

RENDERED: APRIL 9, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001458-WC

GARY SIPE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-63661

HARRISON MEMORIAL HOSPITAL;
HON. JAMES L. KERR, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
REVERSING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON, JUDGE; WHITE,¹ SENIOR
JUDGE.

¹ Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

WHITE, SENIOR JUDGE: Gary Sipe petitions this Court to review an opinion of the Workers' Compensation Board reversing the Administrative Law Judge's opinion that Sipe was entitled to an award based upon a 10% whole-person impairment rating. The Board concluded that Sipe's benefits award should be adjusted to reflect a 10% whole-person impairment with a 5% carve out for a pre-existing active condition. Sipe claims that the ALJ's decision was supported by substantial evidence and should have been affirmed by the Board. We agree and, therefore, reverse the Board's opinion.

Sipe is a 59-year-old maintenance worker at Harrison Memorial Hospital. He has an eleventh grade education and has an employment history that primarily consists of manual labor on farms, in factories, and in hospitals. Sipe began working in the hospital in 1998. His duties include ordinary maintenance tasks, including lifting and disposing of trash and medical waste. Over the course of his employment at the hospital, Sipe has experienced numerous on-the-job injuries.

In 2000, Sipe filed his first workers' compensation claim following a back injury that he incurred while lifting trash. Sipe received treatment from Dr. Frank McKemie and was prescribed muscle relaxers and pain medication.

In 2004, Sipe experience a second back injury while lifting trash. He was treated by Dr. McKemie and missed several weeks of work. When Sipe returned to work, he continued to have back pain which was primarily caused by walking for long periods.

Beginning in 2005, Sipe experienced a series of injuries that would later form the basis for this workers' compensation claim. On November 10, 2005, November 28, 2005, December 14, 2005, and June 12, 2006, Sipe injured his back while lifting trash. Sipe experienced numbness in his right leg when he stood for lengthy periods. Dr. McKemie treated Sipe for these injuries and referred Sipe to Dr. Alexis Norelle.

In September 2006, Dr. Norelle performed a lumbar discectomy to repair a left L4-5 herniated disc. Although the surgery improved his leg symptoms, Sipe continued to experience back pain. At the end of November 2006, Sipe returned to work with orders to remain on light duty. Eventually, Sipe was able to perform his usual tasks.

Dr. McKemie continues to treat Sipe every three months. Sipe is currently on pain medications and muscle relaxers. He continues working at the hospital but questions whether he will be forced to return to full duty. On September 20, 2007, Sipe filed for workers' compensation benefits.²

On January 26, 2009, the ALJ issued an opinion and award concluding that Sipe suffered a 10% whole person impairment based upon a 2006 work related injury. The opinion was primarily based upon the testimony of Dr. Norelle.³

² In October 2007, Sipe had another work injury that occurred while he was lifting medical waste. Instead of reporting the injury directly to his supervisor, Sipe immediately went to the doctor's office. He missed a couple weeks of work and returned to light duty.

³ Although medical records of other physicians were submitted, Dr. Norelle was the only physician that testified in a deposition.

The following questions and answers are relevant excerpts from Dr.

Norelle's testimony. The questions were asked by various attorneys and were all answered by Dr. Norelle.

Q. You filed, a 107, in this case, is that a true and accurate copy of your handwritten report that was filed?

A. It is, yes, this is my signature and my office manager did it and I looked at it.

Q. Is that still your opinion today?

A. Yes. The 10 percent that I gave is just based on the herniated disc and did not take into account any of his pre-existing.

Q. Okay. So 10 percent is based upon the herniated disc that he got in 2006?

A. Correct.

.....

Q. Of that 10 percent impairment on the basis of the herniated disc, how much is related to the 7/26/2000 injury?

A. Probably the five-percent because I was recently made aware of MRI scans from – I have not personally reviewed these – from 2000 and 2005 which showed in concordance with his injury, an L4-5 disc protrusion.

.....

Q. Doctor, it hadn't raised to a disabling reality until the 2/06 surgery; would that be accurate?

A. Correct

Q. So it was a pre-existing non-active condition? In other words, it didn't interfere with his ability to work?

A. As far as I can tell.

.....

Q. Nonetheless though, even if he continued working, strictly adhering to the 5th Edition of the AMA Guides, it would have been a ratable impairment as a DRE Category II?

A. Correct.

Dr. Norelle's statements were contradictory and confusing. In its opinion, the ALJ acknowledged this problem and stated,

While Dr. Norelle seemed somewhat confused by the questions, she unequivocally answered [the] question on page 10 of the deposition that plaintiff's 10% impairment is based upon the herniated disc that he received in 2006, it was a pre-existing non-active condition. This comports with plaintiff's testimony that plaintiff did return to work after the 2000 and 2004 incidents and performed full duties with no restrictions from any physicians. To the undersigned, it is quite clear that the plaintiff had prior back problems. It is also clear that they were symptomatic from time to time and plaintiff required periodic pain medications and muscle relaxers. Still, it is Dr. Norelle's testimony that plaintiff has 10% impairment as the result of the June 12, 2006 injury and the same shall be the basis of the plaintiff's award.

Harrison Memorial Hospital appealed the ALJ's decision to the Board. The Board reversed and remanded the case to the ALJ with instructions to include a 5% carve out for pre-existing injuries.

The Board recognized the contradictions in Dr. Norelle's testimony but concluded that Norelle's testimony showed that pre-existing injury was active, thus warranting the carve-out. Under *Finley v. DBM Technologies*, 217 S.W.3d

261 (Ky. App. 2007), a pre-existing condition must be both symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. *Id.* at 265.

A review of Dr. Norelle's testimony and medical records show that Dr. Norelle opined that Sipe did not have a pre-existing condition. After Dr. Norelle was informed about the previous MRI scans, however, she conceded that 5% of the impairment could be caused by a pre-existing injury. Dr. Norelle did not personally review the MRI scans. The ALJ found, based upon Dr. Norelle's testimony, that the previous back problem was a pre-existing, non-active condition. The ALJ further found that the facts relating to this problem supported the testimony that the previous injury was not symptomatic.

The role of weighing evidence, drawing inferences, and making determinations of credibility rests solely in the hands of the ALJ. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000). The Board and our Court must only question whether the evidence compels a different result. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984).

Dr. Norelle's contradictory testimony leaves much unanswered. Her testimony provides ample support for the opinions of both the ALJ and the Board. The question before us is not which judicial entity properly construed the deposition. Instead, we must only ask whether the ALJ's opinion was supported by substantial evidence. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

The evidence must be such that no reasonable person could have made the same conclusion as the ALJ.

Although Dr. Norelle was informed of Sipe's MRI results, she did not have an opportunity to thoroughly review the results herself. Nonetheless, she reviewed Sipe's medical history and records. Therefore, we conclude that the ALJ's opinion was supported by ample evidence.

Dr. Norelle's conflicting statements alone do not provide automatic grounds for reversal. *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999). Further, conflicting testimony does not allow the Board to substitute its own evidentiary analysis for that of the ALJ. Rather than correcting a factual error within the ALJ's opinion, the Board's decision assumed the role of assigning weight and credibility to portions of Dr. Norelle's testimony. The Board did not have this authority.

Accordingly, we reverse the Workers' Compensation Board's decision, entered on July 14, 2009, and reinstate the Administrative Law Judge's previous opinion and award.

ALL CONCUR.

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