

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-000010-WC

DONNIE CAUDILL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-13-69579

CITY OF MOREHEAD;  
HONORABLE STEVEN G. BOLTON,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: D. LAMBERT, MAZE AND VANMETER, JUDGES.

VANMETER, JUDGE: Donnie Caudill appeals the Workers' Compensation Board's order denying his claim for worker's compensation benefits for a

psychological injury, and finding only a temporary physical impairment. For the following reasons, we affirm.

### **I. Procedural and Factual Background**

Caudill began working for the city of Morehead in 1993, and worked in various positions until August 2013. Caudill worked as a general laborer for Morehead, working on a garbage truck, mowing, vehicle maintenance, and other labor positions. His last official position was head mechanic, although he did not directly supervise anyone; he would still perform other miscellaneous jobs assigned to him. He has an eighth grade education and no GED, and holds a Commercial Driver's License (CDL).

On May 21, 2013, Caudill lifted a welder, weighing approximately 75-100 pounds, onto a stand and experienced immediate burning pain in his mid-back (thoracic region). He immediately reported the injury to his superior; however, he reported to work the next day, missing only a few days "here and there." He reported that his co-worker greatly assisted him with any lifting during that time, and he tried to keep his lifting light. Caudill left work two months later due to neck and back pain, but not at the formal restriction of a physician.

Shortly after his injury, Caudill was seen at St. Claire Family Medicine, and his treatment included a physical exam, x-ray of the thoracic spine, muscle relaxers, and a referral to physical therapy. Caudill did not initially complain of any radiating pain or numbness, although he complained of increased pain and radiating pain, numbness, and tingling as time progressed post-injury.

The initial physical examination of the spine was nearly normal, and although his MRI on August 21, 2013 showed mild central canal stenosis, the treating physician, Dr. Alyssa Hunter, did not believe this to be related to the work injury.

Caudill has since seen numerous physicians and specialists for examination and treatment. The reports of Drs. Tutt, Owen, Guberman, Snider, Ford, and Ruth are summarized in relevant part:

In his February 27, 2014, Independent Medical Evaluation (IME) report, Dr. Henry Tutt, a neurosurgeon, observed that Caudill primarily complained of back pain in his left shoulder and mid-back, extending up to his neck, as well as headaches. Dr. Tutt also noted that Caudill suffered from some depression, for which he has not yet undergone treatment, as a result of his divorce.

Dr. Tutt stated,

Unfortunately, because of various stressors in his life, Mr. Caudill, about the same time, suffered a clinical depression, not recognized, diagnosed, or treated, which has probably played a role in perpetuating his complaints, which, based on standard treatment guidelines for a transient myofascial injury, should have resolved **within six weeks maximum**, following the work event of record. . . . He is considered to have a clinical depression warranting treatment, a clinical entity unrelated to the work event and which should be addressed by his primary care physician[, Dr. Hart].

(emphasis added). Dr. Tutt noted that Caudill wept several times while discussing the divorce and his current condition, and Caudill attributed his depression to non-work-related problems in his life.

In addition to interviewing Caudill, Dr. Tutt performed an examination and reviewed Caudill's medical records, including the MRI, which showed mild to moderate degenerative changes, most notable at vertebrae C5 and C6. Dr. Tutt diagnosed Caudill with a resolved transient myofascial injury, or thoracic strain/sprain, due to his injury at work, and stated that Caudill reached maximum medical improvement (MMI) on July 1, 2013; he further opined that Caudill's injury did not warrant any permanent restrictions or impairment rating. Dr. Tutt also noted that Caudill was not likely a good surgical candidate, but recommended conservative pain management that included a referral for a pain management consult for possible epidural steroid injections.

On June 26, 2014, Dr. James Owen conducted an IME of Caudill, and diagnosed him with persistent neck and mid-back pain with MRI findings in his thoracic spine at vertebrae T6 and T7 with tiny protrusions and disk bulges, and degenerative disease at the cervical spine. Both areas were found to have mild muscle tenderness and slight asymmetry. Dr. Owen noted that Caudill's pain complaints and scores are significantly greater than objective evidence would suggest. Dr. Owen opined Caudill's impairment rating to the thoracic spine to be at 7% impairment. Dr. Owen further opined the rating for Caudill's neck pain would be 0% impairment; therefore, Dr. Owen found Caudill to be at a total impairment of 7% attributable to the thoracic spine injury. Dr. Owen found Caudill to be at MMI, and did not believe epidural injections would be beneficial. Due to Caudill's own observation that his thoracic pain would not allow him to lift

heavy items, Dr. Owen placed Caudill on restriction to only lift objects less than twenty pounds, and to avoid any activity that required bent or stooped positions.

