

RENDERED: APRIL 23, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000959-WC

MIDWEST BLOCK AND BRICK

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-08-00398

TERRY PARKER; HON. R. SCOTT  
BORDERS, ADMINISTRATIVE LAW  
JUDGE; AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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

CLAYTON, JUDGE: This is a timely filed appeal of a decision of the Workers' Compensation Board ("Board"). After a perusal of the record, we affirm the decision of the Board.

## BACKGROUND INFORMATION

Terry Parker began working for appellant Midwest Block and Brick (“Midwest”) in April of 2006 as a cuber. Parker had other manual labor jobs throughout his career after being honorably discharged from the U.S. Navy in 1973. He hung duct work, did roofing work, framed houses, hung drywall, set concrete forms, was a painter and hung tobacco. All these jobs included the use of his arms extended from his body at varying degrees.

He also worked at the Shawnee Steam Plant with the TVA for five years. During his time there he was responsible for the storeroom and was also a laborer who performed retubing and chipping coal residue from boilers. To perform this task, he used a chipping gun which had a spike or a nail on the end. The chipping gun had a trigger which caused a vibration of the spike/nail, which would gradually chip away the coal residue. Parker would use the gun at varying degrees including above his shoulder line.

Midwest manufactures various types of blocks and bricks which vary in weight from twenty-five to seventy-five pounds. After being manufactured and dried in a kiln, the product is placed on a conveyor and then put on pallets for shipping. The cuber operator (Parker’s position) sorts the product, getting rid of defective items and then arranging the product so it can be placed on the pallets.

In culling the product, the cuber could have to lift around 100 blocks which weigh from twenty-five to seventy-five pounds each. The cuber would then

have to throw the block into a hopper which could be located at varying degrees around him.

Parker brought a petition for benefits alleging that his left shoulder was injured as well as cumulative trauma to both shoulders. The accident occurred in August of 2006 and Parker received treatment shortly thereafter. In describing the incident, Parker testified that Midwest was producing blocks which weighed between sixty and seventy pounds. He stated that the day of the incident, there were many defective stones and he and co-workers had to throw many of them into the hoppers. Parker stated that he was turning to throw a block into the hopper, but had to stop short to avoid hitting a co-worker who was returning to the line after taking a hopper of blocks to the dumpster.

Parker testified that he immediately felt intense pain in his left shoulder. Parker received treatment for his injury at the Marion Veterans' Medical Center ("Veterans") on August 23, 2006.

Parker's employment was eventually terminated on June 1, 2007, due to his tardiness after oversleeping. Parker stated that he had taken two pain pills rather than one as prescribed and this caused him to oversleep. Parker asserts that he has tried to perform physical labor since he left Midwest, but has been told he no longer has the physical strength to perform.

Parker's case was heard by an Administrative Law Judge ("ALJ") who denied his claim in an amended order of October, 2008. Parker then appealed

his decision to the Board which affirmed in part and vacated and remanded in part the ALJ's decision. Midwest now brings this appeal of the Board's decision.

### STANDARD OF REVIEW

In reviewing a decision of the Board, our function "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, 687-88 (Ky. 1992).

"[T]he claimant bears the burden of proof and the risk of non-persuasion before the fact-finder with regard to every element of a workers' compensation claim," *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000) We recognize that it is within the broad discretion of the ALJ "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

### DISCUSSION

Midway asserts two arguments on appeal. First, it contends that the Board committed reversible error by not limiting its appellate review to the issue of whether the ALJ's dismissal is supported by substantial evidence of record. Midwest argues that it was error for the Board to address Parker's argument that

the ALJ should have conducted an analysis of pre-existing active impairment under the case of *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007).

As evidence of his injury, Parker offered both lay testimony and medical evidence. Joe Wiseman, a representative of Midwest, testified that he had multiple conversations with Parker regarding the impact his position as cuber was having on his physical well being and that it was just part of the job.

Medical records from Veterans' indicated Parker had been receiving treatment for pain in his left shoulder since 2001. In July of 2006, Parker went to Veterans' for bilateral shoulder pain. Parker was x-rayed and the radiologist found he had an underlying impingement or chronic rotator cuff injury on the right shoulder. This was the result of an August 23, 2006, visit, in which Parker did not mention his work-related injury.

