RENDERED: December 10, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000753-WC

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-90878

FRANK GUFFEY,
WORKERS' COMPENSATION BOARD,
ROGER D. RIGGS,
ADMINISTRATIVE LAW JUDGE,
DOUGLAS KENNEDY, M.D., and
JOHN W. HARDIN — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND MILLER, JUDGES.

MILLER, JUDGE: Commonwealth of Kentucky Transportation Cabinet (Cabinet) asks us to review an opinion of the Workers' Compensation Board (board) rendered March 8, 1999. Kentucky Revised Statutes (KRS) 342.290. We affirm.

On March 17, 1997, Frank Guffey suffered injury after tumbling down a 30-foot embankment while in the employ of the Cabinet. At the time of the accident he was 35 years old and weighed approximately 450 pounds. Guffey, who has not returned

to work since the accident, filed for benefits under the Kentucky Workers' Compensation Act. KRS Chapter 342. His claim was originally reviewed by an arbitrator and then transferred to an administrative law judge (ALJ). In an Opinion and Award dated November 10, 1998, the ALJ found that Guffey suffered from a back injury and traumatic post-concussive syndrome as a result of the March 1997 accident. The ALJ further determined that these ailments render Guffey 100% occupationally disabled. An appeal ensued to the board. The board affirmed the ALJ's decision and remanded the cause for "consideration of a motion for attorney fees by [Guffey's] attorney for defending [the] appeal." This appeal followed.

The Cabinet asserts the following points of error:

1) the ALJ erred in finding Guffey 100% occupationally disabled,

2) the ALJ erred in failing to "carve out" a portion of Guffey's award for the natural aging process,

3) the ALJ erred in failing to order Guffey to attend vocational rehabilitation; and,

4) the ALJ erred in ruling that Guffey's counsel was entitled to attorney fees under KRS 342.320(2)(c).

Where the party who bears the burden of proof is successful before the ALJ, the question on appeal is whether the ALJ's decision is supported by substantial evidence in the record. See Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence is evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable people. See Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). The ALJ, as fact finder, has the

sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. See Paramount Foods, Inc. v. Burkhardt, Ky. 695 S.W.2d 418 (1985). The ALJ has the absolute right to believe part of the evidence and disbelieve other parts even when it comes from the same witness or the same party's total proof. See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). In reviewing a decision of the board, our review is limited to whether the board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

The Cabinet contends that the ALJ erred by finding Guffey 100% occupationally disabled. We disagree. Dr. L. Douglas Kennedy testified that Guffey had a disk herniation with foramen compression at L4-5. This diagnosis was based on the results of an MRI performed of Guffey's low back. Dr. Kennedy also diagnosed cervical and lumbar strain with persistent radicular pain including the left upper and left lower extremities. Dr. Kennedy believed these conditions to be the result of the work-related accident and assessed Guffey to have an 11% impairment under the American Medical Association guidelines.

Dr. James Phifer, a clinical neuropsychologist, also examined Guffey. He conducted numerous tests on Guffey. Many of these were also performed by the Cabinet's witness, Dr. Robert Granacher. Based on these tests and that Guffey had a higher IQ before the accident, Dr. Phifer opined that the accident caused

Guffey brain injury. Dr. Phifer assessed Guffey to have a 7% impairment rating based on his cognitive dysfunction and 5% impairment rating based on emotional problems directly attributable to his brain injury. After reading Dr. Phifer's reports, Dr. Kennedy also diagnosed Guffey with post-concussion disorder and traumatic brain injury.

We believe the above evidence constitutes "[o]bjective medical findings" pursuant to KRS 342.0011(33). We further believe this evidence sufficient to support the ALJ's finding that Guffey is permanently and totally disabled and; thus, unable to perform any type of work. That is, under KRS 342.0011(34), he is unable to provide services for anyone on a "regular and sustained basis in a competitive economy." In sum, we cannot say the board misconstrued the law or erred in assessing the evidence as it relates to this issue.

The Cabinet next maintains that the ALJ erred in failing to "carve out" a portion of Guffey's award for the "natural aging process" pursuant to KRS 342.0011(1). We disagree and adopt the following ratiocination of the board in affirming the ALJ on this issue:

> [T]he express exclusion of the "natural aging process" in defining "injury" is not an alteration of that which has always been compensable. That which is a dormant, non-disabling condition has not now become "the natural aging process." When a claimant has degenerative changes that were dormant and non-disabling but were aroused by a work-related trauma, it is not the effects of the natural aging process that is compensated but rather the disabling effects of the injury upon those dormant and non-disabling conditions that is compensated. The 1996 Act

> merely codifies the law as it had been interpreted prior thereto.
>
> The 1996 amendments also abolished KRS 342.120 thereby eliminating the Special Fund and its availability to pay for such conditions. The Legislature, by its abolition of the Special Fund's liability for such conditions, did not intend to render those conditions noncompensable any more than it intended, by the abolition of the Fund's liability for occupational diseases, for those claims to be noncompensable. Hence, we conclude that the findings made by the ALJ in Guffey's case with regard to the "natural aging process" are supported by substantial evidence in the record. Special Fund v. Francis, [Ky., 708 S.W.2d 641 (1986)].

The Cabinet next asserts that the ALJ erred in failing to order Guffey to undergo vocational rehabilitation. KRS 342.710(3) states in relevant part:

> The arbitrator or administrative law judge . . . may refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him fit for a remunerative occupation. Upon receipt of such report, the arbitrator or administrative law judge may order that the services and treatment recommended in the report, or such other rehabilitation treatment or service likely to return the employee to suitable, gainful employment, be provided at the expense of the employer or his insurance carrier. [Emphases added.]

We are of the opinion that whether an "employee" undergoes rehabilitation is within the sound discretion of the ALJ. Considering Guffey's physical maladies and that his intellectual functioning is borderline, we believe the ALJ's decision not to order vocational rehabilitation is based upon substantial evidence. Hence, we cannot say the board erred in affirming same. See Western Baptist Hospital v. Kelly, 827 S.W.2d 685.

Finally, the Cabinet avers that the ALJ erred in ruling that Guffey's counsel was entitled to attorney fees under KRS 342.320(2)(c). Said statute requires the employer or its insurance carrier to pay up to $5,000 of the employee's attorney fees if the employer unsuccessfully appeals an award by an arbitrator or ALJ. The Cabinet first contends that said statute unfairly distinguishes between employers and employees and, thus, amounts to "legislation arbitrary in impact and unequal in effect." Therefore, the Cabinet argues, it is unconstitutional. We disagree. We are of the opinion that this disparate treatment is reasonable given the employers' greater financial resources. The discrepancy of financial resources between employer and employee is sufficient reason to require employers to pay attorney's fees upon losing an appeal. See Leeco, Inc. v. Baker, Ky. App., 920 S.W.2d 79 (1996).

The Cabinet also argues that it is immune, as an agency of the State, to the imposition of attorney fees under the 1996 amendment to KRS 342.320(2)(c). We cannot agree as KRS 342.630 specifically states that the "state", and "any agency thereof," shall constitute an "employer" subject to the provisions of the Workmens' Compensation Act. Hence, we deem the Cabinet's argument to be without merit.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. David Shearer, Jr.
Louisville, KY

BRIEF FOR APPELLEE/FRANK GUFFEY:

John W. Hardin
Versailles, KY