RENDERED: DECEMBER 22, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-00379-WC

DUANE IRELAND — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-01928

MILAN EXPRESS CO., INC.;
HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

McANULTY, JUDGE: Duane Ireland (Ireland) has petitioned for review of an opinion of the Workers' Compensation Board (Board) entered on January 21, 2005, that affirmed an opinion and order of the Administrative Law Judge (ALJ) rendered August 17, 2004, dismissing Ireland's claim against Milan Express Co., Inc. (Milan) for failure to establish that his physical complaints were the result of a work-related injury. Before us, Ireland argues that the Board erred in affirming the ALJ's opinion and

order, asserting that the ALJ's findings were not supported by substantial evidence and as a legal question, the findings of the ALJ and Board are not conclusive to this Court. We affirm.

Ireland, who obtained his GED after completing the eleventh grade, received vocational training in welding and truck driving, and worked in welding and truck driving prior to beginning work as a truck driver with Milan in the spring of 2002. With Milan, he worked an average of fifty to fifty-five hours per week. His duties included short haul trips from Milan's Frankfort terminal to Lexington and Frankfort, and he also frequently loaded and unloaded freight with an average maximum weight of fifty pounds.

On July 18, 2002, while making his first delivery of the day, Ireland experienced a pinching feeling in his right leg. He "walked-off" the sensation and reentered the truck. While driving to his second delivery, the sensation intensified. Ireland parked the truck to stretch again and became unable to either walk or stand up straight.

Ireland reported to his supervisor that he was having trouble; that the truck ride was very bumpy; and that the pain in his leg "just came on." The supervisor supplied a relief driver and returned Ireland to the terminal. Ireland drove himself to the hospital emergency room (ER). According to the ER records, Ireland reported a three-week history of low back

pain with hip and leg muscle stiffness. (Later, in his deposition, Ireland denied relating this three-week history of pain). He was treated with muscle relaxants and pain medication, and returned to work after a couple of days.

On July 22, 2002, four days after his trip to the ER, Ireland complained to a chiropractor of a very stiff back; lower back pain; and sharp pain shooting around his sides and down his legs to the ankles. Although the chiropractic records indicated a two-month history of the symptoms, later in his deposition Ireland denied or did not recall giving this history. He was treated without much relief, and continued working for Milan.

Eight months later, in March, 2003, Ireland sought treatment from his family physician. He reported an eight-month history of right leg pain, lower backache, and pain around his right buttock area, as well as occasional numbness or funny type feeling in his right lower extremity. The family physician saw no trauma or injury; no swelling or redness of the right lower extremity; intact reflexes; equal or no SI joint area tenderness; paraspinal and spinal tenderness in the lower back; and very early degenerative changes of the lumbosacral spine. He diagnosed probable right lumbrosacral radiculopathy/sciatica without any focal motor deficit, and prescribed pain medication.

That same month, Ireland resigned from Milan for a better job with Taylor Trucking as an over-the-road driver

hauling steel, but because he could not physically chain down the loads, a component of the job, he left Taylor after a month. He then worked for Baylor Trucking, hauling Pepsi products locally from warehouse to warehouse, until July 2, 2003. Since that date, he has not worked.

In July, 2003, Ireland saw his family physician again for pain in his low back and right leg. He again reported that he was not aware of any trauma or injury. An MRI showed, at L5-S1, "a 7-8 mm central and right paracentral disc herniation effacing the ventral thecal sac, impinging on the right lateral recess and presumably impinging on the traversing right S1 nerve root."

He was referred to an orthopedic surgeon on August 5, 2003, where he reported a one-year history of right leg pain symptoms and right leg radicular pains beginning in August, 2002, while on the job driving a tractor-trailer. After a diagnosis of right S1 radiculopathy with mild mechanical low back pain, surgery was performed on August 12, 2003, resulting in a percutaneous discectomy and fusion at L5-S1 with pedicle and cage instrumentation. The surgery relieved the pain in Ireland's right leg, but post-surgery he reported more significant low back pain as well as left leg pain. At his follow-up visit in September, 2003, Ireland was referred for physical therapy.

The record contains a report, dated May 2, 2004, from Ireland's orthopedic surgeon, indicating that Ireland's treatment was the direct result of injuries sustained while working on the job in August of 2002;[1] assessing a 23% impairment under DRE lumbar Category IV of the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides); and recommending restrictions, if he were pain free, against repetitive bending at the waist or lifting of more than fifty pounds.

