RENDERED: November 21, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-001639-WC

KERMIT GLENN MORRISON — APPELLANT

v. PETITION FOR A REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 86-WC-07645

ROCKWELL INTERNATIONAL; ROBERT E. SPURLIN, Acting Director of SPECIAL FUND; RONALD W. MAY, Administrative Law Judge; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

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BEFORE: GUDGEL, CHIEF JUDGE; COMBS and EMBERTON, Judges.

EMBERTON, JUDGE. Kermit Glenn Morrison brings this petition for review of the decision of the Workers' Compensation Board affirming the ALJ's opinion on reopening to the extent it modified his award for total occupational disability benefits and

disallowed compensation for certain chiropractic services.[1] Having reviewed the record and applicable law, we affirm.

On October 23, 1989, Morrison was awarded benefits for total occupational disability resulting from a combination of a back injury and carpal tunnel syndrome, both of which were work-related.

On December 14, 1994, the employer, Rockwell International, filed a motion to reopen the award. Rockwell contested the payment of fees for chiropractic services and sought modification maintaining Morrison was no longer totally disabled.

In an opinion rendered January 2, 1996, the ALJ found Morrison's back and upper extremity conditions had improved resulting in a lessening of his occupational disability. The ALJ decreased Morrison's occupational disability from 100% to 65%, and awarded reduced benefits (assigned 40% to Rockwell and 25% to the Special Fund) for permanent partial occupational disability for a period of 425 weeks commencing December 14, 1996. Additionally, the ALJ determined chiropractic treatments were not beneficial to Morrison and, in fact, were counterproductive. Thus, the ALJ concluded chiropractic treatment in excess of one visit per month was unnecessary, unreasonable, and non-compensable. The ALJ held Rockwell was not responsible for

[1] This petition is being considered with appeals #96-CA-1648-WC and #96-CA-0223-WC which were consolidated by this court's order of July 17, 1996.

chiropractic bills incurred prior to the date of the original award. Rockwell was ordered to pay for chiropractic services rendered during the period from October 23, 1989, to December 14, 1994. Chiropractic treatment rendered thereafter was held non-compensable to the extent that the bills represented treatment in excess of twelve visits annually and were contested within thirty days of receipt by the employer.

On appeal, the Board affirmed the determination that Morrison's occupational disability had changed to 65%. However, the Board reversed the ALJ's opinion insofar as it held chiropractic bills incurred prior to the original award were non-compensable.

Presently, Morrison claims there was insufficient evidence to support the ALJ's determination that he sustained any decrease in his occupational disability. We disagree. Admittedly, Rockwell had the burden to prove upon reopening that Morrison's disability had decreased. Gro-Green Chemical Co. v. Allen, Ky. App., 746 S.W.2d 69 (1987). Rockwell succeeded in this regard. Morrison cannot demonstrate, as he must on appeal, that the decision lacks substantial evidentiary support. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984).

We need not recite the medical evidence herein as the Board's opinion contained a detailed review of the testimony. It is the function of the fact finder to determine the weight and credibility of conflicting evidence. Caudill v. Moloney's

Discount Stores, Ky., 560 S.W.2d 15 (1977). A reviewing body may not substitute its findings for that of the ALJ. Cal Glo Coal Company v. Mahan, Ky., 729 S.W.2d 455 (1987). Determining the extent of a claimant's occupational disability is uniquely the function of the ALJ. Davis v. Baker, Ky., 530 S.W.2d 378 (1978). Based on the record in its entirety, the ALJ properly applied the principles of Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), in determining Morrison was no longer totally occupationally disabled. Morrison failed to demonstrate the evidence compelled a contrary result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). The Board applied sound reasoning in its opinion upholding the ALJ's decision on this issue. It is clear that Morrison wants this court to reconsider, reweigh and re-evaluate the evidence previously considered by both the ALJ and the Board and substitute our judgment on the issue of his occupational disability. We lack the authority to do so.

Apparently, Rockwell has paid the fees for chiropractic services rendered prior to December 14, 1994, and does not contest its responsibility for those bills. Thus, Morrison's argument concerning the compensability of chiropractic treatment rendered prior to the date Rockwell filed its motion to reopen is moot. Moreover, the ALJ's award required Rockwell to pay chiropractic bills incurred between October 23, 1989, and December 14, 1994, unless the bills had not been submitted to Rockwell thirty days prior to its motion to resolve medical fee

disputes and they represented fees for services in excess of twelve visits per year. In our opinion, the Board properly affirmed this portion of the award. Ky. Rev. Stat. (KRS) 342.020; Ausmus v. Pierce, Ky., 894 S.W.2d 631 (1995); Mitee Enters v. Yates, Ky., 865 S.W.2d 654 (1993).

We also agree with the Board's reversal of the ALJ's decision to the extent it denied compensation for chiropractic fees incurred prior to the date of the original award. Those fees were never contested and Rockwell is obligated to pay those bills. KRS 342.020. Morrison does not challenge the remainder of the award which limited the compensability of chiropractic treatment subsequent to December 14, 1994, to one visit per month. It will not be disturbed. Ausmus, supra.

Finally, in light of the record, we are convinced Morrison is not entitled to relief from the Board's opinion simply because it was rendered prior to the expiration of the time period allowed for the filing of a reply brief. Rockwell's response brief was served May 8, 1996. Thus, Morrison accurately notes the May 17, 1996, opinion of the Board was entered before the fifteen day period established in 803 KAR 25:010 § 13(9) expired. However, we think it is significant that replies are not mandatory and that Morrison does not maintain he even intended to file a reply. Moreover, Morrison has not advanced any new theories, supplied any additional authority, or otherwise countered the Board's brief in a manner suggesting he had any

reply to the legal and factual arguments presented on appeal. The fact that the opinion was entered prematurely is harmless error since it did not result in any prejudice to Morrison.

When we review opinions of the Board, we are governed by the standards set forth in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 687 (1992). Our function 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." Based on the record in this case, the Board committed no error.

The opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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