

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001151-WC

G & J PEPSI-COLA BOTTLERS, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-97-02044 & WC-95-29656

THOMAS S. MILLER,  
ROBERT WHITTAKER, DIRECTOR, SPECIAL FUND,  
HON. ROGER D. RIGGS, ADMINISTRATIVE LAW JUDGE,  
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, KNOPF, AND MILLER, JUDGES.

MILLER, JUDGE: G & J Pepsi Cola Bottlers, Inc. (Pepsi) asks us to review an opinion of the Workers' Compensation Board rendered April 16, 1999. We affirm.

On June 10, 1995, Thomas Miller suffered a low back injury while he was in the employ of Pepsi. He continued working until June 23, 1995, when he went to the emergency room because of difficulty bending. Miller was initially treated by Dr. James Russel, an orthopedic surgeon, who eventually referred him to Dr. John Vaughn, another orthopedic surgeon, and Dr. Edward Harder, an infectious disease specialist. Miller apparently developed an

aspergillus infection in his vertebrae which required surgical removal of the infected bone and a spinal fusion.

In October 1996, Miller filed an injury claim seeking Workers' Compensation benefits. Kentucky Revised Statutes (KRS) Chapter 342. On September 15, 1997, he filed an occupational disability claim in which he alleged his aspergillus infection was an occupational disease. Pursuant to KRS 342.315, Miller was referred to a university evaluator, Dr. Betty Joyce, a pulmonary specialist. She believed the results of Miller's exam were consistent with reactive airway syndrome or asthma. Thereafter, Miller amended his occupational disease claim to include a claim for a pulmonary impairment.

The administrative law judge (ALJ) determined that Miller suffered from a work-related pulmonary condition. He further determined that Miller suffered from a pre-existing aspergillus infection which was aroused into disabling reality by the June 10, 1995 work-related back injury. The ALJ concluded that Miller was totally occupationally disabled and apportioned all liability to Pepsi. Pepsi appealed to the board. The board "affirmed in part and reversed in part and . . . remanded" for further findings on whether Miller gave due and timely notice of his pulmonary condition. This appeal followed.

We first address Pepsi's arguments concerning the ALJ's finding that Miller's pulmonary impairment constituted a compensable occupational disease. Pepsi contends that said condition was not work-related and, thus, not compensable. In the alternative, it argues that the pulmonary condition was

caused by a sudden and intense exposure to chemicals in January 1995 and, therefore, constitutes an "injury." Hence, they maintain the claim is now time-barred.

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 (1985). Where the party bearing the burden of proof is successful before the ALJ, the question before the board is whether the ALJ's opinion is supported by substantial evidence. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). The Court of Appeals' function in reviewing a decision by the board is to "correct the Board only where the the [sic] 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." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

Dr. Joyce stated that Miller suffered from either occupational asthma or bronchopulmonary aspergillosis, either of which would have been caused by exposure to irritants at work. Although Dr. Joyce referred to an incident of concentrated chemical exposure at work in early 1995, the evidence reflects that Miller was exposed to such irritants from the inception of his job. Miller reported to Dr. Joyce that he began suffering pulmonary symptoms after about two months on the job. Pepsi complains that Dr. Joyce's testimony should not be considered as she was misinformed of Miller's medical history. Miller reported

to her that he had not suffered from asthma prior to his employment with Pepsi; yet, the ALJ determined that Miller had previously suffered from same. We think this argument unpersuasive as Dr. Joyce, nevertheless, was made aware of the symptoms which led to the ALJ's conclusion that Miller had suffered from asthma. In sum, we believe there was substantial evidence on which the ALJ could reasonably find that Miller's pulmonary impairment was caused by long-term chemical exposure at work. Hence, we perceive no error with the ALJ's determination on this issue.

Next, we turn our attention to Pepsi's allegations concerning the aspergillus infection in Miller's spine. Specifically, Pepsi maintains that the ALJ erred in concluding that the infection was aroused into disabling reality by the June 10, 1995 injury. Miller was hospitalized in March 1995 for a pulmonary problem, which the ALJ later determined was work-related. While hospitalized, Miller was given steroids which lowered his immunity. The ALJ believed that the onset of the aspergillus infection occurred while Miller was in this state. He further determined that it was dormant until the June 10, 1995 accident when it was aroused into disabling reality. We believe substantial evidence for the ALJ's conclusion is found in the testimony of Dr. Joyce and Dr. Harder.

Dr. Joyce testified that she believed Miller's hospitalization was the result of a decrease in pulmonary functioning after work-related exposure to chemicals. Dr. Harder expressed his belief that Miller contracted the infection during

treatment for this pulmonary problem and that the first manifestation of the infection occurred with the June 10, 1995 injury. Although Pepsi cites to conflicting evidence, we note that 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 proof. See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Upon the whole, we perceive no error on this issue.

Next, we address Pepsi's contention that the ALJ erred in finding Miller to be 100% occupationally disabled. We disagree. It is well-settled that the ALJ has wide discretion in translating evidence of functional impairment into an assessment of occupational disability. See Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976). Dr. Joyce assessed a 26% to 50% impairment rating based on Miller's pulmonary disorder. Dr. Vaughan opined that as a result of bone destruction, Miller has a 20% impairment to his whole body and does not believe that he will ever be able to return to gainful employment. Miller also testified concerning ongoing pain in his back, shortness of breath and restricted activities. We believe this constitutes substantial evidence to support the ALJ's finding of total occupational disability.

We next address Pepsi's contention that the ALJ erred by failing to apportion 50% of the liability for the arousal of the aspergillus infection to the Special Fund. As the pre-existing condition, the aspergillus infection, was the result of employment with Pepsi, we believe Pepsi is solely liable for the

award. See Rapid Industries, Inc. v. Clark, Ky. App., 715 S.W.2d 902 (1986). Hence, we perceive no error concerning this issue.

We believe Pepsi's remaining arguments are either without merit or moot.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE/THOMAS S.  
MILLER:

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