

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001784-WC

GIPSON FARMS TRUCKING, LLC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-81696

JOHNEY BALLARD;
FOUR RIVERS BEHAVIORAL HEALTH;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CLAYTON AND STUMBO, JUDGES.

STUMBO, JUDGE: Gipson Farms Trucking, LLC, is appealing the opinion of the
Workers' Compensation Board (hereinafter Board) which affirmed the award of

increased workers' compensation benefits granted by the Hon. Grant Roark, Administrative Law Judge (hereinafter ALJ), to Johney Ballard. Gipson argues that the increase in benefits was not supported by substantial evidence and should have been denied. We find that the Board was not in error and affirm.

Ballard began working for Gipson in August of 2002. On June 17, 2003, Ballard was involved in an on-the-job accident which is the subject of the underlying workers' compensation claim. Ballard severely injured his left elbow causing loss of strength in his left arm and hand. He was later diagnosed with secondary psychological problems as a result of the trauma.

The original workers' compensation claim was heard by ALJ James Kerr. Two doctors testified during the hearing, Dr. DeWeese and Dr. Richardson. Dr. DeWeese assessed Ballard as having an 8% whole person impairment and concluded that Ballard should not perform heavy lifting or perform repetitive pushing or pulling. Dr. Richardson assessed Ballard as having a 21% whole person impairment. Ultimately, ALJ Kerr found Dr. DeWeese's evidence more persuasive, found that Ballard was not permanently and totally disabled, and awarded Ballard with workers' compensation benefits reflecting an 8% whole person impairment. This award was affirmed by the Board and a previous panel of this Court.

In August of 2008, Ballard filed a motion to reopen his claims. ALJ Grant Roark heard this claim. Ballard argued that his physical condition had worsened and that there was an increase in his occupational disability. The only

medical impairment rating presented was that of Dr. Richardson, who assessed Ballard as now having a 20% whole person impairment. Dr. Richardson also believed that Ballard would never be able to return to gainful employment.

ALJ Roark found that Ballard had shown a worsening of his condition and that he was now permanently and totally disabled. The ALJ gave Ballard a 20% impairment rating and awarded workers' compensation benefits commensurate with that rating. Gipson appealed the award to the Board, arguing that the finding of a worsening condition was not supported by substantial evidence. The Board affirmed the finding of the ALJ. This appeal followed.

Gipson argues that there was no proof that Ballard's condition had worsened. Gipson claims that Ballard's testimony regarding his condition was the same as it was in the original action and that Ballard has always felt he was permanently and totally disabled. Also, Gipson points out that Dr. Richardson gave Ballard an impairment rating of 21% in the original action, but only gave him a rating of 20% upon the reopening. Gipson argues this shows an improvement in Ballard's condition, not a worsening.

We begin by noting that the difference in the two Dr. Richardson ratings is irrelevant. In the eyes of the law, once Ballard was determined to have an 8% impairment rating by the original ALJ and Board, that was the impairment rating to be used in all further actions. The 8% impairment rating is entitled to *res judicata*. See *Godbey v. University Hospital of Albert B. Chandler Medical*

Center, Inc., 975 S.W.2d 104 (Ky. App. 1998); *Keefe v. O. K. Precision Tool & Die Co.*, 566 S.W.2d 804 (Ky. App. 1978).

“[T]he function of the Court of Appeals in reviewing decisions of the Workers’ Compensation Board is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Daniel v. Armco Steel Co., L.P.*, 913 S.W.2d 797, 797-798 (Ky. App. 1995). We find no error here.

Both the ALJ and Board found Ballard had presented substantial evidence of a worsening of his condition. At the time of the reopening, Ballard suffered from an 8% whole person impairment. The only medical evidence presented now showed that he suffered from a 20% impairment. Additionally, evidence was presented that Ballard’s pain has increased; his pain medication has been doubled; his motor and sensory deficits in the distribution of the left ulnar nerve have deteriorated; there was no longer any active firing of the ulnar-innervated muscles below the elbow; that electrodiagnostic testing showed a demyelinating left ulnar neuropathy and left median neuropathy at the wrist; his ring and little fingers have drawn completely down into the palm of his hand (a clawing of the hand); and the spacing of the joint in the elbow has become more narrow. All of this occurred after the original workers’ compensation award.

We find that the Board properly assessed the evidence and that there was no “gross injustice.” We therefore affirm the opinion of the Board.

ALL CONCUR.

PETITION FOR REVIEW
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RESPONSE TO PETITION FOR
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