

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 22, 2019

CLAIM NO. 201571752

VINSON PLUS ONE LLC

PETITIONER

VS. **APPEAL FROM HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE**

DONALD WEBB
and HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

STIVERS, Member. Vinson Plus One LLC (“Vinson”) seeks review of the July 30, 2019, Opinion, Award, and Order of Hon. John H. McCracken, Administrative Law Judge (“ALJ”) finding Donald Webb (“Webb”) sustained a work-related low back injury on July 23, 2015, while in the employ of Vinson. The ALJ awarded permanent partial disability (“PPD”) benefits, temporary total disability (“TTD”) benefits, and

medical benefits. Vinson also appeals from the August 30, 2019, Order overruling its petition for reconsideration.

On appeal, Vinson asserts the ALJ erroneously awarded TTD benefits during a period when a non-work-related condition delayed the treatment of Webb's low back injury. As Vinson does not challenge the finding Webb sustained a work-related injury, the impairment rating attributable to that injury, and the award of PPD and medical benefits, we will not discuss the evidence related to those aspects of the claim. Vinson contests the award of TTD benefits from May 8, 2018,¹ the day after Webb's first low back surgery was aborted through September 26, 2018, the day before he successfully underwent low back surgery.

BACKGROUND

Webb testified at a March 14, 2019, deposition and at the June 24, 2019, hearing. During his deposition, Webb testified he started working at Vinson in November 2010 as a fabricator. He worked in that capacity until he injured his low back on July 23, 2015. Webb denied undergoing low back treatment and experiencing low back pain or problems prior to July 23, 2015. However, he acknowledged receiving treatment for high blood pressure prior to the date of injury. At the time of his injury, Webb's family physician was Dr. John Lee in Henderson, Kentucky. His current primary care physician is Shara Mills ("Mills"), a Physician's Assistant with Family Practice in Morganfield, Kentucky. Although he had also undergone double hernia surgery before the injury, Webb denied that a doctor had placed restrictions on

¹ Even though Vinson states in its brief the contested period begins May 18, 2018, that date appears to be a typographical error as the first surgery was on May 7, 2018. Thus, the beginning date would be May 8, 2018.

his physical activities prior to July 23, 2015. Webb was injured working at Superior Cabinets in Talladega, Alabama. At that time, Vinson was building an oven using “pre-fabbed” parts. He described the injury as follows:

Q: How did the accident occur?

A: I was unloading the outside panels of the oven and one of the pallets were stacked up high. And when I pulled out on my last pull, I somehow twisted; and when I twisted, I just went to my knee and it just gave me a real bad pain there and it just stayed and wouldn't go away.

Q: Real bad pain where?

A: Right here on my lower back.

Q: Is it on the left side?

A: It's on the left side, yes.

Webb estimated the panel he was lifting weighed between 120 and 150 pounds. He immediately told the owner, Donnie Vinson, he had injured his back and needed to go to a doctor. Webb was not afforded the opportunity to seek treatment in Alabama and stayed in his motel room for two and half days before returning with the work crew to Kentucky. Upon returning to Kentucky, he first treated at Methodist Hospital in Henderson. When he saw Dr. Lee, he was referred to Dr. David Weaver, a neurosurgeon, who treated him for approximately one year. Ultimately, Webb left Dr. Weaver's care, and with Mills' help, secured treatment from Dr. Mike Chou. Webb saw Dr. Chou for low back pain extending into his left leg and foot. Dr. Chou performed two surgeries. The first surgery had no impact as it was terminated due to excessive bleeding.² Thereafter, Mills referred Webb to a “blood doctor” at Methodist

² The medical records reveal the first surgery was performed on May 7, 2018.

Hospital. He testified the second surgery was performed in October 2018.³ Webb testified the surgery resolved his symptoms, as he has no leg pain, little back pain, and no tingling in his toes. He is able to sleep and takes no longer takes prescription medication for low back pain. The only medication he takes is that prescribed by Mills for his high blood pressure and arthritis.

At the hearing, Webb reiterated much of his testimony regarding the injury and his treatment. Webb provided the following testimony regarding his condition prior to seeing Dr. Chou:

Q: Well, it's in the record. That's okay. Let's talk about the period of time between when you were seeing Dr. Weaver and seeing Dr. Chou. During that time, did your back ever get better?