On June 2, 2004, an independent medical examination (IME) was performed by an orthopedic surgeon. After looking at the medical records from the ER and the chiropractor, taking a history, and performing a physical examination, he concluded that Ireland's condition was pre-existing and active prior to July 18, 2002; that the right leg sciatica developed spontaneously without traumatic causation while Ireland was driving the truck; and that there was neither a single work-related traumatic event nor a series of traumatic events producing a harmful change in the human organism. He therefore assessed a 23% permanent impairment rating under DRE lumbar Category IV of the AMA Guides based on Ireland's continued symptoms and new onset of left leg symptoms, or a 15% permanent impairment rating under the Range of Motion Model of the AMA

[1] In contrast, the date of the claim was July 18, 2002.

Guides; and allowed Ireland to return to work at a sedentary to medium duty job with restrictions against lifting over thirty to forty pounds.

On August 17, 2004, the ALJ issued its opinion and order, dismissing Ireland's claim on a finding that Ireland's recollection of the onset of his symptoms was not supported by the contemporaneous medical record which established that in the ER, he gave a history of onset three weeks before; and four days later at the chiropractor, he gave a history of onset of two months before. As Ireland was "unable to point to any work-related traumatic event or series of traumatic events which were the proximate cause of his right leg and back pain on July 18, 2002," the ALJ concluded that Ireland failed to carry his burden of proving, pursuant to Kentucky Revised Statutes (KRS) 342.0011(1),[2] the occurrence of a work injury on July 18, 2002. The ALJ discounted the orthopedic surgeon's May 2, 2004, report, noting that the surgeon did not have the benefit of a complete history because he did not have the opportunity to review medical records from other treating physicians; whereas the

[2] "Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. "Injury" when used generally, unless the context indicates otherwise, shall include an occupational disease and damage to a prosthetic appliance, but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.

orthopedic surgeon who performed the IME had the benefit of a full medical record review.

Before the Board, Ireland contended that although the conclusion of the ALJ was based upon substantially undisputed evidence, that it was subject to review by the Board as a legal question, arguing that although the ER and chiropractic records evidenced a history of *symptoms* prior to July 18, 2002, that Ireland denied that history; that the medical records did not indicate a history of *leg pain* prior to July 18, 2002, but only *low back pain*; and that the leg pain began during the bumpy delivery on July 18, 2002.

In affirming the ALJ's opinion and order, the Board stated:

> Ireland impermissibly requests this Board to substitute its judgment as to the weight and credibility of the evidence for that of the ALJ as fact-finder. As we admonish so frequently, this is not the Board's function. *See* KRS 342.285(2); Paramount Foods Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).
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> It is well-established that a claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his cause of action. Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925 (2002). Since Ireland was unsuccessful in his burden of proof before the ALJ, the question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (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, Ky.App., 691 S.W.2d 224 (1985). As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993); Paramount Foods Inc. v. Burkhardt, supra. Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., Ky., 951 S.W.2d 329 (1997); Luttrell v. Cardinal Aluminum Co., Ky.App., 909 S.W.2d 334 (1995). The ALJ, as fact-finder, may 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. Magic Coal v. Fox, Ky., 19 S.W.3d 88 (2000); Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999); Halls Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327 (2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, supra. In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support his decision. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

In this instance, pertaining to the issue of when and how the petitioner's injury actually occurred, the evidence is conflicting. Ireland could not identify a specific episode of trauma that produced his symptoms. While it is undisputed that Ireland was afflicted with significant pain on July 18, 2002, upon arriving at the Norton Hospital emergency room he reported a history of low back pain with hip and leg muscle stiffness that had begun three weeks prior. The emergency room records do not mention a work-related cause. Four days later, on July 22, 2003 (sic), Ireland sought treatment at Eriksen Chiropractic

> Center. The patient intake form contained a history of low back pain and stiffness and sharp pain in both legs for the preceding two months. Again Ireland did not report a work-related cause. Moreover, as pointed out by the ALJ, Dr. Gleis, after conducting an exhaustive medical records review, concluded that Ireland's right leg and low back condition were pre-existing and active prior to July 18, 2002. Dr. Gleis further opined that Ireland's complaints developed spontaneously and without any work-related traumatic causation. Such evidence, in our opinion, is more than ample to support the conclusions reach (sic) by the ALJ dismissing Ireland's case. There is sufficient evidence of substantial probative value plainly indicating that Ireland's complaints were pre-existing and active prior to July 18, 2002. Hence, we may not disturb the ALJ's ruling on appeal. Special Fund v. Francis, supra.

