

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 28, 2022

CLAIM NO. 201959142

CHRISTOPHER JOHN BRENNAN

PETITIONER/
CROSS-RESPONDENT

VS.

APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

PROGRESS RAIL SERVICES
and
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/
CROSS-PETITIONER

RESPONDENT

OPINION
AFFIRMING IN PART,
REVERSING IN PART & REMANDING

* * * * *

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

MILLER, Member. Christopher John Brennan (“Brennan”), *pro se*, and Progress Rail Service (“Progress Rail”) seek review of the June 18, 2021 Opinion, Order and Award issued by Hon. R. Roland Case, Administrative Law Judge (“ALJ”). The ALJ determined Brennan is entitled to a period of temporary total disability (“TTD”)

benefits from August 29, 2019 through October 28, 2019 and dismissed the claims for permanent partial disability (“PPD”) benefits and past and future medical benefits.

On appeal, Brennan, *pro-se*, asserts evidence shows he sustained a work-related injury. He asserts medical bills should be paid by Progress Rail and he is entitled to indemnity benefits. Brennan believes the ALJ misconstrued the evidence, and he is entitled to an award of medical benefits and any other rights stemming from the May 2019 injury.

Progress Rail appeals, arguing the finding of there being no evidence establishing any hernia occurred at work negates the award of TTD benefits. Quite simply, if there is no finding of a work-related injury leading to medical treatment, no benefits can be awarded, medical or indemnity, rendering all subsequent issues moot.

We affirm in part, reverse in part, and remand to the ALJ with instructions to dismiss the claim.

Brennan filed a Form 101 in April 2020 alleging he sustained a work injury on or about May 17, 2019 while in the employ of Progress Rail. Brennan testified by deposition on September 20, 2020 and at the Final Hearing on April 20, 2021. Progress Rail builds infrastructure for the railroad industry. Brennan began working for Progress Rail in October 2018 making switch panels. On the date at issue, he was preparing to gauge the rail, using a rail ratchet tool on the gauge plates to pull in the rail. Brennan testified he was pulling up the handle and pushing down on the ratchet when he felt nauseous, had a bowel movement, and developed a headache. He told a co-worker about his symptoms and was permitted to go home.

Brennan returned to work the next day and he notified his supervisor of the event. He stated his abdomen felt different and a piece of skin had appeared.

Brennan continued working the same position for the next three months until he was terminated for unrelated reasons. During this time frame, no medical attention was sought. Shortly after the termination, Brennan went to the Emergency Room at Mercy Health.

The Mercy Health Hospital Emergency Room note of August 28, 2019 lists diagnoses of abdominal, epigastric, and umbilical pain. The notes mention the history of injury as provided by the patient. "Patient reports about 2 months ago he was using a large wrench at work and felt an abrupt onset of central abdominal pain and had to rush to the bathroom to defecate." All hospital billings were sent to Brennan's regular health care provider, BCBS.

Brennan saw a primary care physician, Dr. Todd Bramlee, on August 29, 2019. Dr. Bramlee noted Brennan was "a very poor historian and is concerned about an abdominal hernia." Dr. Bramlee further noted, "Possible umbilical hernia - patient injured himself two months ago while working on a vehicle, was informed by ER that he had a hernia but when examining records no mention of this in ER note."

Brennan was referred to Dr. Matthew Funch, who performed umbilical hernia surgery on September 6, 2019. No opinion on causation was offered by Dr. Funch and Brennan was released to full duty in October 2019. Subsequently, Brennan applied for unemployment benefits, which he received.

Progress Rail introduced the December 3, 2020 report of Dr. David C. Randolph. Dr. Randolph reviewed the medical records and opined there is

insufficient information in the clinical record to support or substantiate the development of an umbilical hernia in the timeframe of May 2019. Dr. Randolph noted the umbilical hernia surgery in September 2019 but believed any acute hernia in May 2019 would have been painful and debilitating in nature. He noted the treatment in September 2019 included complaints of a tender umbilical area, which is not consistent with a hernia occurring four months earlier. Dr. Randolph believes the May 2019 complaints were more consistent with acute gastro-enteritis of unclear etiology.