A: No, it didn't.

Q: Were you ever able to look for work?

A: No, I wasn't.

Q: Were you able to go back to the same job?

A: No.

Q: Why do you think you were not able to work?

A: I – I wasn't able to even – I wasn't able to get out and do anything. I couldn't even mow my own grass. I couldn't lift nothing. I mean I just hurt constantly. I couldn't sleep at night. I would sleep maybe two or three hours of – of a night, get up, roam around for two or three hours, go back to bed, get up, do the same thing, and it was like that, and I – and I didn't know what to do about it.

Q: Uh-huh.

³ The medical records reveal the second surgery was performed on September 27, 2018.

A: I was stuck. I didn't – I've never been in this predicament and –

Between the surgeries, Webb was unable to return to any type of work, explaining as follows:

Q: Now, there was a – a glitch in the surgery, the first surgery that Dr. Chou did. I think the records show that there was a – you had a bleed or something, isn't that right?

A: Yes, I – I was bleeding real bad, and he decided to stop the surgery and sew me back up until we could figure out what to do with my blood.

Q Okay. And be – between the time of that aborted surgery and the second surgery –

A: Uh-huh.

Q: -- did you receive worker's compensation wage benefits for that?

A: I did to a certain point and then it was back off again. I'm not really sure on dates.

Q: Uh-huh, okay. But you were not able to go back to work or look for work until when?

A: Until after Dr. Chou had done my last surgery.

Q: And you recuperated from that?

A: And from then on, I've – I've been fine.

Webb also testified regarding the termination of the first surgery and his treatment thereafter:

Q: The first surgery attempt, by my recollection, was early May of 2018. Does that sound right?

A: Yes, I believe it does, yes.

Q: You've – you've mentioned that you had bleeding and that caused Dr. Chou to – to sew you back up?

A: Uh-huh.

Q: Did Dr. Chou, after he enclosed you in – closed you up in May of 2018, then refer you to a physician to be – so that they could investigate the blood disorder or the blood condition?

A: No, he didn't. Sara Mills did. It was in Methodist Hospital. I can't remember his name. What he done was gave me a medicine to increase my blood platelets because my blood platelets were low.

Q: The physician at Methodist Hospital in Henderson gave you that medica [sic] – or that prescription medication?

A: Yes, sir.

Q: And – and I – I thought I heard Sara, but perhaps that was Shara Mills?

A; Shara, yes. I – I said Sara, but –

Q: Once your platelets were back in order, did Dr. Chou then go ahead with the surgery in late September?

A: Yes. After the – after the medicine was taken, he had a – a five-day window, if I'm not mistaken, to get the surgery done. After that, after the five days, he wouldn't be able to do the surgery without me taking another series of medicine.

The May 29, 2019, Benefit Review Conference Order reflects the parties stipulated Webb sustained an injury and TTD benefits were paid from July 29, 2015, to December 5, 2016, from May 7, 2018, to July 1, 2018, and September 27, 2018, to January 24, 2019. The parties also agreed Webb retained the physical capacity to return to the type of work performed at the time of the injury. The contested issues were: "Permanent income benefits per KRS 342.730; TTD benefits; and unpaid or contested medical expenses." Under "Other contested issues" is listed: "agreed upon 10% IR with no multipliers, medical dispute Form 112."

In his July 30, 2019, decision, the ALJ listed the periods during which TTD benefits were paid. He noted this left two gaps in the payment of TTD benefits, from December 6, 2016, through May 6, 2018 and from July 2, 2018, through September 26, 2018, which were in dispute.⁴ The ALJ determined Webb was temporarily totally disabled between July 26, 2016, through at least May 6, 2018. Thus, Vinson owed TTD benefits for the first period TTD benefits were not paid from December 6, 2016, through May 6, 2016. The ALJ also concluded Vinson was liable for TTD benefits during the second disputed period, reasoning as follows:

Defendant states that the blood disorder was an intervening cause or condition that prevented the first surgery and it should not be required to pay TTD during the time from July 2, 2018 through September 26, 2018. Defendant states that the blood condition was not a work-related condition, or a natural consequence of the work injury. The ALJ finds that the reason Webb was temporarily totally disabled was due to his work-related low back condition. The ALJ finds that the blood disorder was a condition that temporarily prevented Webb from having the low back fusion. The ALJ does not find this to be an intervening cause. The blood disorder did not cause Webb to be temporarily totally disabled. The ALJ sees this similar to a person who has diabetes whose medical treatment may be delayed or altered due to that condition. The precipitating event leading to surgery was the work-related back injury. Beale v. Hammons, 804 S.W.2d 13 (Ky. App. 1991).

