

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001735-WC

ROMONA FRITZ

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-91005

BELCAN STAFFING; MAYFIELD
CLINIC/DR. CHRISTOPHER MCPHERSON;
HON. CAROLINE PITT CLARK;
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Romona Fritz appeals from a decision of the Workers' Compensation Board affirming an award of benefits for a shoulder injury and a denial of benefits for a cervical spine condition. Fritz argues that the evidence compelled a finding that she sustained a work-related injury to her cervical spine

¹ Senior Judge 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.

and that she was entitled to benefits for an impairment based upon an unnecessary surgery. We affirm.

Fritz was employed by Belcan Staffing Services, a temporary agency, and was placed at ZF Steering in Hebron, Kentucky. On February 29, 2008, another employee bumped into a stack of totes containing aluminum parts causing the totes to strike Fritz on her back and shoulder. Fritz continued working for two and a half days before seeking medical treatment at St. Elizabeth Business Health on March 4, 2008. She was initially diagnosed by Dr. Patrick Kunkler with a contusion of the upper-left to middle back with spasms and possible strain. Fritz sought treatment with Dr. Nicholas Mirkopoulos of Tri-State Orthopedics on April 10, 2008, complaining of pain in her neck and the left side of her shoulder. Dr. Mirkopoulos diagnosed an acute trapezial strain and referred her to Dr. Doug Obermeyer, a chiropractor. Fritz was also treated by Dr. Christopher McPherson during the period of December 11, 2008, until May 5, 2009. Dr. McPherson performed a cervical fusion surgery on Fritz after finding that the cervical spine condition was likely a preexisting degenerative condition, but was exacerbated by the work-related injury. Fritz was also treated by Dr. Edward Negovetich following a referral by Dr. Obermeyer.

Dr. Richard Sheridan performed an independent medical evaluation on January 14, 2009. He diagnosed a resolved acute left trapezial strain and assigned a 4% impairment rating with recommended restrictions of no lifting,

pushing, or pulling more than 10 pounds on a frequent basis or 50 pounds infrequently. Dr. Sheridan stated that the cervical fusion surgery was not reasonable or necessary for the work injury. Dr. Timothy Kriss performed an independent medical examination on June 8, 2009. Dr. Kriss found that the surgery was neither necessary nor related to the work injury. Dr. Warren Bilkey performed an independent medical examination of Fritz on July 16, 2009. Dr. Bilkey found that the surgery was necessary and related to the work injury and assigned an impairment rating of 33%.

Following a hearing, the Administrative Law Judge (ALJ) found that Fritz sustained a 4% impairment rating for the left shoulder injury and awarded benefits accordingly. The ALJ also found that Fritz did not sustain her burden of proving that the cervical fusion surgery was reasonable or related to the work injury. The Board affirmed the award of the ALJ. This appeal followed.

Fritz first argues that the medical evidence overwhelmingly supports a finding that she suffered a work-related injury to her cervical spine. We disagree.

When the party with the burden of proof was unsuccessful before the ALJ, the issue on appeal is whether the evidence compels a contrary conclusion. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). “Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis

for reversal on appeal.” *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). “The ALJ, as the fact finder, has sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence.” *Morrison v. Home Depot*, 279 S.W.3d 172, 175 (Ky.App.2009). “[W]here medical testimony is concerned and that testimony is conflicting . . . the question of who to believe is one exclusively for the [ALJ].” *Pruitt v. Bugg Brothers*, 547 S.W.2d 123, 124 (Ky. 1977). Moreover, we can reverse a decision of the Workers' Compensation Board affirming an ALJ's decision only where 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).

Fritz has merely pointed to conflicting testimony in the record. As stated above, we are not permitted to reweigh the evidence. The ALJ specifically determined that Fritz only sustained an acute muscular strain involving the trapezius. This finding was based upon the opinions of Drs. Kunkler, Mirkopoulos, Sheridan, and Negovetich in his original diagnosis. Drs. Sheridan and Kriss both found that there was no evidence of any work-related injury to the cervical spine. We cannot conclude that the evidence compels a finding in Fritz's favor.

Next, Fritz argues that she is entitled to benefits for injuries resulting from the unnecessary cervical fusion surgery because the surgery was related to the work injury. We disagree.

In *Transport Associates v. Butler*, 892 S.W.2d 296, 298-99 (Ky.

1995), the Court held that an employer is liable for the aggravation of a work-related injury resulting from unnecessary medical treatment. However, this rule is inapplicable to the present case because the unnecessary treatment did not relate to the work injury, but instead related to a separate and distinct non-work-related condition.

Accordingly, the decision of the Workers' Compensation Board is affirmed.

CLAYTON, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Joseph M. Schulte
Covington, Kentucky

BRIEF FOR APPELLEE BELCAN
STAFFING:

Donald C. Walton, III
Thomas C. Donkin
Lexington, Kentucky