On July 9, 2014, Dr. Bruce Guberman conducted an IME, and diagnosed Caudill with chronic post-traumatic strain of the thoracic, lumbar, and cervical spine, with the work-injury causing the thoracic and lumbar pain, and inept physical therapy causing the cervical spine pain. Dr. Guberman determined Caudill had reached MMI by the date of examination, and no further specific treatment or testing would likely improve his injury. Dr. Guberman assigned 7% impairment for the thoracic spine injury, 6% impairment for the lumbar spine injury, and 0% for the cervical spine injury for a total of 13% impairment solely attributed to work-related injury. Dr. Guberman opined that Caudill cannot lift, carry, push, or pull heavy objects, and cannot use his arms or legs for repetitive movements; he should also avoid kneeling, crawling, climbing, and going up and down hills or stairs. Dr. Guberman found range of motion abnormalities as to Caudill's entire spine, but did not provide information on which areas of the spine had abnormalities; however, he noted Caudill walked and moved with a normal gait.

Dr. Gregory Snider conducted an IME on Caudill the next day on July 10, 2014, and diagnosed a soft tissue sprain/strain of the thoracic spine superimposed on mild, age-related degenerative changes. X-ray and MRI imaging of the neck and mid back showed no gross anatomic deficit. Dr. Snider found that Caudill had reached MMI as of February 27, 2014, the date of Dr. Tutt's

examination, and in his opinion, required no further medical treatment. Dr. Snider opined that Caudill could return to his previous duties with no specific restrictions. Dr. Snider also noted no range of motion abnormalities, and assigned Caudill at 0% impairment.

On July 14, 2014, Caudill was seen by Dr. Leigh Ann Ford for a psychological evaluation. Dr. Ford based her opinion on an examination and interview of Caudill, noting that he reported he left his job of 20 years due to a work place accident, and “denied any active psychiatric impairment at the time of the workplace incident.” Dr. Ford made the following diagnosis “as caused by the work-related injury”: Generalized Anxiety Disorder, Depressive disorder, NOS Reading Disorder. She also diagnosed borderline intellectual functioning, high blood pressure, bulging disks, bone spurs, neck pain, and restless leg syndrome. Dr. Ford further noted that Caudill had been “experiencing symptoms of depression and anxiety after the development of an illness. Based on his exam, it appears that depressive and anxiety symptoms are at least in some part due the frustration associated from pain and his inability to work and engage in other activities.” Dr. Ford classified Caudill’s psychological impairment as 5%.

On September 2, 2014, Dr. Douglas Ruth, a psychologist, conducted a psychological evaluation of Caudill. He noted that Caudill had not sought treatment for his psychiatric complaints, and he would not be considered to have reached MMI. He diagnosed Caudill, should he not undergo treatment, to be at an 11% psychiatric impairment. Dr. Ruth attributed 5% of this impairment to his

depressive disorder arising from his back pain and subsequent physical limitations, and the remaining 6% to Caudill's pre-existing learning disorder and memory complaints, noting that the 5% impairment rating would improve with psychiatric treatment.

On July 22, 2015, following a final hearing, the ALJ determined Caudill did suffer a transitory thoracic sprain/strain, however he was found not to have a temporary total disability (TTD) since Caudill had continued to work until after the date he reached MMI following the injury.<sup>1</sup> The ALJ found no evidence of work-related permanent partial disability based on the opinions of Drs. Tutt and Snider. The ALJ further found that based on Dr. Tutt's opinion, Caudill suffered no work-related psychiatric impairment. Caudill then filed a Petition for Reconsideration; the ALJ issued an Order on the Petition on August 21, 2015 affirming his prior order.<sup>2</sup> On appeal, the Workers' Compensation Board affirmed the findings of the ALJ and dismissed the appeal. From the decision of the Board, Caudill now appeals.

