

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001880-WC

EMERSON POWER TRANSMISSION

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-96400

CARL E. OVERLY;
HONORABLE CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

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

DIXON, JUDGE: Emerson Power Transmission seeks review of a Workers'

Compensation Board decision affirming an Administrative Law Judge's award of

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

benefits for a low back cumulative trauma injury sustained by Emerson's former employee, Carl Overly.² We affirm.

Overly has a high school education, and he worked for Emerson for more than thirty-four years. Overly's job was labor-intensive, as he was required to lift and maneuver heavy transmission components while standing at an assembly line. In August 2007, Overly noticed tingling in his right foot and leg that progressed to radiating low back pain. Overly was referred to a neurosurgeon, Dr. Thomas Becherer, who diagnosed lumbar stenosis and disc herniation at L4-5. Dr. Becherer performed a lumbar discectomy and medial facetectomy in January 2008. Overly's last day of employment with Emerson was January 11, 2008.

Overly filed a claim for workers' compensation benefits alleging his work caused a cumulative trauma injury to his low back. A benefit review conference and formal hearing were held February 23, 2010.

Overly testified that his job at Emerson required frequent bending and heavy lifting. Overly explained that the onset of his low back pain was gradual and increased in severity in late 2008. Overly submitted the medical records of Dr. James Owen and the medical records and deposition of Dr. Becherer. In his deposition, Dr. Becherer opined that Overly's low back condition was attributable to pre-existing degenerative disc disease and was not work-related. However, on

² The Board vacated and remanded the award of TTD benefits for the ALJ to correct a typographical error; the award was affirmed in all other respects. We further note the ALJ dismissed Overly's additional claims of hand, shoulder, and knee injuries, and Overly did not appeal. This opinion addresses only the low back claim.

cross-examination, Dr. Becherer allowed that engaging in repetitive lifting and bending possibly exacerbated Overly's condition into painful existence. Dr. Owen performed an IME of Overly in September 2009. Dr. Owen noted a history of work that included heavy lifting between 5 and 100 pounds. Dr. Owen diagnosed chronic low back pain with laminectomy and found it to be work-related. Dr. Owen assigned a 12% impairment rating for Overly's low back condition.

Emerson submitted the IME reports of Dr. Henry Tutt and Dr. Gregory Snider. Both reports concluded Overly's condition was due to degenerative changes and was not work-related.

The ALJ found that Overly's "work brought the previously and otherwise dormant and non-disabling low back condition into an active and disabling state." The ALJ relied on the opinion of Dr. Owen and found that Overly gave credible testimony regarding the onset of his symptoms and his work requirements. The ALJ also acknowledged the opinion of Dr. Becherer, where he explained that a disc herniation could result from repetitive lifting and bending. Based on the lay and medical evidence, the ALJ awarded Overly permanent partial disability benefits based on a 12% impairment rating.

On appeal to the Board, Emerson argued the evidence was insufficient to support the ALJ's finding that Overly sustained a work-related low back injury. The Board concluded that Dr. Owen's opinion coupled with Overly's credible testimony regarding his job duties constituted substantial evidence to support the ALJ's decision regarding causation. The Board further expressed its opinion that

Dr. Becherer's testimony did not support a finding of work-relatedness, but concluded it did not alter the outcome of the decision. The Board rendered an opinion affirming Overly's award of benefits. This petition for review followed.

The findings of an ALJ in favor of an injured worker will not be disturbed on appeal where the decision is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). When this Court reviews a workers' compensation decision, our function is to correct the Board only where we believe "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).

Emerson argues here, as it did before the Board, that the ALJ's finding of a work injury was not supported by substantial evidence because Overly's testimony was incompetent as to causation and Dr. Owen's report was unreliable. Specifically, Emerson opines that Dr. Owen's Form 107 was incomplete, failed to explain causal connection, and erroneously cited January 2008 as the date of symptom onset.

KRS 342.0011(1) defines a compensable injury as being "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." In *Staples, Inc. v. Konvelski*, 56 S.W.3d 412, 415-16 (Ky.

2001), the Kentucky Supreme Court advised that, although the statute requires objective medical findings to prove a harmful change, such objective medical findings are not necessary to establish causation.

In the case at bar, it was undisputed that Overly had a herniated disc that required surgical intervention. The medical evidence established pre-existing degenerative disc disease; however, there was no indication Overly suffered any prior active impairment. Dr. Owen's report, as a whole, could reasonably be interpreted to indicate he attributed the back condition to the repetitive heavy lifting required by Overly's employment. Furthermore, Overly competently testified that he believed his back problems were related to lifting at work, and he explained the circumstances of the gradual onset of his symptoms as he carried out his job duties.

Although Emerson is dissatisfied with the ALJ's assessment of the evidence, we are mindful that the ALJ "has the authority to determine the quality, character and substance of the evidence[.]" *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985), and he is free "to believe part of the evidence and disbelieve other parts of the evidence . . . [.]" *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Overly's testimony concerning the duties he performed during his more than thirty-four of years of employment with Emerson, coupled with Dr. Owen's objective medical findings of a harmful change in Overly's low back constitute substantial evidence to support the ALJ's finding of causation. Despite Emerson's argument to the contrary, the ALJ did not rely on

improper evidence; rather, the ALJ weighed the conflicting evidence and found Dr. Owen's medical opinion and Overly's lay testimony to be the most credible. After careful review, we affirm the decision of the Board.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE CARL E.
OVERLY:

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