

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000436-WC

BIZZACK, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-97-01086

THOMAS D. FITCH;  
HON. ROBERT L. WHITTAKER,  
Director of Special Fund;  
HON. DONALD G. SMITH,  
Administrative Law Judge; and  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: BUCKINGHAM, HUDDLESTON, and SCHRODER, Judges.

BUCKINGHAM, JUDGE. Bizzack, Inc., petitions this court to review a decision of the Workers' Compensation Board ("the board") which affirmed (1) the administrative law judge's ("ALJ") October 9, 1997, opinion and award, and (2) the October 9, 1998, opinion and order denying Bizzack's motion to reopen. After reviewing the record and considering the arguments of counsel, we affirm.

On June 17, 1996, Thomas D. Fitch was injured while operating a bulldozer in the course of his employment with Bizzack. Fitch was electrically shocked when the bulldozer he

was using came into contact with a live electric wire. Several hours after the accident, Fitch drove himself to the Highland Regional Hospital emergency room, where he complained of pain in his hands and feet. Fitch was admitted into the hospital for treatment and discharged the next morning. He returned to work for Bizzack two days later and continued to work until January 8, 1997. On May 1, 1997, Fitch filed an application for resolution of injury claim against Bizzack and the Special Fund.

After a hearing, the ALJ determined that (1) all of Fitch's current physical and psychological problems were caused by the 1996 work-related accident; (2) due to his psychological condition, Fitch was now totally occupationally disabled; (3) Bizzack bears sole responsibility for Fitch's benefits; and (4) Bizzack is responsible for all of Fitch's medical expenses for his psychological condition, heart condition, and eye problem. After Bizzack's motion to reconsider was denied by the ALJ, Bizzack then appealed to the board. Prior to the board's ruling, Bizzack filed a motion to reopen, pursuant to Kentucky Revised Statute (KRS) 342.125, on grounds of fraud and newly discovered evidence. Consequently, the board agreed to hold Bizzack's appeal in abeyance pending resolution of the motion to reopen.

After an arbitrator granted Bizzack's motion to reopen, the case was transferred to ALJ Donald Smith, the same ALJ who had determined the original award. In his October 9, 1998, opinion and order, ALJ Smith found that the alleged fraud did not have any impact upon the original award. Bizzack appealed the ALJ's decision to the board. In review of both the

October 9, 1997, opinion and award and the October 9, 1998, opinion and order, the board found (1) that there was substantial evidence to support the original award, (2) that a portion of Bizzack's evidence presented in the motion to reopen did not constitute "newly discovered evidence", and (3) that the ALJ's denial of the motion to reopen was proper. This appeal followed.

The standard this court employs when reviewing a workers' compensation decision is set forth in Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687 (1992):

The [Board] is entitled to the same deference for its appellate decisions as we intend when we exercise discretionary review of Kentucky Court of Appeals decisions in cases that originate in circuit court. The function of further review of the [Board] in the Court of Appeals 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.

#### **OPINION AND AWARD RENDERED OCTOBER 9, 1998**

In the case sub judice, the board reviewed the record and found substantial evidence to support the ALJ's award of 100% occupational disability. Wolf Creek Collieries v. Crum, Ky. App. 673 S.W.2d 735 (1984). Specifically, the board pointed to the testimony of Dr. Timothy Thistlewaite, Dr. Mark Kingston, and Dr. Leo Gibson. Dr. Thistlewaite, a board certified psychiatrist, treated Fitch during two extended hospital stays and two out-patient visits after the 1996 accident, and he diagnosed Fitch as suffering from major depression associated with post-traumatic stress disorder (PTSD). In Dr. Thistlewaite's opinion, Fitch's

psychological condition prevented him from returning to his job or any similar type of work. Dr. Kingston, a family medical doctor who practiced in the Riverview medical clinic, diagnosed Fitch with PTSD, severe anxiety, and depression. Based on his evaluations, Dr. Kingston believed that Fitch was totally disabled. Finally, Dr. Gibson, in his medical report, diagnosed Fitch with PTSD, anxiety, depression, and optic neuritis. Using the American Medical Association (AMA) guidelines, Dr. Gibson found Fitch's permanent whole body impairment to be 100%. All three doctors related Fitch's problems to the work-related accident.

The ALJ specifically stated in his findings of fact and conclusions of law that he found the testimony of these doctors to be more persuasive than the testimony presented by the physicians on behalf of Bizzack. When medical evidence conflicts, the ALJ has the sole authority to determine who to believe. Pruitt v. Bugg Bros., Ky., 547 S.W.2d 123 (1977). This court may not substitute its judgment for that of the fact-finder on the weight of the evidence. Wolf Creek, supra at 736. We cannot say the board erred in assessing the evidence concerning the ALJ's original award.

**OPINION AND ORDER RENDERED OCTOBER 9, 1998**

The board properly set forth its standard of review of the ALJ's decision on reopening under KRS 342.125:

The party who seeks to reopen an award bears the burden of proof on reopening.

Where the party who bears the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the evidence compels a finding in his favor. Compelling evidence is defined as evidence which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. [Citations omitted.]

We agree with the board that the evidence presented by Bizzack does not compel a finding in its favor.

Bizzack's claim of fraud and newly discovered evidence centered around a medical report it received from Dr. Kingston in November 1998, several weeks after the original opinion and award. The report revealed that Fitch had been treated in September 1988 for pharyngitis and depressive anxiety and again in January 1994 for acute depressive anxiety. The medical report appeared to rebut Fitch's testimony that he had not been treated for depression prior to the 1996 accident and raised the issue of a prior disability. However, the depositions of Dr. Kingston and Dr. Norman Edwards expounded upon Dr. Kingston's report and clarified the effect of the previous treatments on Fitch's current condition.

Dr. Kingston testified that Dr. Edwards, another doctor who practiced in the Riverview medical clinic, treated Fitch in September 1988 and January 1994. However, having treated Fitch after the 1996 accident and after reviewing his previous medical history, Dr. Kingston maintained that Fitch's current condition was unrelated to the two "situationally based" episodes Fitch experienced in 1988 and 1994. Dr. Kingston opined that the anxiety Fitch experienced and even the medications he was prescribed correlated with his attempt to quit smoking and his

divorce. Dr. Edwards, Fitch's treating physician in 1998 and 1994, also testified that Fitch had no permanent or long-standing mental health problems prior to the 1996 accident.

Finally, Bizzack argues that the ALJ exceeded his authority and abused his discretion by denying the motion to reopen after an arbitrator had granted the motion. We find this argument to be without merit. In an order rendered on April 10, 1998, the ALJ specifically stated that the matter had been reopened due to the alleged fraud on the part of Fitch. Bizzack was allowed to file additional proof and brief the arguments for a decision.

Essentially, Bizzack's argument is one that puts form over substance and is based solely on the fact that the ALJ chose to state in the order that Bizzack's "motion to reopen is OVERRULED", rather than simply refusing to end, diminish, or change the previous award pursuant to KRS 342.125. More importantly, the substantial rights of the parties were not affected by the language used in the order.

For the reasons stated above, the board's opinion entered February 1, 1999, is hereby affirmed.

ALL CONCUR.  
BRIEF FOR APPELLANT:  
  
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BRIEF FOR APPELLEE, THOMAS D.  
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