

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001249-WC

OSF INTERNATIONAL, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-00297

CHARR ENGLEMAN; HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,¹ SENIOR
JUDGE.

LAMBERT, SENIOR JUDGE: OSF International, Inc., appeals from the decision
of the Workers' Compensation Board that affirmed in part, vacated in part and

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

remanded the matter to the Administrative Law Judge for further proceedings.

After our review, we affirm the decision of the Workers' Compensation Board.

On March 27, 2007, Charr Engleman was working at the Old Spaghetti Factory (OSF, International) as a food server when she walked into a dark room carrying a food tray and tripped over a box. She fell and struck a chair with her left wrist and her arm just below her left elbow. She was referred to Jewish Hospital where she was treated by Dr. Mahoney who placed a cast on her left arm and wrist. She then underwent surgery to move a portion of muscle in her lower arm. That muscle was placed between her radius and ulna to create a ligament to hold those bones in place. She was placed in a series of casts over the next six months and returned to work in September of 2007.

Engleman resumed her regular employment duties but had difficulty performing certain tasks. She was forced to use her right hand to set down a tray and remove food from it for serving which slowed her down. In November 2007, she suffered a non-work related injury to her left arm while playing with her daughter at home. She then worked as a United States Census clerk and had no problem performing the required tasks as she simply had to type a 1 or a 2 for "yes" or "no" as input into a form. She also took work as a bartender in Middletown, Kentucky. She was able to perform the tasks required at that job where she also served food. She eventually quit that job because it was a long commute from her home in Indiana and she did not like leaving her children alone for such an extended period of time.

Dr. Bilkey evaluated Engleman on February 10, 2009 and noted the subsequent re-injury of the left arm on November 2, 2007 while Engleman was playing with her daughter. That injury was in fact a fracture of the left arm and she underwent another surgery to stabilize that fracture. Dr. Bilkey also noted a prior subluxation of the ulna occurring when Engleman was 8 years old. Dr. Bilkey assessed a 26% whole person impairment rating attributing the entire impairment to the March 25, 2007 work injury.

Dr. Burgess evaluated Engleman on April 15, 2009. He describes the diagnoses of the March 25, 2007 injury as a contusion to the ulnar aspect of her left wrist. He concluded Engleman had either a Monteggia fracture or plastic deformation of the ulna with anterior radial head dislocation as a child. He then opined that in this condition, the radial head will perform and migrate proximally with the ulna becoming prominent leading to a dislocation of the distal radio-ulnar joint on a chronic basis. He believed the March 25, 2007 work injury caused a contusion but did not change the chronic dislocation of her distal radio-ulnar joint. The surgery performed by Dr. Mahoney then placed increased pressure on the dislocated joint but x-rays taken at the time of the subsequent fracture showed the dislocation had not changed position.

Dr. Burgess then concluded that any changes to the elbow were a result of the childhood injury and there were no changes to the left elbow following the contusion to her left wrist. He saw no evidence of any change to the ulnar diaphysis as a result of the contusion suffered at work or the subsequent

surgery for the non-work related fracture. He concluded that the fracture of the ulna and subsequent open reduction and internal fixation were not work-related. He did decide the wrist suffered chronic dislocation of the distal radio-ulnar joint with apparent contusion and increased pain from the work injury and assessed an 11% upper extremity rating due to decreased range of motion in the wrist.

Dr. Bilkey issued a supplemental report on May 26, 2009 acknowledging he erred in assigning a 7% upper extremity rating based upon medial-lateral deformity and agreed that any upper arm injury was not work related. That change in evaluation resulted in an impairment rating of 23%.

At a deposition on June 10, 2009, Dr. Burgess noted that Engleman had a longstanding and chronic dislocation of her lower left arm that was not work related. His diagnosis of a contusion did not, in his opinion, require the drill-hole surgery to repair her dislocated wrist. He also observed a drill-hole in a bone can only precipitate a fracture at the hole and therefore Engleman's subsequent non-work related fracture was not related to her earlier surgery as the fracture was distant from the drill-hole.

He went into detail about what he viewed as discrepancies in Dr. Bilkey's report. He believed Bilkey made an assumption that all changes in the elbow were secondary to the wrist injury, which in Dr. Burgess's opinion, was not based on any objective evidence. He stated that fractures will not occur 5 to 6 cm away from a drill hole as Engleman's was located but would occur right at the drill hole site. He noted Dr. Bilkey assigned impairment for loss of strength and range

of motion in the elbow in spite of the fact that Dr. Bilkey did not test that joint for fear of a fracture of the forearm. He then relied on the AMA Guides section that specifically show that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of body parts that prevent effective application of the maximal force in the region being evaluated.