The March 17, 2020 Benefit Review Conference Order and Memorandum reveals the parties stipulated the contested issues were, “Extent and Duration; Benefits per KRS 342.730; Entitlement to Medical Benefits; Temporary Total Disability Benefits; and Causation/Work Relatedness of Umbilical Hernia.”

In the Opinion, Order and Award, the ALJ dismissed the claim for past and future medical expenses, dismissed the claim for PPD benefits, and awarded TTD benefits from August 29, 2019 through October 28, 2019.

Neither party filed a petition for reconsideration and therefore the ALJ’s award or order is conclusive and binding as to all questions of fact. KRS 342.285(1). The Board shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on questions of fact, its review being limited to determining whether the order, decision, or award is clearly erroneous based on the reliable, probative, and material evidence contained in the whole record. KRS 342.285(2)(d). Absent a petition for reconsideration, questions of fact,

including the adequacy of the ALJ's findings of fact are not preserved for appellate review. Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81, 83 (Ky. 2005).

As the claimant in a workers' compensation proceeding, Brennan had the burden of proving each of the essential elements of his claim, including work-relatedness/causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).—Because Brennan was unsuccessful in his burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Compelling evidence” is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same adversary party's total proof Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). Although a party may note evidence supporting a different outcome than reached by an ALJ such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp, 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W. 2d 641 (Ky.1986)

The initial question is whether the work injury caused the subsequent medical treatment leading to the umbilical hernia surgery. As a practical matter, this was the only medical treatment Brennan underwent.

Injury as defined by the Act - Work-relatedness/Causation.

“Injury” is statutorily defined in KRS 342.0011(1) as a work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment, which proximally causes a harmful change in the human organism evidenced by objective medical findings. “Objective medical findings” is defined by KRS 342.0011(33) as information gained through direct observation and testing of the patient, applying objective or standardized methods.

The ALJ stated the follow regarding medical benefits:

KRS 342.020 provides that it is the responsibility of the Defendant-employer to pay for the cure and relief from the effects of an injury or occupational disease, all medical, surgical, hospital treatment, including nursing, medical and surgical supplies and appliances as may be reasonably be required at the time of the injury and thereafter during disability. However, treatment which is shown to be unproductive or outside the type of treatment generally accepted by the medical profession is deemed unreasonable and non-compensable. This finding is made by the ALJ based upon the facts and circumstances surrounding each case. Square D Company v. Tipton, 862 SW2d 308 (Ky. 1993). In a post-award medical fee dispute, the employer has the burden of proving that contested medical treatment is not reasonable or necessary for the cure and relief of a work injury. National Pizza Company v. Curry, 802 SW 2d 949 (Ky. App. 1991).

Although the ALJ has awarded temporary total disability benefits, there is no evidence of record to establish the alleged hernia was work-related. The Plaintiff has quite simply failed to establish that he is entitled to medical benefits for the alleged hernia since there is no evidence to establish any hernia occurred at

work and, in fact, the evidence from Dr. David Randolph indicates the evidence of record does not support the development of the hernia during the May 2019 time frame. Plaintiff's claim for past and future medical expenses must be dismissed.

When the causal relationship between an injury and a medical condition is not apparent to a lay person, the issue of causation is solely within the province of a medical expert. Elizabethtown Sportswear v. Stice, 720 S.W.2d 732-733 (Ky. App. 1986); Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W. 2d 184 (Ky. 1981). Because there was evidence in the record from Dr. Randolph, it cannot be shown there was no evidence of substantial probative value to support the ALJ's decision. Special Fund v. Francis, supra. Further, the ALJ described the lay and medical evidence of record when reaching his decision. The ALJ found no evidence of a permanent impairment and dismissed the claim for permanent partial disability benefits as well as dismissing the claim for past and future medical expenses. On this, we affirm.

Having found there was no work-related injury causing the treatment for the umbilical hernia, and no permanent injury from the work event, the ALJ still awarded TTD benefits during the timeframe when medical treatment for the hernia occurred. These dates are more than three months after the injury date and after Brennan was terminated from employment. The dates specifically encompass the time frame of the hernia surgery and recuperation.

It is this award of TTD benefits from which Progress Rail appeals. Succinctly, if the work injury did not cause the medical treatment to occur, then TTD benefits were erroneously awarded. This is not an issue of a temporary injury

where TTD and medical benefits could be awarded without an award of permanent benefits, but rather a finding that the work injury did not cause the hernia.

