

RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001694-WC

FRANK N. WHEELER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-04-01159

ACTIVE TRANSPORTATION;
HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY,¹ AND SCHRODER, JUDGES.

McANULTY, JUDGE: The Administrative Law Judge (ALJ) denied Frank N. Wheeler's claim for workers' compensation benefits from a back injury occurring on September 3, 2003, when he fell down the steps of a shuttle van at work. The ALJ held that Wheeler sustained only a temporary back strain as a result of the fall.

¹ This opinion was completed and concurred in prior to Judge William E. McAnulty, Jr.'s resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

Consequently, the ALJ awarded Wheeler medical benefits for treatment of the strain but no benefits for treatment of ongoing pain attributable to degenerative changes in his lumbar and thoracic spine.

Wheeler appealed the ALJ's decision to the Workers' Compensation Board (the Board). After a review of Wheeler's testimony and the medical evidence, the Board affirmed the decision of the ALJ. In its opinion, the Board stated that Wheeler's arguments on appeal were simply re-arguments of the merits of his claim. Unsatisfied with the results, Wheeler has pursued an appeal to this Court.

Wheeler worked as a yard man for Active Transportation. As a yard man, he drove newly-manufactured Ford trucks a short distance from a staging area near the Ford plant to a parking lot. After parking the vehicles, he boarded a shuttle van and rode across the street to repeat the process.

While working as a yard man, on Wednesday, September 3, 2003, Wheeler slipped and fell when stepping down out of the van. As a result of the slip and fall, he scraped up his legs and injured his ankles and lower back.

A couple of days after the injury, Wheeler sought medical treatment for his injuries from his family doctor, Dr. Matthew Fargen. Dr. Fargen diagnosed a low back strain and ankle pain without evidence of strain or ligament instability

and kept Wheeler off work over the weekend. Wheeler returned to work on Monday, September 8, 2003.

Wheeler continued working for about eight more months. In March of 2004, however, his employer changed shuttle vans. The new van configuration required him to have to twist, turn and maneuver more to get around in the van. After riding on the shuttle van for a short while, Wheeler's back started to bother him. He sought treatment, and one of his doctors eventually referred him to an orthopedist, Dr. Mladen Djurasovic.

Dr. Djurasovic took Wheeler off work and advised him that he would have a difficult time ever resuming his work as a yard man. Based on Dr. Djurasovic's advice, Wheeler retired in September of 2004.

Wheeler filed his application for resolution of injury claim in early July of 2004. As a part of the claim process, Wheeler submitted to two independent medical evaluations, one performed by Dr. S. Pearson Auerbach and another performed by Dr. Thomas Loeb. Both doctors assigned a 5% permanent impairment rating to the whole person. Dr. Auerbach believed that it was more likely than not that Wheeler's work-related injury brought his condition into a disabling reality. Dr. Loeb, however, apportioned the 5% impairment to pre-existing degenerative changes and further qualified that none of it related to the work injury of September 3, 2003.

As to the September 3, 2003, injury, Dr. Loeb opined that the mechanism of injury -- slipping in a van and striking the low back area - "is consistent with a contusion and not any type of mechanism that would cause degenerative joint disease to occur." After reviewing Wheeler's medical records, he noted that Wheeler had not mentioned the fall to Dr. Djurasovic and further stated as follows:

I think it is clear from the medical record that this gentleman is suffering from longstanding pre-existing osteoarthritis of the thoracolumbar spine which is following a natural progressive course of ongoing degeneration. I think if indeed the injury of September 3, 2003 had caused any symptoms which were not reported to Dr. Djurasovic I think they would have been transient and in my opinion would not have significantly altered the progression of his degenerative process. He obviously had exacerbations and remissions of his degenerative joint disease over many years. Based on the objective findings and evidence in the medical record, I cannot relate his current complaints secondary to degenerative changes to the work injury of September 3, 2003.

The ALJ relied on Dr. Loeb's opinion in denying benefits. In this appeal, Wheeler argues that the ALJ erroneously separated the uncontroverted back strain from the preexistent degenerative changes of the lumbar and thoracic spine. He contends that he had a dormant non-disabling condition that was brought into a disabling reality by a work injury and such a condition is still compensable in Kentucky.

Wheeler believes that the Board misperceived his argument on appeal and overlooked and misconstrued controlling statutes and case law. He asserts that at a very minimum, he should have been awarded temporary total disability benefits of \$571.42 per week from June 15, 2004, through the date he reached maximum medical improvement on October 5, 2004.

In addition to overlooking and misconstruing controlling statutes and case law, Wheeler argues that the ALJ also committed reversible error by prospectively denying the medicals after finding a work injury. He argues that the ALJ should have awarded him appropriate medical benefits under KRS 342.020 and Cavin v. Lake Const. Co., 451 S.W.2d 159 (Ky. 1970).

This Court's function when reviewing the Board's affirmance of a decision of the ALJ is to correct the Board only where we perceive "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 Hosp. v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992). Moreover, in this case, Wheeler had the burden of proof. If the ALJ finds against the person with the burden of proof, his burden on appeal is infinitely greater. See Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Because Wheeler had the burden of proof, he must do more than assert that there was some evidence of substance which

would have justified a finding in his favor. See id. He must show that the evidence was such that the finding against him was unreasonable on the basis of reliable, probative, and material evidence contained in the whole record. See id.; KRS 342.285(2)(d). A finding that is unreasonable under the evidence presented is clearly erroneous and would compel a different finding. See id.

Having reviewed the evidence and the arguments of the parties, we conclude that there was substantial evidence in Dr. Loeb's report that Wheeler sustained no permanent impairment as a result of the work-related injury and that a different finding was not compelled. The fact that Dr. Auberbach's report supports Wheeler's claim does not compel a different finding as the question of which evidence to believe is the exclusive province of the ALJ. See Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993).

We move to Wheeler's second contention on appeal that the ALJ committed reversible error by prospectively denying the medicals in violation of KRS 342.020 and Cavin, 451 S.W.2d at 161-62. On this issue, in view of Dr. Loeb's medical opinion that the work-related incident was transient, there was substantial evidence to support the conclusion that Wheeler was not entitled to future medical benefits for this injury. See

Robertson v. United Parcel Service, 64 S.W.3d 284, 287 (Ky.
2001).

For the reasons stated above, the judgment is
affirmed.

ALL CONCUR.

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