RENDERED: June 12, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-1921-WC

BOBBY RICHARDSON — APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
NO. WC-95-003788

COCA COLA ENTERPRISES, INC.;
SPECIAL FUND;
HON. JAMES L. KERRY,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART - REVERSING AND REMANDING IN PART

* * * * *

BEFORE: ABRAMSON, GARDNER and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Bobby Richardson (Richardson) appeals from an opinion of the Workers' Compensation Board (the Board) rendered July 3, 1997, which affirmed the opinion and order of the Administrative Law Judge (ALJ) entered February 1, 1997, dismissing his claim. We affirm in part and reverse and remand in part.

Richardson has been employed by appellee, Coca Cola Enterprises, Inc. (Coca Cola) since 1972. He started with Coca Cola as a driver, and his job included driving, delivering, and stocking shelves. He worked as a driver until 1978, when kidney

problems caused him to miss three months of work. He returned to work as a case packer; his job consisted of making sure bottles were properly packed in cases. Approximately one year later he became a load supervisor responsible for checking the trucks as they returned to the facility. He had no physical trouble performing any of these jobs. He was only required to lift and unload trucks when he worked as a driver.

In 1985, the facility stopped bottling soft drinks. For approximately two months he helped with the loading of the delivery trucks. He had difficulty doing this work because of his kidney problems. He denied having back problems that kept him from doing this work. He then began working as a double bottom driver, which involved driving a truck from Paducah to Hopkinsville. The only physical part of this job involved using a dolly to connect the truck trailers and raising the trailer doors. He was not responsible for loading or unloading the trucks. Richardson testified that the dolly and the truck doors were heavy, but denied having physical problems performing the job.

In 1992, Richardson began having neck problems. A cervical fusion was performed and he missed approximately three months of work. There were no allegations that his neck problems were work-related and no workers' compensation claim was filed.

On May 23, 1994, Richardson was in the process of unhooking a set of doubles with a dolly when the dolly handle struck him across his lower back. Richardson testified that the

force of the blow knocked him to his knees. He continued to work and reported the accident the next morning. He started having back pain that night. Some days it was better, some days it was worse, but Richardson continued to work. Richardson did not seek medical treatment for his back until January 25, 1995, when he saw his family physician. He did not return to work after that date. Back surgery was performed on July 7, 1995. Although he had some relief following surgery his back still bothers him and he does not feel there is any job he can physically perform.

Richardson introduced the medical records of Dr. Thomas Spagnolia (Dr. Spagnolia), a neurosurgeon. Dr. Spagnolia performed Richardson's earlier cervical fusion. He first saw Richardson for his low back complaints on February 13, 1995. On that date, Richardson complained of left-sided lower back pain and also pain radiating into his left leg. He ordered a myelogram and CT scan which showed a narrowing of the L5-S1 nerve root foramen but no nerve root amputation. When conservative treatment failed, a left-sided L5-S1 foraminotomy was performed on July 7, 1995. Although surgery provided some relief, Richardson still reported lower back pain. Dr. Spagnolia indicated that "[i]t appears, within reasonable medical probability, that his work related accident brought into disabling reality his condition." Dr. Spagnolia assessed a 10% impairment to the body as a whole.

Richardson also introduced a one page letter from Dr. Monte Rommelman (Dr. Rommelman) into evidence. Dr. Spagnolia's

records indicate that Dr. Rommelman saw Richardson on September 29, 1995 and October 9, 1995. Dr. Spagnolia referred Richardson to Dr. Rommelman for pain management. According to Dr. Rommelman's letter:

> After a review of the medical records and patient history, it is my opinion, within reasonable medical certainty, that the accident of May 23, 1994, brought into disabling reality a dormant degenerative condition in Bobby Richardson's back and caused the need for his surgery performed by Dr. Spagnolia on July 7, 1995.

Dr. Rommelman did not offer an impairment rating.

