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**IN THE
COURT OF APPEALS OF INDIANA**

BETTY McCORD,)
)
Appellant-Plaintiff,)
)
vs.)
)
KIMBLE GLASS,)
)
Appellee-Defendant.)

No. 93A02-0808-EX-716

APPEAL FROM THE WORKER'S COMPENSATION BOARD
The Honorable Linda Peterson Hamilton, Chairman
Applications Nos. C-162987, C-170002

March 12, 2009

MEMORANDUM DECISION—NOT FOR PUBLICATION

BRADFORD, Judge.

Appellant-Plaintiff Betty McCord appeals the decision of the Full Worker's Compensation Board of Indiana affirming the decision of the Single Hearing Member denying her applications for adjustment of claim seeking additional worker's compensation benefits through her employer, Appellee-Defendant Kimble Glass. Upon appeal, McCord argues that the Board's decision is contrary to the facts and the law. We affirm.

FACTS AND PROCEDURAL HISTORY

On August 7, 2001, McCord, an employee of Kimble Glass, sustained a work injury when she fell backwards while performing a work duty. McCord was hospitalized due to her inability to move her legs or arms and was diagnosed with a cervical spinal cord concussion. Cervical and lumbar MRI films from August 8, 2001 showed that McCord had degenerative disc and joint disease. Kimble Glass furnished authorized medical care to McCord through its worker's compensation insurance carrier, Chubb Insurance. Chubb Insurance also paid temporary total disability (TTD) benefits to McCord for the period of August 8, 2001 to November 6, 2001, for a total payment of \$5054.34, and temporary partial disability (TPD) benefits for the period of November 7-November 26, 2001, for a total payment of \$712.70. Following her discharge from the hospital on August 10, 2001, McCord continued to receive medical treatment and seemed to do reasonably well until May 2002, when she reported an increase in neck and bilateral numbness. Neurosurgeon Dr. Jeffrey Kachmann determined that McCord was a candidate for surgery, and on August 22, 2002, he performed "anterior cervical decompression, allograft fusion and plate fixation at C5-7." Appellant's App. p. 72.

On March 13, 2003, McCord was found to be at maximum medical improvement and was assigned a permanent partial impairment (PPI) rating of fifteen percent of the whole person. On June 13, 2003, McCord and Kimble Glass, through Chubb Insurance, entered into an agreement for compensation in the amount of \$20,500 for the PPI rating. The Worker's Compensation Board approved this agreement on June 17, 2003.

On April 2, 2003, McCord was still employed by Kimble Glass, which by this time had worker's compensation insurance through Hartford Insurance. On that date, McCord fell on the sidewalk to the parking lot while leaving work. According to McCord, her leg "gave out." Appellant's App. p. 60. McCord reported the incident. McCord's final day of work at Kimble Glass was May 14, 2004.

On May 17, 2004, McCord returned to Dr. Kachmann, and on June 11, 2004, he performed "surgical removal of C5-7 titanium plate, C4-5 anterior discectomy and allograft fusion with titanium plate fixation of C4-5." Appellant's App. p. 60. On October 1, 2004 Dr. Kachmann performed a "left L4-S1 hemilaminectomy and Left L5-S1 discectomy." Appellant's App. p. 60. Neither Chubb nor Hartford Insurance has paid for any medical treatment since May 17, 2004.

On May 17, 2004, McCord filed an Application for Adjustment of Claim against Kimble Glass under Case No. C-162987 in which she alleged a change in condition stemming from her original August 7, 2001 fall. Also on May 17, 2004, McCord filed an Application for Adjustment of Claim against Kimble Glass under Case No. C-170002,

alleging a separate injury date of April 2, 2003, which was the date of her fall in the Kimble Glass parking lot while leaving work.

On May 12, 2005, pending resolution of her claims, the Board issued an amended order awarding McCord temporary total disability (TTD) benefits of \$388.80, to be divided equally between Chubb and Hartford Insurance Companies, and paid from the date of the order until the final hearing date unless otherwise terminated.¹ In its order, the Board further provided that if, following a hearing, McCord was determined to be ineligible for these benefits, she was responsible for repaying Chubb and Hartford for their overpayment of TTD benefits. The Board also ordered that if it was later determined that one insurance carrier was liable for the full amount, the liable insurance carrier was to reimburse the other carrier for its overpaid benefits.

On May 21, 2007, the parties submitted to the Single Hearing Member their Joint Stipulation of Facts, Exhibits, and Disputed Issues. In it, the parties stipulated to the above facts, as well as to the fact that McCord was and is temporarily totally disabled.