The ALJ finds that Webb continued to be temporarily totally disabled consistent with KRS 342.0011(11) from July 2, 2018 through September 26, 2018.

⁴ Vinson paid TTD benefits during a portion of the disputed period.

The ALJ also awarded TTD benefits from September 27, 2018, through January 24, 2019, when Dr. Chou determined Webb had reached maximum medical improvement (“MMI”).⁵ The ALJ resolved the medical fee dispute in favor of Webb.

Vinson filed a petition for reconsideration asserting the same argument it now asserts on appeal regarding its liability for the TTD benefits during the period of time between the two surgeries. Noting Vinson did not point to a patent error and concluding the petition for reconsideration was a re-argument of its position at the original hearing, the ALJ overruled the petition for reconsideration.

On appeal, Vinson contends the ALJ erroneously awarded TTD benefits during the period from May 8, 2018, through September 26, 2018, when a non-work-related condition delayed surgical treatment of the work injury. Vinson agrees with the ALJ’s finding the blood disorder was a temporary condition that prevented Webb from undergoing the low back fusion. Therefore, Vinson asserts that, as a matter of law, the ALJ should have found it was not liable for TTD benefits during this time since Webb was actively treating to resolve a non-work-related blood disorder. It notes there is no evidence the blood disorder was caused by the work injury or that the work injury caused Webb to be more susceptible to the blood disorder. Vinson posits that, had the first surgery attempted on May 18, 2018, been completed as planned, TTD benefits from that date through the period of recovery would have been appropriate. Vinson maintains the relief it seeks is not foreclosed by the holding in Daugherty v. Watts, 419 S.W.2d 137, 138 (Ky. 1967). Vinson submits it owes PPD benefits not TTD benefits during the period from May 8, 2018, through September 26,

⁵ Vinson had previously paid the TTD benefits during this period.

2018. Vinson seeks remand with directions to find it is not liable for the payment of TTD benefits for the period in question.

ANALYSIS

Finding Daugherty v. Watts, *supra*, to be on point, we reject Vinson's argument. In Daugherty, the Kentucky Supreme Court's predecessor, the Kentucky Court of Appeals, summarized the facts as follows:

The original agreed award was made in May 1962 in proceedings initiated in April 1961 by the filing of a claim by Watts seeking an award for total permanent disability from silicosis. All the doctors who then had examined Watts agreed that he was totally disabled, some attributing it to silicosis but others saying that they found no evidence of silicosis and that the disability was due to other (noncompensable) causes.

The motion by Watts to reopen was filed in February 1966. At the hearing on the motion two of the doctors who had examined Watts in 1961 for his employer and who had testified then that they found no evidence of silicosis, testified that upon reexamining Watts in 1965 they found positive and definite evidence of silicosis; that the disease is a progressive one, and that the scarring of the lungs in the form of nodular fibrosis had progressed or continued in Watts' body since 1961 so as to become clearly visible on X-rays in 1965. Watts had not worked, and therefore had not been exposed to the hazards of silicosis, since 1961, so his silicotic condition in 1965 clearly was attributable to development of a condition of early stage silicosis that was present in his body but not clearly discernible in 1961. The two doctors testified that Watts' present silicotic condition is of totally disabling character.

The employer took the position on reopening that, since Watts had been determined to be totally disabled in 1961, any change in the cause of his disability was not of any significance. The Court summarized the employer's argument as follows:

...In other words, the appellant argues that the only change of condition that will authorize a reopening is a change in the extent of disability, not in the cause. In substance, this amounts to an argument that if an employe [sic] is disabled simultaneously by two causes, one compensable and the other not, he should receive no compensation.

