cummins with a left-sided herniated disc, L4-L5. The doctor was fully aware of Cummins's prior surgeries and history of back maladies. Dr. Bean admitted that prior injuries and surgeries weaken the spine at that point and make it more susceptible to another injury. However, Dr. Bean made clear that, in his opinion, Cummins sustained a new work-related injury in June 2011, and Cummins's condition and need for surgery were solely attributable to that injury.

The ALJ awarded interlocutory relief by order entered July 5, 2012. The ALJ found Cummins sustained a work-related injury – a re-herniated disc in his lumbar spine – which resulted “from lifting the ozone units in June of 2011 while on [the] trip to California.” (R. at 332). The ALJ stated further: “Riding in the vehicle for thirteen to fourteen hours thereafter may well have intensified his pain, but this in and of itself was not the cause of it.” (*Id.* at 332-33). The ALJ was persuaded by the opinion of Dr. Bean coupled with Cummins's credible testimony.

The ALJ placed the claim in abeyance until Cummins reached maximum medical improvement following surgery. Dr. Bean performed a posterior lumbar interbody fusion with pedicle screw fixation at the L4-L5 level on September 29, 2012. The matter then came back before the ALJ for a determination of whether Cummins was entitled to permanent partial disability and other benefits. At the final hearing, Cummins again testified as to the circumstances causing his injury in June 2011. His testimony tracked and was consistent with his prior testimony. Cummins also testified that his recent surgery went well and his pain had subsided considerably.

REM submitted a new report proffered by Dr. Kriss. The doctor altered his causation opinion, concluding the most medically accurate and likely conclusion was that Cummins's back condition was not a result of any work-related injury in June 2011, but a consequence of his past medical history, a highly vulnerable L4-L5 disc, and naturally occurring progressive degenerative processes. Additional lay testimony was also offered regarding Cummins's activities while on the 2011 work trip. Ultimately, the ALJ declined to reconsider work-relatedness and causation, finding no new evidence which would change his previous findings and opinion.

REM filed a petition for reconsideration, arguing the ALJ failed to consider the direct and natural consequences rule. The ALJ addressed REM's reconsideration petition in an order entered on June 9, 2014. The ALJ explained:

The [ALJ] acknowledges the fact that Dr. Kriss changed his opinion in regards to the issue of causation but does not find his testimony persuasive. In fact, it appears Dr. Kriss based his opinion on the lay witnesses presented by [REM] whose testimony the [ALJ] found to be inconsistent and not credible. The [ALJ] has found [Cummins's] story of how he injured himself to have been consistent throughout his deposition testimony and his hearing testimony presented in front of the undersigned ALJ on two separate occasions.

In addition, the [ALJ] has reviewed Dr. Bean's testimony once again and believes that his testimony was sufficient to enable [Cummins] to meet his burden of proving that he suffered an injury as defined by the Act sufficient enough to entitle him to permanent partial disability benefits. Dr. Bean clearly believes that the incident at work necessitated the need for his most recent surgeries and resulted in his current disability. While Dr. Bean acknowledged that [Cummins] had some prior active back problems he did not attribute his current condition to that pre-existing active condition.

(R. at 702-03).

REM appealed to the Board, arguing the facts of this case represent a textbook case for application of the direct and natural consequences rule, yet the ALJ repeatedly refused to consider the doctrine.

Neither was the Board convinced. After discussing the workings of the direct and natural consequences rule, the Board found:

To the extent REM argues the ALJ did not adequately address its argument based on the "direct and natural consequences rule", we disagree. In the June 9, 2014 Order on Reconsideration, the ALJ specifically acknowledged this argument and reiterated his belief that a new work injury had occurred, and his reliance on Dr.