## **II. Standard of Review**

The well-established standard of review for the appellate courts of a workers' compensation decision "is to correct the [Workers' Compensation] Board

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<sup>1</sup> KRS (Kentucky Revised Statutes) 342.0011(11)(a) defines "Temporary total disability" as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]"

<sup>2</sup> The ALJ did acknowledge he erred in failing to award Caudill medical benefits pursuant to KRS 342.020 for medical treatment received between the date of injury and his release of treatment, which actually occurred after Dr. Tutt found he had reached MMI. Notwithstanding that error, since Caudill continued working at the same job until August, past the date of MMI, he does not meet the definition of KRS 342.0011(11) for TTD and is not entitled to benefits.

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.” *E.g.*, *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992); *Butler’s Fleet Serv. v. Martin*, 173 S.W.3d 628, 631 (Ky. App. 2005); *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky. App. 2004). *See also Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986) (holding that if the fact-finder finds in favor of the person having the burden of proof, the burden on appeal is only to show that some substantial evidence supported the decision); *cf. Gray v. Trimmer*, 173 S.W.3d 236, 241 (Ky. 2005) (If the ALJ finds against the party having the burden of proof, the appellant must “show that the ALJ misapplied the law or that the evidence in her favor was so overwhelming that it compelled a favorable finding[.]”).

### **III. Argument**

Caudill makes three arguments on appeal. First, he argues the Board erred in affirming the ALJ’s reliance on the report of Dr. Henry Tutt in dismissing his claim for a work-related psychological injury. Second, he argues the ALJ erred when he stated improperly that there can be no psychological injury without physical injury, and the Board erred in concluding the ALJ properly interpreted KRS 342.0011(1). Third, Caudill argues the Board erred in affirming the ALJ’s finding that no objective evidence supported a work-related physical impairment despite the opinions of Drs. Guberman and Owen.

#### **A. Work-Relatedness of Psychological Injury and Reliance on Dr. Tutt**



First, Caudill argues that the Board erred in affirming the ALJ's reliance on Dr. Tutt in determining no work-related psychological injury occurred. He argues that although the ALJ has broad discretion to weigh the evidence, the ALJ abused his discretion in finding that the opinion of Dr. Tutt, a neurosurgeon, was more probative to the psychological injury than the evaluations of Drs. Ruth and Ford, a psychiatrist and psychologist. Caudill contends that Dr. Tutt's evaluation is not sufficient evidence to conclude that his depression was caused by his separation and divorce and was not work related.

In affirming the ALJ, the Board held

the ALJ properly exercised his discretion in finding Dr. Tutt's opinion most persuasive as the cause of Caudill's psychological condition, and clearly articulated his reasoning for doing so in the opinion and order on reconsideration. Caudill's attacks upon the ALJ's determination go to the weight of the evidence, and do not render Dr. Tutt's opinion unsubstantial.

In his order, the ALJ stated that he found Dr. Tutt's report to be the most compelling and persuasive as to Caudill's psychological/psychiatric condition because Dr. Tutt saw Caudill first, and the ALJ determined that Dr. Tutt had received the most complete history from Caudill. At the time Caudill presented to Dr. Tutt, he had already been out of work for fourteen months, was not being treated by any physician for his pain, and he ascribed his depression to non-work-related aspects of his life.

Although Drs. Ford and Ruth are both specialists in mental health, the ALJ held their opinions "were both corrupted to some extent by the incomplete

history given to them by Mr. Caudill.” The ALJ observed that Caudill seemed to ignore or forget the history of depression he had given Dr. Tutt just seven months prior to the examinations by Drs. Ford and Ruth, thus explaining the shift from Dr. Tutt’s opinion that the previously existing depression was the cause of the continuing back pain, to Drs. Ford and Ruth’s opinions that the depression resulted from the injury.

“The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence. Where . . . the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ.” *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). “The fact-finder 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). Furthermore, “where it is irrefutable that a physician's history regarding work-related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician on the issue of causation cannot constitute substantial evidence.” *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839, 842 (Ky. 2004). An ALJ is not required to rely on the opinion of a physician that is based on the patient's clinical presentation or reported symptoms when other evidence indicates that the patient is malingering. *See Cepero*, 132 S.W.3d at 839; *Osborne v. Pepsi-Cola*, 816 S.W.2d 643 (Ky. 1991) (superseded by statute on other grounds).