Before us, Ireland submits as he did before the Board that the ALJ erred in dismissing his claim upon substantially undisputed evidence that he suffered a traumatic event/injury while driving his truck for Milan on July 18, 2002, in that although he suffered problems prior to that date, that they were normal aches and pains, and the leg pain of the type he experienced that caused him to be unable to walk, stand up, or drive, began on July 18, 2002. Ultimately, he argues that the ALJ and the Board erred in failing to conclude in his favor based upon his "undisputed and unrefuted" testimony.

Our standard of review of 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 Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). Having reviewed the Board's application of the law to the evidence, we conclude that the Board committed no error.

As noted by the ALJ and the Board, the evidence supporting Ireland's condition as pre-existing and active ultimately consisted of ER and chiropractic medical records containing histories of pre-existing low back and leg pain prior to July 18, 2002; and the IME, which concluded, with the benefit of full medical records, a complete history, and a physical examination, that Ireland's right leg and low back condition were pre-existing and active prior to July 18, 2002. In contrast, Ireland disputed the medical histories and in support of a work-related injury offered a differing opinion from his orthopedic surgeon, which (in addition to incorrectly citing August, 2002, as the injury date, instead of July 18, 2002, as claimed) the ALJ discounted because the surgeon did not have the opportunity to review all the medical histories.

Based on the above, we conclude that the Board correctly applied the law in concluding that the ALJ, as fact-finder, can accept or reject any testimony and evidence, and that "(t)here [was] sufficient evidence of substantial probative

value plainly indicating that Ireland's complaints were pre-existing and active prior to July 18, 2002." See generally, Magic Coal v. Fox, 19 S.W.3d 88, 96 (Ky. 2000); Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We note that Milan submits that because Ireland did not file a petition for reconsideration with the ALJ,[3] he failed to preserve the issue herein for appellate review pursuant to KRS 342.285(1).[4] In Brasch-Barry General Contractors v. Jones, ____ S.W.3d ____, (Ky. 2005) (finality endorsed 11/10/05), the Kentucky Supreme Court cited Smith v. Dixie Fuel Company, 900 S.W.2d 609, 612 (Ky. 1995), in summarizing the Board's duties on review:

> No new evidence may be introduced before the Board and the Board may not substitute its judgment for that of the ALJ concerning the weight of the evidence on questions of fact. The scope of review of the Board is limited to determining whether the ALJ's decision

[3] KRS 342.281 - Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order, or decision of the administrative law judge. The petition for reconsideration shall clearly set out the errors relied upon with the reasons and argument for reconsideration of the pending award, order, or decision. All other parties shall have ten (10) days thereafter to file a response to the petition. The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision and shall overrule the petition for reconsideration or make any correction within ten (10) days after submission.

[4] An award or order of the administrative law judge as provided in Kentucky Revised Statutes (KRS) 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may in accordance with administrative regulations promulgated by the executive director appeal to the Workers' Compensation Board for the review of the order or award.

> was: authorized, not procured by fraud, in conformity with Chapter 342, supported by the evidence, and not arbitrary or capricious.

The court then went on to hold that questions of law need not be preserved by a petition for reconsideration to the ALJ, but may be appealed directly to the Board:

> (I)n Whittaker v. Reeder, 30 S.W.3d 138 (Ky. 2000), we reiterated that it is the Board's province on appeal to ensure that ALJ decisions are in conformity with Chapter 342 (the Workers' Compensation Act) and that such determinations constitute questions of law, and not fact. *Id*. at 144.

Milan relies on Halls Hardwood Floor Company v. Stapleton, 16 S.W.3d 327, 330 (Ky. App. 2000), but that holding is consistent with Brasch-Barry and factually distinguishable from the case at bar. In Halls Hardwood, the issue concerned an erroneous computation of weekly benefits. A petition for reconsideration was therefore required to bring a patent factual error to the attention of the fact-finder. As the question herein was one of law, it did not require Ireland to first file a petition for reconsideration in order to preserve the issue for review before the Board, and the Board did not err in addressing the issue on the merits.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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