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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001097-WC

WAL-MART STORES, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-08-01020

ELMER LEE BLANKENSHIP; HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Wal-Mart Stores, Inc. petitions for the review of a Workers' Compensation Board opinion which reversed and remanded an opinion of the Administrative Law Judge (ALJ). The ALJ found that Elmer Blankenship

[1] Senior Judges Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

had not suffered a work-related injury during the course of his employment with Wal-Mart. The Board held that the evidence compelled a different conclusion. We hold that the Board erred as a matter of law and, therefore, we reverse and remand the case to the ALJ for further proceedings.

Blankenship was hired by Wal-Mart on November 14, 2007. The alleged injury occurred about eight months later, on June 20, 2008, when Blankenship tried to start a pressure washer. He pulled on the starting cord which locked up and snapped back, jerking him downwards. He was treated on the same day at King's Daughters Medical Center, where he was diagnosed with neck pain, left shoulder pain and muscle strain. He was released immediately to modified work duty, which included no use of the injured extremity, no overhead work and weight restrictions on lifting, pushing and pulling.

Blankenship's condition did not improve. In November 2008, he was diagnosed with a cervical disc herniation with a left upper extremity radiculopathy. Blankenship continued to complain of increasing pain in his neck, left arm and right arm. On August 15, 2008, Blankenship filed a workers' compensation claim alleging an injury to his neck and left upper extremity. His treating neurosurgeon, Dr. James Powell, planned to perform a cervical fusion procedure if the surgery was compensable. In May 2009, a CT scan of Blankenship's cervical spine showed mild levoscoliosis involving the mid to lower cervical spine, moderate

degenerative changes with associated osteophyte formation and multiple level stenosis.

The ALJ bifurcated the issues of the compensability of the cervical fusion surgery recommended by Dr. Powell and whether Blankenship's cervical condition was work related. The parties waived a formal hearing. After considering the medical evidence, the ALJ dismissed Blankenship's claims on the ground that he had failed to prove that his injury was work related. The ALJ relied on the medical report of Dr. David Jenkinson, medical records from Cabell Huntington Hospital in West Virginia, and Blankenship's own deposition. According to Dr. Jenkinson, Blankenship had pre-existing degenerative disc disease of the cervical spine, but there was no evidence that any of his complaints were related to the work injury of June 20, 2008, which Dr. Jenkinson dismissed as a sprain. He also opined that Blankenship exhibited multiple signs of symptom exaggeration.

The Cabell Huntington Hospital records showed that Blankenship was seen there on April 17, 2007, about five months before he began working at Wal-Mart. He was diagnosed with upper arm and shoulder pain. In his deposition, Blankenship allegedly denied that he had ever complained of any left shoulder or neck pain before June 20, 2008, but he did acknowledge that his social security number and his signature were on the records from the Cabell Huntington Hospital. He apparently did not deny being a patient at the hospital. The ALJ relied on this deposition testimony to conclude that Blankenship was not being truthful about his condition.

Blankenship appealed to the Board, which reversed the ALJ's finding. The Board ruled that the ALJ erred in relying on Blankenship's deposition testimony because the deposition was not in the ALJ's file, and the Department of Workers' Claims records did not show that a copy of the deposition was ever filed into evidence.[2] Furthermore, the Board held that even if the deposition testimony were assumed to be true and had been introduced into evidence by the implied consent of the parties, the evidence presented compelled a contrary decision to that arrived at by the ALJ. The Board concluded that there was simply no evidence to support the proposition that Blankenship had a pre-existing active condition prior to the June 20, 2008, incident with the pressure washer. This appeal by Wal-Mart followed.

Our standard of review requires us to show deference to the rulings of the Board.

> The function of further review of the WCB in the Court of Appeals 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, 687-688 (Ky. 1992).

The Board in this case arrived at its decision by employing the well-established principle that "[w]hen a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense

[2] On July 16, 2010, this Court entered an order granting Wal-Mart's motion to correct and supplement the record on appeal to include Blankenship's deposition of August 9, 2008 and the ALJ's order correcting the record to include the deposition. The latter order was entered by the ALJ on June 9, 2010.

related solely to the pre-existing condition is compensable." *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky.App. 2007). By contrast, "[t]o be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." *Id.* The Board concluded that there was no evidence that Blankenship had an active neck condition prior to June 20, 2008, and that the incident which occurred with the pressure washer had aroused a dormant pre-existing condition into disabling reality and was, therefore, compensable.

But this analysis is simply not applicable here because, as the ALJ noted, the critical issue is whether or not any work-related injury actually occurred. The ALJ's opinion is fully supported by the evidence of Dr. Jenkinson. Dr. Jenkinson agreed with the other medical experts that Blankenship had ongoing degenerative changes in the cervical spine, but in his view the incident with the pressure washer was unrelated to these changes. He opined that the incident had resulted in an unrelated sprain which had resolved itself and that it was not credible to suggest that the changes in the spine were related to one simple pulling-type incident as described by Blankenship.

The ALJ also made numerous references to Blankenship's deposition testimony and concluded that it undermined the reliability of the physicians' reports which diagnosed the injury as work related, because "[t]he physician's opinion of the causative factor does not constitute probative evidence if it is based upon a false history."

"When evidence is conflicting, as it was in this case, it is within the exclusive province of the ALJ to determine what to believe and what to reject." *Wal-Mart Stores, Inc. v. Smith,* 277 S.W.3d 610, 619 (Ky.App. 2008) (internal citations and quotation marks omitted).

Accordingly, we reverse the opinion of the Board and remand the case to the Board with directions to reinstate the opinion and order of the ALJ.

DIXON, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS BY SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I respectfully dissent and would affirm the opinion of the Board, which properly applied the holding in *Finley*. The Board correctly found that a pre-existing dormant condition was aroused into disabling reality by the incident at work.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
James E. Skaggs Lexington, Kentucky	Kenneth C. Smith, III Catlettsburg, Kentucky