The Court rejected that argument concluding as follows:

...We do not believe that our workmen's compensation law contemplates that any disability an employe [sic] sustains in the course of and arising out of his employment shall be cancelled out, for compensation purposes, by disability from another cause. There seems to be little authority on the question but it is that if a workman has suffered a compensable injury he will not be deprived of compensation merely because of the existence of an independent, concurrent cause of disability. See 58 Am.Jur., Workmen's Compensation, sec. 338, p. 810.

...

...This is simply an argument that if the independent, noncompensable disabling cause will not completely cancel out an equal compensable cause, it at least should cancel it out half way. As hereinbefore indicated, it is our opinion that it is not within the intent of the workmen's compensation statutes that an independent, noncompensable disabling cause shall in any way reduce the force and effect of a compensable disabling cause.

The above logic applies in the case *sub judice*, as Webb continued to be disabled due to the work-related low back injury. Consequently, we see no reason to penalize Webb because his treatment was delayed in order to treat a blood disorder which appears to have arisen after the injury. Although there does not appear to be any evidence establishing the blood disorder was work-related, there was also no evidence Webb had that condition prior to the work injury. We perceive no difference in a surgery being cancelled either because of a condition Webb developed or because

of some reason beyond Webb's control, such as the physician's inability to perform the surgery on the first date.

In his initial record of May 6, 2018, Dr. Chou noted Webb had experienced a lifting injury resulting in low back pain on July 23, 2015. In his opinion, the "temporal historical presence of pain demonstrates causative agent for pain to be lifting injury 7/23/15 and pathology is consistent with such lifting injury." Dr. Chou recommended a left "Sacro Illiac Fusion." He also noted the pre-operative testing showed Webb to be thrombocytopenic and had received medical and hematology clearance with the following caveat: "he should have CBC done on date of procedure and be transfused platelets prior to procedure if less than 100,000." The surgical note of May 7, 2018, reveals that, even though two units of platelets had been given, there was still an excessive amount of bleeding which was difficult to control. After a significant loss of blood, they decided to abort the operation considering it was too dangerous for Webb's state of health.

Dr. Chou's July 30, 2018, note reflects Webb was currently debilitated and unable to work due to the pain. He also stated as follows:

Mr. Webb had been seeing a hematologist, D. Hussain. The patient tells me Dr. Hussain told him there is a medicine he can take for ten days but he has to have the surgery within five days of starting it. We are to call Dr. Hussain's office with Donald's surgery date at least two weeks prior to surgery so he can check his Vitamin K and also prescribe the medication he needs to start him on prior.

Again, Dr. Chou's impression was that "the temporal historical presence of pain demonstrated causative agent for [Webb's] pain to be a lifting injury from July 23, 2015, and his pathology is consistent with such a lifting injury."

On September 21, 2018, Dr. Chou noted he had attempted to perform the procedure on May 7, 2018, but “had to abort due to excessive bleeding.” Thus, Webb had been seeing Dr. Hussain for his bleeding issues and had started on medication. Dr. Chou noted Webb was to go for another CBC on Wednesday, and the surgery was scheduled for Thursday, September 27, 2018. In an addendum, Dr. Chou noted he spoke with Dr. Hussain who stated Webb had started on medication for his platelet issue last Monday and suggested they repeat the labs on Monday. Dr. Chou’s surgical note of September 27, 2018, reflects surgery was performed on that date. Dr. Chou’s follow up note of October 8, 2018, reveals Webb was doing well but was sore and needed pain medication. Webb was to be seen in two weeks. On October 24, 2018, Dr. Chou noted Webb was on crutches and feeling a lot better.

Dr. Chou’s records firmly demonstrate Webb was temporarily totally disabled and remained disabled during the period between the first surgery on May 7, 2018, and the second surgery on September 27, 2018. Consequently, Dr. Chou’s records comprise substantial evidence in support of the ALJ’s finding Webb was temporarily disabled during the period in question due to the work injury.

Since substantial evidence supports the ALJ’s finding that Webb was temporarily totally disabled during the period in question, and the holding in Daugherty directs that an injured worker who has suffered a compensable injury will not be deprived of compensation because of the existence of an independent concurring cause of disability, we affirm the ALJ’s decision regarding the issue raised on appeal.

Accordingly, the July 30, 2019, Opinion, Award, and Order and the August 30, 2019, Order overruling the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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