In April of 2007, Parker saw Dr. Jennifer Nelson, his family physician, for treatment for his shoulder. Dr. Nelson diagnosed Parker with a bony spur on the underside of his shoulder joint. Parker was later examined by Dr. Emily Rayes-Prince on July 16, 2008. Dr. Rayes-Prince noted that Parker had started experiencing pain and mobility issues after the work accident. She stated that this injury transformed a chronic, nondisabling condition into a disability. She determined that his shoulder injuries were due to repetitive trauma and assigned a 10 percent functional whole body impairment rating.

Dr. Michael Moskel, a board certified orthopedic surgeon, examined Parker on June 23, 2008. He found Parker had diffuse degenerative changes in his

rotator cuff, degenerative degeneration of the subscapularis tendon with articular partial defect, degenerative interstitial degenerative defects of the long head of the biceps tendon, and osteoarthritis of the glenohumeral joint with associated loss of range of motion. Dr. Moskel's diagnosis was that these injuries were the result of a preexisting active condition which manifested prior to Parker's employment with Midwest.

The ALJ found:

the medical records are devoid of [Parker's] being treated initially after the August 1, 2006 traumatic event and in fact, Dr. Nelson's records do not reflect any allegations of left shoulder problems resulting from [Parker's] work until June of 2007. In addition, the MRI reports of [Parker's] left and right shoulder are virtually identical in their findings. Further, [Parker], according to his supervisors, never reported a work-related injury and in fact their first notice of the same was when they received a bill from the emergency room were [sic] [Parker] presented himself immediately after being terminated by [Midwest Block & Brick]. Finally, Dr. Moskel . . . was of the opinion that none of [Parker's] shoulder conditions, left or right, are causally related to his work for [Midwest Block & Brick].

In this specific instance, after careful consideration of the lay and medical testimony herein, the Administrative Law Judge is simply not convinced [that Parker] met his burden of proving he suffered a work-related injury to his left upper extremity as he alleged on August 1, 2006 or to either the left or right upper extremity as a result of cumulative trauma manifesting on June 1, 2007.

Parker then appealed this decision to the Board. The Board may not disturb an ALJ's finding that a claimant failed to prove the occurrence of a workplace injury unless the evidence is so overwhelming, upon consideration of

the record as a whole, it is compelled. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 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*, 691 S.W.2d 224 (Ky. App. 1985). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999).

The Board reversed the decision of the ALJ finding as follows:

Our case law mandates that basic facts must be clearly set out by the ALJ in order for there to be sufficient evidence to support the ALJ's ultimate conclusions. *Shields v. Pittsburgh and Midway Coal Min. Co.*, 634 S.W.2d 440, 444 (Ky. App. 1982). This is necessary "so that both sides may be dealt with fairly and be properly apprised of the basis for the decision." *Id.*

In this case, it is impossible to determine whether the ALJ applied the standards set forth in *Finley, supra*, or whether the ALJ's ultimate determination of no work-related injuries is supported by substantial evidence. A review of the record indicates that none of Parker's medical records reflect a reporting of right shoulder pain by Parker prior to his employment with Midwest Block & Brick. In fact, there is a total absence of right shoulder symptoms or diagnoses until July 2006. Since Parker's right shoulder condition appears asymptomatic prior to his employment with Midwest Block & Brick, we question how Midwest Block & Brick could have met its burden to prove a 100% preexisting active condition as it relates to Parker's right shoulder.

The Board then affirmed the ALJ's dismissal of the claim involving the alleged left shoulder injury from a specific traumatic injury on August 1, 2009,

but vacated his cumulative trauma injury claim. The Board remanded the latter for further findings consistent with its opinion.

We agree with the Board's decision. The Board correctly held that the burden of proving the existence of a preexisting condition is the employer's. Without sufficient findings from the ALJ regarding evidence of the existence of such a condition, the Board could not determine whether the standards in *Finley*, 217 S.W.3d at 261, had been applied. While preexisting conditions may be present, it is possible for subsequent injuries to worsen them. *Derr Const. Co. v. Bennett*, 873 S.W.2d 824 (Ky. 1994).

Midwest's second argument has been essentially answered as well. Midwest contends that the Board's decision vacating and remanding the claim to the ALJ for further analysis of preexisting active impairment under *Finley* was in error. We find this argument unpersuasive.

As set forth above, the burden was on Midwest to prove the impairment was preexisting. Without sufficient findings from the ALJ, it would be impossible for a reviewing court to determine whether the proper standards had been applied. Thus, we affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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