The stipulated evidence included a March 15, 2006 deposition of Dr. Kachmann, who opined that the August 2001 accident caused McCord to suffer a spinal cord concussion. An MRI taken in November 2001 revealed that McCord suffered from degenerative spinal changes at the L4-L5 and L5-S1 levels, which in Dr. Kachmann's view predated the August 2001 fall. McCord's injuries caused by the August 2001 fall, together with her pre-existing

¹ At the time of this order, McCord was unable to pay her mortgage and electric bill, her electricity had been shut off, she had been forced to move to a motel, and she could not provide a home for the grandchildren for whom she was guardian.

neck problems including degenerative disc disease and osteophytes, necessitated McCord's August 22, 2002 surgery on the C5-C7 area of her spine.

Dr. Kachmann released McCord on October 7, 2002 and next saw her on May 17, 2004, more than a year after her April 2003 fall, when she had symptoms of worsening neck and lower-back pain. Following an MRI, Dr. Kachmann discovered that McCord was suffering from a new disc protrusion at cervical level C4-C5 which had not been present in 2002. Dr. Kachmann opined that this protrusion was related or had contributed to her 2003 fall. On June 11, 2004, Dr. Kachmann performed surgery to treat the C4-C5 disc protrusion.

Dr. Kachmann also determined that McCord was suffering from a disc bulge and lateral disc protrusion at the L4-L5 level and, at the L5-S1 level, a progression of foraminal stenosis causing compression of the left S1 nerve root, none of which was detected in tests administered following the 2001 fall. According to Dr. Kachmann, McCord's lumbar problems were the primary cause of her leg giving out.

On October 1, 2004, Dr. Kachmann performed lumbar surgery on McCord to treat her L4-L5 stenosis and L5-S1 foraminal stenosis, or narrowing of the spine, which Dr. Kachmann attributed to degenerative changes. As for the cause of these degenerative changes, Dr. Kachmann indicated that the natural progression of the disease could have caused the L4-L5 level protrusions, but that the falls could have contributed to or accelerated the progression of the disease. Hospital records indicated that, even as of the date of the 2001 fall, McCord had a history of her left leg giving way beneath her. Appellee's Conf. App. p. 23.

On December 11, 2007, the Single Hearing Member found that McCord's April 2, 2003 fall did not arise out of her employment with Kimble Glass and that neither the cervical surgery performed on June 11, 2004 nor the lumbar surgery performed on October 1, 2004 were related either to the August 7, 2001 fall or the April 2, 2003 fall. Accordingly, McCord's applications for adjustment of claim were denied. Following an application to the Full Board for review, on June 5, 2008, the Full Board affirmed the decision of the Single Hearing Member denying McCord's applications. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

“On appeal, we review the decision of the Board, not to reweigh the evidence or judge the credibility of witnesses, but only to determine whether substantial evidence, together with any reasonable inferences that flow from such evidence, support the Board's findings and conclusions.” *Bertoch v. NBD Corp.*, 813 N.E.2d 1159, 1160 (Ind. 2004) (quoting *Walker v. State*, 694 N.E.2d 258, 266 (Ind. 1998)). In evaluating the Board's decision, we employ a two-tiered standard of review. *Triplett v. USX Corp.*, 893 N.E.2d 1107, 1117 (Ind. Ct. App. 2008), *trans. denied*. First, we review the record to determine if there is any competent evidence of probative value to support the Board's findings. *Id.* We then assess whether the findings are sufficient to support the decision. *Id.* The Board's conclusions of law, in contrast, are reviewed de novo. *Bertoch*, 813 N.E.2d at 1160.

As the claimant, McCord had the burden to prove a right to compensation under the Worker's Compensation Act (“the Act”). *Triplett*, 893 N.E.2d at 1116. As such, she appeals

from a negative judgment. *See id.* When reviewing a negative judgment, we will not disturb the Board's findings of fact unless we conclude that the evidence is undisputed and leads inescapably to a contrary result, considering only the evidence that tends to support the Board's determination together with any uncontradicted adverse evidence. *Id.* The Board is not obligated to make findings demonstrating that a claimant is not entitled to benefits; rather, the Board need only determine that the claimant has failed to prove entitlement to benefits. *Id.*

Whether an injury arises out of and in the course of employment is a question of fact to be determined by the Board. *Manous, LLC v. Manousogianakis*, 824 N.E.2d 756, 763 (Ind. Ct. App. 2005). Both requirements must be met before compensation is awarded, and neither alone is sufficient. *Id.* The person who seeks worker's compensation benefits bears the burden of proving both elements. *Id.* An injury "arises out of" employment when a causal nexus exists between the injury sustained and the duties or services performed by the injured employee. *Pavese v. Cleaning Solutions*, 894 N.E.2d 570, 575 (Ind. Ct. App. 2008). An injury occurs "in the course of" employment when it occurs within the period of employment, at a place where the employee may reasonably be, and while the employee is fulfilling the duties of employment or while engaged in doing something incidental thereto. *Id.*