After reviewing the conflicting reports and other evidence, the administrative law judge entered an opinion, award and order where he determined that Engleman suffered a work related injury on March 25, 2007. That opinion and award also determined that the November 2, 2007 subsequent injury while playing with her daughter away from work was a direct and natural consequence of her initial work-related injury. The opinion and award also granted vocational rehabilitation benefits after a finding that Engleman no longer retained the physical capacity to perform job duties for which she had prior training and experience.

OSF International, Inc., the business corporation behind the Old Spaghetti Factory restaurant, filed a petition for reconsideration regarding the finding that the subsequent fracture was a direct and natural consequence of the initial work-related injury as well as the award of vocational rehabilitation benefits. The ALJ overruled that petition on January 11, 2010 but issued additional findings of fact supporting the vocational rehabilitation benefits award. OSF appealed to the Workers' Compensation Board which affirmed the ALJ's findings on May 28, 2010 but remanded the matter back to the ALJ for OSF to be heard on the issue of vocational rehabilitation benefits. OSF then filed this appeal.

OSF first argues there is insufficient evidence to support the ALJ's finding that the November 2, 2007 fracture was reasonably connected to the original work-related injury. We disagree. We are required to analyze this appeal to determine whether the ALJ's decision "is supported by substantial evidence." *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994). The ALJ alone has the authority to determine the "quality, character and substance of evidence." *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999). The ALJ is additionally authorized to weigh the evidence and draw any reasonable inferences. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). The ALJ, as the finder of fact, is empowered to believe or disbelieve conflicting evidence when arriving at a decision. *Magic Coal Co., v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

Simply because evidence that conflicts with the decision of the ALJ exists is insufficient to require us to reverse on appeal. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). To be successful on appeal, one must show that "the evidence was such that the finding against him was unreasonable[.]" *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). OSF has not met that burden. Its argument is that because Dr. Ronald Burgess is an orthopaedic surgeon, his testimony should be more credible than the evidence offered by Dr. Bilkey who is a physical rehabilitation specialist and not an orthopedist.

Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable

men.” *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). After our review of the record, the testimony of Dr. Bilkey reaches the level of substantial evidence. The ALJ was entitled to rely on that evidence in order to reach a decision and we will not disturb that determination on appeal.

Next, OSF argues the permanent impairment rating determined by Dr. Bilkey is inappropriate. Again, we disagree. The core of the argument is that Dr. Bilkey failed to conduct extensive strength measurements of Engleman’s arm before assigning a 5% impairment for the biceps and triceps and 4% each for the pronation and supination muscles.

Any permanent impairment rating must be in accord with the American Medical Association Guidelines. Kentucky Revised Statutes (KRS) 342.730(1)(b); KRS 342.0011(35). Interpretation of those guidelines is within the exclusive domain of medical experts. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003). Dr. Bilkey did not conduct precise strength measurements of the entire arm but rather inferred some values.

Dr. Bilkey found grip strength “weakness was indeed measurable.” Based on the history of the easy fracture of the ulna, he did not want to risk a new fracture while subjecting the entire arm to excessive strength measurements. It is not our place nor that of the ALJ to dictate the medical procedures used during an evaluation or to interpret the AMA Guidelines. *George Humfleet Mobile Homes v. Christman*, 125 S.W.3d 288, 294 (Ky. 2004). The ALJ decided the determination of Dr. Bilkey was more credible than the determination of Dr. Burgess. Provided

there is substantial evidence to support the determination, as there is here, we will not disturb the findings.

Finally, OSF presents a purely factual argument attempting to persuade this court that Engleman is not in need of vocational rehabilitation benefits. We note that although the ALJ made a determination that Engleman was eligible for those benefits, the Workers' Compensation Board remanded the matter so that both parties could present those factual arguments for a just determination.

The administrative law judge on his or her own motion, or upon application of any party or carrier, after affording the parties an opportunity to be heard, may refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him or her fit for a remunerative occupation.

KRS 342.710(3).

Neither party initially presented the issue of entitlement to vocational rehabilitation. The ALJ provided that *sua sponte*, a practice allowed by statute, but only after the parties have an opportunity to be heard on the issue. Here, as noted by the Workers' Compensation Board opinion, the issue was first raised "in the opinion and award from which OSF now appeals." We agree with the Board that the matter must be remanded for further evidence on the issue of vocational rehabilitation training. In all respects we affirm the Board's decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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