Bean's opinion for this finding. In determining a distinct injury occurred, the ALJ implicitly rejected the argument that Cummins' condition flowed directly from the 2009 injury. Upon review of the ALJ's interlocutory and final orders in this case, we are convinced he completely grasped REM's theory of the case and rejected it. Furthermore, he sufficiently stated his reasoning and the evidence upon which he relied in reaching this conclusion.

(R. at 805-06). Unhappy with the Board's decision, REM appealed to this Court.

Our task when reviewing a decision of the Board "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). The ALJ, not the Board, is empowered "to determine the quality, character and substance of the evidence." *American Greetings Corp. v. Bunch*, 331 S.W.3d 600, 602 (Ky. 2010) (footnote omitted). The ALJ is free to reject testimony, *id.*, and "to believe part of the evidence and disbelieve other parts of the evidence[.]" *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Neither the Board nor this Court shall ever substitute its judgment for that of the ALJ "as to the weight of evidence on questions of fact." KRS¹ 342.285(2); *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 316 (Ky. 2007). We review *de novo* questions of law. *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009).

¹ Kentucky Revised Statutes.

REM contends the direct and natural consequences rule precludes an award of workers' compensation benefits because Cummins's 2011 injury was the direct and natural consequence of his prior injuries in 2004 and 2009. It argues that Cummins's "original 2004 and 2009 work-related injuries, and prior surgeries caused [Cummins] disc at L4/5 to be more susceptible to injury." (Appellant's Brief at 7). Consequently, so goes the argument, Cummins's 2011 injury must be a "direct and natural consequence" of his prior injuries, and his 2011 claim should be barred as a matter of law. REM's interpretation of the rule is misguided.

The direct and natural consequences rule addresses whether compensability should be extended to a subsequent injury or aggravation related in some way to a prior work-related injury. *See Addington Res., Inc. v. Perkins*, 947 S.W.2d 421, 423 (Ky. App. 1997). "The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is *compensable* if it is the direct and natural result of a compensable primary injury." *Id.* (citation omitted) (emphasis added). "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment[]" and is compensable. 1 Larson's Workers' Compensation Law § 10 (2004).

Addington is the seminal case in Kentucky discussing the direct and natural consequences rule. 947 S.W.2d at 423. In *Addington*, the claimant suffered a work-related back injury in 1990 and underwent surgery. Five years

later, after a normal recuperation period, the claimant suffered a non-work-related back injury. This Court affirmed the ALJ's conclusion that medical expenses incurred as a result of the second injury were related to the first injury. *Id.* Vital to our decision was medical evidence suggesting that the initial work-related injury caused the claimant's back to be more susceptible to injury. *Id.* Consequently, the second, non-work-related injury was the "direct and natural result of" the compensable 1990 injury and was, therefore, *compensable*.

At its core, the doctrine bridges the causation gap of work-relatedness. The rule's underlying premise is that "the initial injury is the cause of all that follows." *Anderson v. Westfield Group*, 259 S.W.3d 690, 696 (Tenn. 2008). Stated another way, the direct and natural consequences rule declares a subsequent injury *compensable*, not barred, despite its possible lack of a connection to a work event, if the original compensable injury caused the part of the body that was later injured to be more susceptible to injury. *Addington*, 947 S.W.2d at 423.

REM seeks to turn the doctrine on its head. Under its interpretation, a prior compensable injury that makes a body part more susceptible to injury renders a subsequent injury to that same body part, even if the injury is work-related, *non-compensable*. This reading of the rule is entirely inconsistent with precedent.

In any event, the ALJ found, as a matter of fact, that Cummins's 2011 injury did not flow from and was in no way related to his prior surgeries or injuries. Instead, this was a new, work-related injury. The ALJ findings are firmly

supported by Dr. Bean's medical testimony and Cummins's lay testimony.

Consequently, based on the facts as found by the ALJ, we find, as a matter of law, that the "direct and natural consequences" rule has no applicability to this case.

We affirm the October 10, 2014 Opinion of the Workers' Compensation Board.

ALL CONCUR.

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