II. Analysis

A. Findings and Conclusions

In denying McCord benefits, the Board concluded that the evidence failed to show a medical probability that (1) her April 2, 2003 fall arose out of her employment with Kimble Glass; (2) her June 11, 2004 cervical surgery was related to her August 7, 2001 fall or her April 2, 2003 fall; or (3) that her October 1, 2004 lumbar surgery was related to either the August 7, 2001 or April 2, 2003 falls. We address McCord's challenges to each of these conclusions in turn.

1. April 2, 2003 Fall

McCord claims that the Board erred in determining that her April 2, 2003 fall, during which her leg "gave out," did not, as a matter of a medical probability, arise out of her employment with Kimble Glass. In reaching its conclusion on this point, the Board relied upon Dr. Kachmann's testimony that McCord's leg weakness was caused primarily by her lumbar condition, specifically the S1 level disc herniation and resulting nerve compression, and that her lumbar condition was degenerative in nature and perhaps accelerated, but not caused, by the 2001 injury. The Board additionally relied upon diagnostic studies indicating that the nerve compressions resulting from C4-5 and S1 disc herniations were not yet present three months following the 2001 injury, as well as the undisputed evidence that McCord waited to seek medical treatment until May 2004, and the cause of the 2003 fall was McCord's leg "giving out" rather than any work-related risks.

We conclude that the Board was within its fact-finding discretion to credit Dr. Kachmann's testimony that McCord's 2003 fall was largely attributable to her lumbar condition and to draw the reasonable inference that the nerve compression contributing to her leg weakness, which was not detected in diagnostic tests following the 2001 fall, resulted from McCord's pre-existing degenerative condition and developed independent of that fall. The Board was further entitled to draw the reasonable inference from this and the evidence of McCord's pre-August 2001 problems with her leg "giving out," together with the undisputed evidence that the cause of the April 2003 fall was McCord's leg "giving out," that this fall was attributable to McCord's medical condition and was not causally connected to her 2001 work injury or to her duties as an employee of Kimble Glass.

In challenging the Board's decision on the basis of particular statements, including her own, in the record, McCord is merely inviting us to reweigh the evidence, which we decline to do. We find no clear error in the Board's denial of benefits on the grounds that McCord's April 2003 fall did not arise out of her employment with Kimble Glass.

2. June 11, 2004 Cervical Surgery

McCord also claims that the Board erred in concluding, as a matter of a medical probability, that her June 2004 surgery was not related to her August 2001 or April 2003 fall. In reaching this conclusion, the Board relied upon evidence demonstrating that McCord's C5-C7 cervical injury had reached maximal medical improvement on March 13, 2003; that the purpose of the June 2004 surgery was to correct a new injury, specifically a disc herniation at the C4-C5 level; that testimony by Dr. Kachmann indicated both the possibility

that the C4-C5 herniation had contributed to the 2003 fall and also the possibility that the fall had contributed to the herniation; and that there was no medical evidence linking the C4-C5 herniation to the 2001 fall.

We again conclude that the Board was within its fact-finding discretion to conclude from this record that there was no medical probability that the June 2004 cervical surgery was related to the August 2001 fall. The stipulated evidence and Dr. Kachmann's testimony demonstrate that the purpose of the June 2004 surgery was largely to correct the C4-C5 cervical herniation. The fact that this injury was not detected in diagnostic tests performed within approximately three months following the 2001 fall supports the reasonable inference that this injury did not result from the 2001 fall. Given our endorsement of the Board's conclusion that the April 2003 fall was similarly unconnected, as a matter of medical probability, to the August 2001 fall, it seems fairly immaterial whether the C4-C5 injury caused the 2003 fall or vice versa. Because it is not our duty to reweigh the evidence, we conclude that the record supports the Board's denial of benefits on the basis that the June 2004 cervical surgery was unconnected to the 2001 fall.

3. October 1, 2004 Lumbar Surgery

McCord additionally claims that the Board erred in concluding, as a matter of a medical probability, that the October 1, 2004 lumbar surgery was not related to the August 2001 or April 2003 falls. In reaching this conclusion, the Board relied upon Dr. Kachmann's testimony that the lumbar surgery was designed to treat a degenerative lumbar stenosis and an S1 herniation, with the S1 herniation being the most likely cause of McCord's leg

weakness; and that medical evidence established that the S1 herniation was not present during McCord's treatment for the August 2001 fall, nor was it identified until over a year following the April 2003 fall; and that no medical evidence conclusively linked either the 2001 fall or the 2003 fall to McCord's lumbar problems.