In the instant case, the ALJ provided his explicit reasoning for finding Dr. Tutt most persuasive over conflicting medical evidence by Drs. Ford and Ruth, and the Board determined that his articulation for his reasoning was well within his discretion. The history Caudill gave to Dr. Tutt conflicted with those given to Drs. Ford and Ruth, who examined Caudill after his formal termination at his job, with scant mention of Caudill's nearly contemporaneous separation and divorce. Further, the ALJ noted that the physical injury, the transient myofascial injury, should have resolved within six weeks following the work event; the record contains no explanation for the malingering and worsening back pain. The ALJ was free to weigh the evidence and reasonably relied on Dr. Tutt's opinion over those of Drs. Ford and Ruth. The Board did not err in affirming the ALJ's finding that any psychological injury was not work-related.

### **B. Physical and Psychological Injury under KRS 342.0011(1)**

Second, Caudill argues the ALJ erred in improperly stating the law that psychological injury could not occur without physical injury, and the Board erred in concluding the ALJ was merely restating KRS 342.0011(1). However, as discussed earlier, the ALJ properly used his discretion to weigh the reports of Drs. Tutt, Ford, and Ruth, and found that any psychological injury Caudill suffered was not work-related, and thereby not compensable. Therefore, Caudill's argument about the interpretation of KRS 342.011(1) is moot.

### **C. Objective Evidence to Support Work-Related Physical Impairment**

Third, Caudill argues the Board erred in affirming the ALJ's finding that no objective evidence supported a finding of a permanent work-related physical impairment. He argues that, although the ALJ has discretion to weigh the credibility of the evidence, the ALJ had no reasonable basis to reject the objective reports of Drs. Guberman and Owen in favor of the reports of Drs. Tutt and Snider.

“‘Objective medical findings’ means information gained through direct observation and testing of the patient applying objective or standardized methods[.]” KRS 342.0011(33). Caudill argues both Drs. Guberman and Owen submitted medical findings. Both documented range of motion testing, and Dr. Guberman noted radiating pain to both the chest and left leg, which he diagnosed as supportive of a diagnosis of a thoracic injury and impairment as well as a lumbar injury and impairment. Caudill argues that even Dr. Snider, upon whom in part the ALJ based his opinion, indicated complaints of mid-back pain radiating toward his neck and pain radiating to the left leg.

In his order, the ALJ expressly relied on the reports of Drs. Tutt and Snider to find that Caudill did not suffer a permanent physical impairment. The ALJ stated he found Drs. Tutt and Snider to be persuasive due to the lack of objective findings to support a permanent injury noted by every physician except Dr. Guberman. The ALJ found the opinion of Dr. Guberman “to be an anomaly,” remarking that Dr. Guberman “finds chronic post-traumatic strain of the lumbar spine when that has never been a significant issue in the claim. He awards a [6%] impairment for the lumbar spine that is not substantially supported anywhere in the

evidence by any other physician, treating or examining.” The ALJ held that Dr. Guberman also assigned Caudill a 7% impairment for his work-related thoracic spine injury, due to “non-verifiable complaints of radiation of pain to his chest, significant loss of motion in his thoracic spine.” The ALJ noted that Dr. Guberman made “no comment on how he determined that Mr. Caudill’s limitation of flexion was genuine” especially in light of the extreme disparity in the range of motion and flexion in a mere 24-hour period between Dr. Guberman and Dr. Snider’s examinations.

The ALJ did not believe Dr. Guberman accurately gauged the validity of Caudill’s complaints, especially since, about five months prior, Dr. Tutt found Caudill to have a full range of motion, and the very next day after Dr. Guberman’s examination, Dr. Snider also found Caudill to have a completely normal range of flexion and bilateral rotation of the thoracic spine with only some midline tenderness. Also notable is that between the date of Dr. Tutt’s examination, and June 26, 2014, when he presented to Dr. Owen for an IME at the request of his counsel, Caudill left work because of increasingly severe pain, yet none of the examining physicians could find an objective reason for his ongoing, and even worsening symptoms.

Since only Dr. Guberman found that Caudill required significant restrictions that would limit his return to employment, the ALJ reasonably relied on the objective reports of Drs. Tutt and Snider in awarding no permanent impairment benefits, and the Board properly affirmed.

## **D. Conclusion**

For the following reasons, the Board's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Grover Arnett  
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BRIEF FOR APPELLEE:

Katherine M. Banks  
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