The ALJ noted Progress Rail had not filed a timely Form 111 and therefore the existence of the May 2019 event could not be disputed. However, that admission did not lead to the conclusion the work event caused the subsequent medical treatment or period when TTD benefits were awarded. It is noted there was no medical report attached to the Form 101 establishing the causal relationship between the medical condition requiring treatment and the work-related event.

The ALJ summarized his findings on TTD in his Opinion as follows:

TEMPORARY TOTAL DISABILITY

Temporary total disability is defined in KRS 342.001(11)(a) as the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement which would permit a return to employment. The Courts have noted that in order for temporary total disability benefits to be payable the Plaintiff must not have reached maximum medical improvement and must not have reached a level of improvement that would permit a return to employment. Magellan Health v. Helms, 140 S.W.2nd 579 (Ky. App. 2004). The Defendant paid no temporary total disability benefits to the Plaintiff for the alleged injury date of May 17, 2019. Neither the medical records filed herein from Mercy Health nor the report of Dr. Randolph give a date of maximum medical improvement. Neither the records of Mercy Health nor the report of Dr. Randolph assigns any impairment rating to the Plaintiff's condition.

The employer did not timely file a Form 111 and the allegations made in the Plaintiff's 101 are deemed accurate to the extent they are supported by evidence. The ALJ is persuaded the allegations of the 101 when considered in conjunction with the testimony of the Plaintiff is sufficient to establish a period of temporary total. It appears the Plaintiff continued to work after the

injury until August 29, 2019. Additionally, he had surgery in September 2019 and was not released from care until late October 2019. He apparently began drawing unemployment in late October 2019. The ALJ is unable to pinpoint the exact date in October 2019 but based on the evidence of record determines the period of temporary total ended on October 28, 2019, which would be consistent with Plaintiff's release from care and the commencement of unemployment benefits. The ALJ finds Plaintiff is entitled to temporary total disability benefits from August 29, 2019 through October 28, 2019.

The employer provided wage records but did not perform the calculation of average weekly wage. The ALJ finds the 13-week period for calculation of AWW were the checks from February 21, 2019 through May 16, 2019. It appears the Plaintiff was earning \$17.00 per hour and during that 13 week period worked 693.75 hours. This would yield an AWW of \$907.21. The Plaintiff's temporary total disability rate would be two-thirds of that amount or \$604.81.

The ALJ finds the Plaintiff is entitled to a period of temporary total disability in the amount \$604.81 for the period of August 29, 2019 through October 28, 2019.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). As noted earlier, neither party filed a petition for reconsideration. Therefore, utilizing the findings of the ALJ as to work-relatedness/causation, the award of TTD benefits is clearly erroneous. The ALJ found there was no work-related event necessitating the medical treatment, hence the award of TTD for that same time frame cannot stand. The award of TTD benefits from August 29, 2019 through October 28, 2019 is hereby reversed and this claim is remanded to the ALJ to issue an order consistent with this Opinion.

Finally, Brennan requested an oral argument be held. After having reviewed the record, **IT IS HEREBY ORDERED AND ADJUDGED** an oral argument is not necessary to arrive at a decision and therefore the request is **DENIED**.

Accordingly, the June 18, 2021 Opinion, Order and Award issued by Hon. R. Roland Case, Administrative Law Judge is **AFFIRMED IN PART** and **REVERSED IN PART**. We **REMAND** for entry of an opinion in conformity with the views expressed herein.

ALL CONCUR

/s/ Scott M. Miller
SCOTT M. MILLER, MEMBER
WORKERS' COMPENSATION BOARD

DISTRIBUTION:

PETITIONER /CROSS-RESPONDENT/ PRO SE

USPS

CHRISTOPHER JOHN BRENNAN
364 ELLIOTT AVE
CINCINNATI, OH 45215

COUNSEL FOR RESPONDENT/ CROSS-PETITIONER:

LMS

HON BONNIE HOSKINS
PO BOX 24564
LEXINGTON, KY 40502

ADMINISTRATIVE LAW JUDGE:

LMS

HON R ROLAND CASE
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601