As with the above analyses, we conclude that the Board was within its fact-finding discretion to conclude from this record that there was no medical probability that McCord's October 2004 lumbar surgery was attributable to her August 2001 or April 2003 falls. The parties stipulated that the lumbar surgery treated the L4-L5 and S1 areas of her spine. Dr. Kachmann testified that the L4-L5 disc protrusion and stenosis and the S1 foraminal stenosis and nerve root compression, which were visible in 2004 diagnostic tests and necessitated surgery, were not detected in diagnostic tests following the 2001 fall. The Board was entitled to draw the reasonable inference from the timing of these conditions that they did not result from McCord's 2001 fall. Again, because we have affirmed the Board's conclusion that the 2003 fall did not result from the 2001 fall, we similarly deem it immaterial whether the lumbar surgery was attributable to the 2003 fall. We decline to reweigh the evidence and find no clear error.

B. Medical Causation

McCord additionally challenges the Board's decision by suggesting that its finding of a lack of medical probability was not supported by a thorough review of the record, including Dr. Kachmann's opinion letter and her own testimony. As the claimant, McCord had the burden of proving that her medical conditions arose out of her employment by establishing a

causal connection between her work and the condition. *See Outlaw v. Erbrich Prods. Co.*, 777 N.E.2d 14, 28-29 (Ind. Ct. App. 2002), *trans. denied*. “[T]he question of the causal connection between a permanent condition, a work-related injury and a pre-existing condition is a complicated medical question.” *Noblesville Casting Div. of TRW, Inc. v. Prince*, 438 N.E.2d 722, 732 (quotation omitted). Although the admissibility of an expert’s opinion does not require that it have a particular level of certainty, an opinion which lacks reasonable certainty or probability is insufficient by itself to support a judgment. *Outlaw*, 777 N.E.2d at 29.

McCord points to *Noblesville Casting* and *Bertoch v. NBD Corp.*, 813 N.E.2d 1159 (Ind. 2004), which address the question of the relevance and weight of medical expert testimony when it is not expressed with a reasonable degree of certainty. *See Bertoch*, 813 N.E.2d at 1162 (citing *Noblesville Casting*, 438 N.E.2d at 731). Both the *Bertoch* and *Noblesville Casting* courts determined that such evidence was probative when considered in conjunction with other relevant evidence demonstrating causation. *See id.* (citing *Noblesville Casting*, 438 N.E.2d at 731). Indeed, in *Bertoch* the Supreme Court overturned the Board’s finding of a lack of medical causation on the basis that the medical testimony, although not expressed in terms of a reasonable degree of medical certainty, was adequately supplemented by other record evidence demonstrating causation. 813 N.E.2d at 1163.

Here, McCord suggests that the Board’s finding of a lack of medical probability to support a connection between the August 2001 fall and the April 2003 fall, her cervical surgery, or her lumbar surgery similarly fails to reflect the evidence from the record as a

whole. In support of her claim that her injuries stemmed from her 2001 fall, McCord points to Dr. Kachmann's statement in his opinion letter that "the repeated falls [McCord] sustained at work due to her neck and low back pain were most likely the cause of her C4-5 disc herniation and left L5-S1 disc herniation with compression of the left S1 nerve root." Appellant's Conf. Appendix pp. 133-34. Yet Dr. Kachmann's statement was based on McCord's report of a number of falls, some apparently unreported, while at work, and cannot necessarily be read to implicate the 2001 fall. Further, other evidence included diagnostic reports following the 2001 work injury which showed no signs that the above herniations resulted from the 2001 fall, and Dr. Kachmann subsequently modified his written statement by testifying that the unspecified falls merely "could contribute" to the C4-C5 disc herniation and left L5-S1 disc herniation with S1 nerve root compression. Exh. 1, p. 13. Further still, additional evidence included hospital records indicating that McCord had had degenerative disc and joint disease in her cervical and lumbar spine at the time of her 2001 fall, and that her leg had "given out" prior to that time. The Board was fully within its fact-finding discretion to conclude, based upon the full record, that McCord had failed to demonstrate, as a matter of medical probability, that her injuries were attributable to her employment with Kimble Glass or her 2001 work injury. McCord's reliance upon *Noblesville Casting* and *Bertoch* is unavailing.

III. Conclusion

Having found no clear error in the Board's findings and conclusions, we affirm the Board's denial of McCord's applications for benefits under Cause Numbers C-162987 and C-170002.

The decision of the Full Board is affirmed.

FRIEDLANDER, J., and MAY, J., concur.