Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 4, 2016

CLAIM NO. 201301973

AMAR GUEYE PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

FLEET STAFF INC.
DHL EXPRESS INC.
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Amar Gueye ("Gueye"), *pro se*, appeals from the March 5, 2014, March 14, 2014, August 6, 2014 and September 1, 2015 orders rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"). The first order dismissed DHL Express, Inc. ("DHL") as a defendant. The second order bifurcated the claim on threshold issues of

causation/work-relatedness, course and scope of employment, and notice. The third order cancelled a Benefit Review Conference ("BRC") after Gueye's appeal to this Board. The fourth order dismissed Gueye's claim due to failure to file medical evidence of a work-related injury or of a permanent impairment. For the reasons set forth herein, we affirm.

Gueye filed his claim on December 20, 2013 against Fleet Staffing ("Fleet") and DHL for alleged back and right wrist injuries. No injury date was noted in the Form 101. The ALJ entered an order dismissing DHL as a party on March 5, 2014. Upon motion by Fleet, the claim was bifurcated regarding the issues of causation, course and scope of employment, and notice. On March 21, 2014, Fleet filed a renewed motion to dismiss on the grounds Gueye attached no medical report or documentation with the Form 101, and submitted no evidence within his proof time. A BRC scheduled for August 12, 2014 was cancelled after Gueye filed an appeal on August 4, 2014. In an October 17, 2014 Opinion and Order Dismissing, this Board concluded Gueye's appeal was not from a final and appealable order and remanded.

On remand, Fleet moved to reset the BRC. Gueye filed a response, objecting to any BRC and indicating his intent to prosecute his case in federal court. The ALJ

placed the claim in abeyance for 60 days by order dated December 15, 2014, after which the parties were ordered to submit status reports.

On August 17, 2015, Fleet filed a motion to remove the claim from abeyance and a renewed motion to dismiss or, in the alternative, a renewed motion for BRC.

On September 1, 2015, the ALJ issued an order removing the claim from abeyance. By separate order that same day, the ALJ granted Fleet's renewed motion to dismiss, noting Gueye failed to introduce any medical evidence showing a work-related injury or to support a finding of permanent impairment within the allotted proof time.

On appeal, Gueye argues the ALJ failed to conduct a timely BRC and improperly dismissed the claim. He alleges his doctor timely filed a medical record with the Department of Workers' Claims, and he complains of various delays in reporting his injury and the processing of his claim. Further, he maintains that he did inform DHL's supervisor of his injury before his termination and that he called Fleet the next morning to report the injury. In his response to Fleet's brief, Gueye states "The main question in this case is the employers' failure to timely and transparently process Petitioner's claim with impunity."

Gueye alleges he was the victim of wrongful discharge after reporting his injury.

As the claimant, Gueye bore the burden of proof and the risk of non-persuasion on all elements of his claim. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). As a threshold requirement, Gueye had the burden to produce medical evidence that he sustained a harmful change to the human organism caused by his work and evidenced by objective medical findings. KRS 342.0011(1). The record is devoid of any evidence supporting a finding Gueye established causation through medical opinion filed pursuant to 803 KAR 25:010. To apply for resolution of an injury claim, 803 KAR 25.010 §5(1) mandates a completed Form 101. The regulation requires:

> (1) To apply for resolution of an injury claim, the applicant **shall** file Form 101 with the following completed documents . . .
>
> (d) **One (1) medical report**, which may consist of legible, hand-written notes of the treating physician, and **which shall include** the following:
>
> 1. A description of the injury which is the basis of the claim;
>
> 2. A **medical opinion establishing a causal relationship between the work-related events or the medical condition which is the subject of the claim**;
> (emphasis added)

When the cause of a condition is not readily apparent to the lay person, medical testimony supporting causation is required. Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980).

In this instance, Gueye filed an incomplete Form 101 on December 20, 2013.[1] In it, he failed to state the date of his alleged injury and did not file a medical report or records providing a description of his injury and establishing a causal relationship. Although records of Dr. Pete Haggenjos documenting chiropractic treatment from September 30, 2013 through February 28, 2014 appear in the record, (marked as received by the Commissioner of the Department of Workers' Claims on April 28, 2014 and entered in the claim that same date) the filing is defective in that no notice was given pursuant to 803 KAR 25:010. Further, the records are not signed, nor is there an

[1] Gueye's initial submission was returned to him. Although still deficient, his Form 101 was accepted on December 20, 2013.

affidavit verifying the authenticity of the report as required by the regulation.

Even if we assume Dr. Haggenjos' records were properly placed into evidence, he does not offer an opinion as to causation of the condition. The mere fact Gueye provided Dr. Haggenjos with a history of a work injury does not equate with the doctor expressing an opinion as to causation. Dr. Haggenjos did not address Gueye's prior treatment and it does not appear he was provided with a history of the November 2012 injury. Thus, it is not clear Dr. Haggenjos was aware of Gueye's recent chiropractic treatment for his back from November, 2012 through January 16, 2013. Fleet filed records from Claim Number 2012-62318, wherein Gueye alleged injuries to his back, hands, chest, shoulders and neck that occurred during his subsequent employment with GAP, Inc. In that claim, Dr. Andrea Jewell opined his condition was directly related to a November 11, 2012 work injury. The questions of causation of Gueye's current condition and whether it is now any different from his condition in early 2013 can only be answered by a medical expert.

The ALJ's March 5, 2014, March 14, 2014, and August 6, 2014 orders were not final orders, and any issues concerning those orders are rendered moot by the ALJ's

dismissal on the threshold issue of causation/work-relatedness. Even if that were not the case, we would find no abuse of discretion regarding these orders. An ALJ has broad discretion to control the taking and presentation of proof in a worker's compensation proceeding. New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004). Thus, any purported error by the fact-finder must be reviewed under the abuse of discretion standard. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 191 S.W.2d 214 (Ky. 1945).

Gueye was cautioned in the March 5, 2014 order that he is held to the same standard as would be an attorney regarding the statutes and regulations governing the prosecution of his claim. The ALJ specifically directed Gueye to the requirements and procedures set forth in 803 KAR 25:010. The ALJ's April 14, 2014 order granted Gueye an additional 10 days to cure the defects in the Form 101 and reopened proof for an additional thirty days. Although Gueye objected to the extension of time, it was granted for his benefit. Without an extension and the

reopening of proof time, the record at that time would have mandated the dismissal of Gueye's claim. Gueye was given ample opportunity to submit medical evidence to establish work-relatedness/causation and failed to do so.

We find no error in the ALJ's dismissal of DHL as a defendant. Fleet acknowledged Gueye was its employee and it had coverage. Thus, had Gueye been successful in proving an injury, he would have been fully compensated.

Finally, we note any action for wrongful discharge in violation of KRS 342.197(1) is an action that must be brought in a circuit court. This Board is without jurisdiction to address that issue.

Accordingly, the September 1, 2015 order rendered by Hon. Steven G. Bolton, Administrative Law Judge is hereby **AFFIRMED.**

ALL CONCUR.

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