Coca Cola introduced the medical records of Dr. Leon Ensalada (Dr. Ensalada). Richardson was seen by Dr. Ensalada on August 27, 1996. Richardson told Dr. Ensalada that his back pain began immediately on May 23, 1994, but that he did not experience pain in his left leg for another three months. According to Dr. Ensalada's records, Richardson denied any prior back problems. Dr. Ensalada did not believe there was a causal relationship between Richardson's lumbar radiculopathy and the work-related accident. However. Dr. Ensalada did believe there was a correlation between Richardson's problems and "his nonoccupationally related, pre-existing active lumbar degenerative disease, including lumbar spondylosis and foraminal stenosis." Dr. Ensalada also felt that Richardson's condition was not aggravated by his accident. Dr. Ensalada stated:

> I base my opinions in this regard on a number of considerations, including: First, Mr. Richardson's foraminal stenosis, which is a narrowing of the opening through which his spinal nerve root exited, is a

> nonoccupationally related active degenerative condition which progresses over time from an asymptomatic state to a symptomatic state. Second, the mechanism of Mr. Richardson's injury of record, as he describes it, would not likely injure his neural foramen, a structure which is well below the surface of his back. Third, Mr. Richardson's radiculopathy, manifested by his radicular leg pain and subjective numbness, did not begin until at least three months following his 05/23/94 injury of record.

Dr. Ensalada gave Richardson an impairment rating of 10% and attributed 100% of Richardson's impairment to the presence of pre-existing, active degenerative disease.

Coca Cola also introduced the medical records and deposition testimony of Dr. Gregory Lansford (Dr. Lansford). According to Dr. Lansford's medical records, he diagnosed Richardson with lumbar degenerative disc disease, lumbar spondylosis, foraminal stenosis, and radiculopathy. Dr. Lansford also assigned an impairment rating of 10%. Dr. Lansford believed that Richardson's degenerative changes were asymptomatic prior to the accident, but also indicated that it was unusual for his symptoms to appear five months after the accident.

At his deposition, Dr. Lansford testified that Richardson's foraminal stenosis was a degenerative condition caused by overgrowth of the facet joint which caused compression of the nerve root. He stated that Richardson's back problems were caused by a degenerative condition and it was difficult for him to connect Richardson's accident to his problems. In Dr. Lansford's opinion trauma is not a likely cause of spinal stenosis. If the stenosis was caused by the accident,

Richardson's symptoms should have manifested earlier than five months after the accident. However, Dr. Lansford acknowledged that Richardson had complained of back pain immediately after the accident; and agreed that Richardson's condition had been aggravated to the point that he was experiencing back pain. In reference to the work-related accident, Dr. Lansford stated that "at least by his history, it caused his back pain. Now how his leg pain factors into that, I can't say with medical certainty that that caused that, no." Dr. Lansford also stated:

> I believed his lumbar condition was a degenerative process which is basically a natural process of aging. it is sometimes accelerated in people who do a lot of repetitive bending, lifting, stooping.
>
> It's hard for me to correlate the accident he described five months prior to the onset of leg pain as being the direct cause of his needing surgery since the symptoms didn't occur until five months later.

Out of the 10% impairment rating. Dr. lansford testified that "half of his impairment would be related to his underlying condition and half would be apportioned to his operation."

Coca Cola also introduced the deposition of Kevin Demumbree (Demumbree), who witnessed Richardson's accident. Demumbree testified that the dolly handle weighed approximately five to eight pounds. He stated that when the handle hit Richardson he grabbed his back and yelled something like "dang that smarted" or "that hurt." He did not fall to his knees.

In an opinion entered February 11, 1997, the ALJ indicated that he found the testimony of Dr. Lansford and Dr.

Ensalada more credible and believable and held that "the radiculopathy complained of by the plaintiff in January of 1995 did not manifest itself as a result of the May 23, 1994 injury." The ALJ also found that Richardson "had ongoing active degenerative processes in his spine which were evident by his need for neck fusion in 1992," and that the accident did not cause the injury to the neuroforamina. The ALJ held that Richardson failed to meet his burden of proof on the issue of causation and dismissed his claim.

