

RENDERED: OCTOBER 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002060-WC

JAMES T. ENGLISH TRUCKING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-66668

AARON K. BEELER; HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND NICKELL, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: James T. English Trucking ("English") appeals from the October 15, 2010 opinion of the Workers' Compensation Board ("Board")

¹ Senior Judge Ann O'Malley Shake completed this opinion prior to the expiration of her term of Senior Judge service on September 30, 2011. Release of this opinion was delayed by administrative handling.

increasing Aaron K. Beeler's ("Beeler") workers' compensation award. We find no error and therefore affirm.

Beeler, while employed by English, suffered a work related injury on October 7, 2003, and subsequently made a workers' compensation claim. In his September 20, 2004, opinion and award, Administrative Law Judge ("ALJ") John Coleman found that Beeler had suffered an injury involving the peroneal nerve at the fibular head of the right leg. Coleman also noted that the October 7, 2003, incident resulted in an injury in the form of a tear to the posterior horn of the medial meniscus. Beeler was awarded temporary total disability benefits from October 10, 2003 through January 12, 2004. Thereafter, Beeler was awarded permanent partial disability, based on a whole person impairment of 17%, without multipliers. In his order, ALJ Coleman found that Beeler could return to work.

In August 2007, while employed by Williams Construction, Beeler suffered an injury to his right knee when his foot gave way and he stumbled and fell as a result of his previous injury. After the August 2007 incident, Beeler testified that he experienced pain on the inside of his right knee. He testified that, prior to the August 2007 incident, his pain was located on the outside of his right knee. Beeler attempted to continue working but was unable to continue his employment past June 9, 2008, when his right knee pain became so severe that he

sought emergency medical attention. On March 6, 2009, Beeler underwent medial meniscectomy.

On May 12, 2008, Beeler filed a motion to reopen his workers' compensation claim, and argued that he has suffered an increase in his disability since the resolution of his original claim. Beeler produced medical evidence from his first workers' compensation claim as well as new medical evidence from physicians who had seen him as a result of the August 2007 injury. After reviewing the evidence, ALJ Douglas W. Gott awarded Beeler with restored total temporary disability benefits and increased his permanent partial disability benefits in an opinion, award, and order entered on May 5, 2010.

In his opinion and order, ALJ Gott determined that Beeler had been successful in proving that his 2007 injury, and resulting surgery, were related to his original 2003 injury. In so finding, ALJ Gott relied on medical evidence from Dr. Claude St. Jacques, Dr. Edwin Perez, and Dr. Timothy Hamby, as well as Beeler's own testimony. ALJ Gott found that Beeler has an increased impairment of 3%, based on the evidence from Dr. St. Jacques. ALJ Gott noted that Beeler had experienced an improvement in his condition after his initial 2003 injury but that the improvement did not continue. Therefore, ALJ Gott found that, although Beeler is not totally disabled, he no longer has the capacity to return to work and

was therefore entitled to the 3.0 multiplier of KRS 342.730(1)(c)1. Total temporary disability benefits were restored to Beeler from approximately June 9, 2008 through July 7, 2009. Beeler also recovered an increase in his permanent partial disability award. English filed a petition for reconsideration, which was subsequently denied. English appealed the award to the Board, which affirmed the ALJ's May 5, 2010, opinion, award, and order in an opinion entered on October 15, 2010. This petition for review followed.

Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order [for] . . . [c]hange of disability *as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.*

KRS 342.125(1)(d)(emphasis added).

English first argues that the ALJ cannot disregard undisputed medical evidence. In particular, English argues that the medical evidence indicates that any impairment of Beeler's right knee, due to the meniscal condition, was already present at the time of the 2003 injury. English further argues that the testimony of the claimant alone is immaterial if unsupported by substantial medical evidence, and cites to *Com. v. Workers' Compensation Bd. of Kentucky*, 697 S.W.2d 540 (Ky. App. 1985).

As the fact finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). The ALJ also has the sole authority to judge the weight to be afforded to the testimony of a particular witness. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). When conflicting evidence is presented, the ALJ may choose whom or what to believe. *Pruitt v. Bugg Bros.*, 547 S.W.2d 123, 125 (Ky. 1977). Furthermore, the ALJ 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 Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

An ALJ's decision is "conclusive and binding as to all questions of fact" and the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.285.

When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did.

Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). This Court's review is limited to that of the Board and also to errors of law arising before the Board.

Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999); KRS 342.290. Hence, our review “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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

The Board, when affirming the opinion and order of the ALJ, found that the testimony given by Dr. St. Jacques served as substantial evidence to defeat English’s argument. Dr. St. Jacques indicated that, pursuant to the American Medical Association (“AMA”) Guidelines, a 3% partial permanent disability was assigned to any patient who had undergone a medial meniscectomy. Dr. St. Jacques’ impairment rating was affirmed by English’s witness, Dr. Ellen Ballard. As the Board indicates, and the record supports, Beeler did not undergo his surgery until after his initial award, and such a surgery warrants a 3% impairment rating. Therefore, the Board correctly found that the impairment rating assigned to Beeler, for the surgery he underwent after his initial award, serves as substantial evidence to support the ALJ’s finding. We find no error with this analysis.

English next argues that the application of the 3-multiplier to the original 17% rating appears to be in error. English argues that because there has been no increase in Beeler’s condition since his original award, that he is not

entitled to the multiplier on the original 17%, but only on the additional 3%. We do not agree.

If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount [of his or her permanent partial disability award].

KRS 342.730(1)(c)1.

The assignment of a 3% impairment rating, based on Beeler's medial meniscectomy, which was not present in the original award, is proof of increased disability. Furthermore, the ALJ specifically found that Beeler no longer has the physical capacity to return to his pre-injury work. KRS 342.730(1)(c)1 necessitates no other requirements for application of the multiplier. As the Board found, English offered no legal support of "selective application" of the three multiplier, and the cases it offered as support were factually distinguishable. *See, Westerfield v. Diversified Health Care, Inc.*, 2003-SC-0758-WC, 2004 WL 2913224 (Ky. Dec. 16, 2004)(claimant sought benefits for an injury after having reached a settlement for her first); *Pepsi Cola General Bottlers, Inc. v. Murrell*, 2009-CA-002044-WC, 2010 WL 1851385 (Ky. App. May 7, 2010)(claimant returned to a new job earning a wage greater than that earned at the time of the injury); *Roberts Bros. Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky.

2003)(claimant's pre-existing *impairment*, due to natural aging, did not equate to pre-existing disability with regard to his total disability award). Accordingly, we find no error in the ALJ's application of the three multiplier, nor in the Board's affirmation of same.

For the foregoing reasons, the October 15, 2010 opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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