In an opinion rendered July 3, 1997, the Board affirmed the opinion of the ALJ. The Board found that the evidence presented did not compel a finding in favor of Richardson and that the ALJ's opinion was supported by substantial evidence. As to Richardson's argument that the ALJ erred in failing to consider his low back complaints separate from his low back radiculopathy, the Board found that "there are no causation opinions regarding Richardson's low back pain. Since causation is a necessary element of Richardson's claim, his failure to produce evidence of causation regarding the low back pain is necessarily fatal." This appeal followed.

We agree with the Board's findings concerning Richardson's lumbar radiculopathy and adopt as our own that portion of the Board's opinion as set forth below:

> The claimant in a workers' compensation case bears the burden of proving each of the essential elements of his claim. Snawder v. Stice, Ky.App., 576 S.W.2d 276 (1979). Where the party with the burden of proof is unsuccessful before the ALJ, the question on

appeal becomes whether the evidence compels a contrary finding. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984). Compelling evidence is defined as evidence which is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985). It is not enough for Richardson to show that there is merely some evidence which would support a contrary result. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). As long as the ALJ's opinion is supported by any evidence of substance, it cannot be said that the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 91985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Furthermore, this Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence on questions of fact. KRS 342.285(2).

Richardson first attacks the credibility of Dr. Ensalada, pointing out that he limits his practice primarily to disability evaluations. Arguments such as this have no place before this Board. As noted above, the ALJ alone may determine the weight and credibility to be afforded particular testimony. Paramount Foods, Inc. v. Burkhardt, supra. This Board may not substitute its judgment in such matters. KRS 342.285(2). Richardson also argues that Dr. Ensalada's opinion is entitled to no weight because he describes the preexisting conditions in Richardson's low back as being active, but he gives no basis for this opinion, and no support for it can be found

> anywhere in the record. We agree with Richard (sic) that the preexisting spondylosis and foraminal stenosis to which Dr. Ensalada refers do not appear to meet the definition of a preexisting, active condition as pertains to Kentucky Workers' Compensation Law. A condition is considered a preexisting, active condition if it produces a degree of occupational disability prior to the occurrence of the work-related injury. See, Wells v. Bunch, Ky., 692 S.W.2d 806 (1985). However, it is quite common for physicians and workers' compensation lawyers to use the same words in different contexts. Thus, the preexisting conditions to which Dr. Ensalada refers may well be medically active without being actively disabling prior to Richardson's May 1994 injury. Therefore, we find no error with the ALJ's reliance upon Dr. Ensalada's opinions.

However, we disagree with the Board's conclusion that there are no causation opinions regarding Richardson's lower back pain and that Richardson failed to meet his burden of proof regarding this lower back pain. Richardson testified that he had no back pain prior to the accident, that his back pain started immediately after the accident, and that his pain fluctuated from day to day. In Dr. Lansford's opinion, Richardson's back pain was caused by the accident and half of his impairment rating is related to the underlying condition.

We agree with Richardson's contention that the issue in this case is whether Richardson was injured in the course of his employment and, if so, the extent of his disability. While we agree with the Board that Richardson did not meet his burden of proof regarding causation of his lumbar radiculopathy, our review of the testimony in this case shows that Richardson did meet his burden of proof in regard to the causation of his lower back

pain. As such, the ALJ erred in not rendering findings regarding Richardson's low back pain separate from his lumbar radiculopathy. The ALJ's finding as to failure to prove causation in regard to Richardson's back pain is not reasonable under the evidence presented and as such, is clearly erroneous. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

Having considered the parties' arguments on appeal, the opinion of the Board is affirmed in part and reversed in part, and this matter is remanded to the ALJ for further proceedings in accordance with this opinion. We hope this negates any concerns counsel for Richardson may have concerning the status of appellate review after Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

GARDNER, JUDGE, CONCURS.

ABRAMSON, JUDGE, CONCURS IN RESULT ONLY.

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