

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-003083-WC

ROGER MARTIN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-98-82584

TRINITY COAL COMPANY; RONALD  
W. MAY, Administrative Law Judge;  
and WORKERS' COMPENSATION BOARD

APPELLEES

### OPINION

### AFFIRMING

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BEFORE: GUDGEL, Chief Judge; DYCHE and HUDDLESTON, Judges.

HUDDLESTON, Judge. Roger Martin appeals from an opinion of the Workers' Compensation Board affirming an opinion of an Administrative Law Judge which denied Martin's claim for permanent partial disability workers' compensation benefits.

Martin was injured on May 7, 1999, when, while working for Trinity Coal Company, he attempted to move a large rock. When he twisted to throw the rock, he felt a burning pain in his back and both his legs went numb. The injury resulted in six days' hospitalization. Martin's attending hospital physician diagnosed

Martin with acute back strain, sacralization of lumbar vertebra 5 and minimal osteoarthritis of the left knee. Following Martin's release from the hospital, he was examined by Dr. Richard Mortara, who did not assess any impairment. Martin was also examined by Dr. Fazal Ahmad who assessed an impairment rating of 2 to 3% based upon range of motion.

On July 28, 1998, Martin filed an Application for Resolution of Injury Claim.<sup>1</sup> The matter was referred to an arbitrator, who denied Martins' claim for permanent disability benefits. Martin thereafter requested a hearing before an ALJ.<sup>2</sup> On July 12, 1999, the ALJ entered an Opinion, Award and Order determining that the work-related injury of May 7, 1998, caused Martin to suffer a period of temporary total disability from May 8, 1998, through June 8, 1998. However, the ALJ determined that there was no evidence to support a finding of permanent disability or impairment. He therefore dismissed Martins' claim for permanent partial disability benefits. Martin appealed to the Board<sup>3</sup> which on November 19, 1999, rendered a decision affirming the ALJ. This appeal followed.<sup>4</sup>

Martin contends that he met his burden of proof to show entitlement to benefits pursuant to KRS 342.730, and that the ALJ erred in not awarding him permanent partial disability benefits. Martin argues that the ALJ should have given greater weight and

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<sup>1</sup> Ky. Rev. Stat. (KRS) 342.270.

<sup>2</sup> KRS 342.275.

<sup>3</sup> KRS 342.285.

<sup>4</sup> KRS 342.290.

credibility to the report of Dr. Ahmad. Dr. Ahmad filed a form 107 medical report that concluded that Martin fell within a 2 to 3% whole body impairment pursuant to American Medical Association guidelines. The report concluded that Martin's injuries would have occupational implications grater than reflected by his whole body impairment. It was Dr. Ahmad's opinion that Martin could only stand or walk for approximately three hours and sit for about three hours during the day. Dr. Ahmad would limit Martin to lifting a maximum of ten pounds.

Dr. Mortara, a neurosurgeon, examined Martin and reached medical conclusions conflicting with those of Dr. Ahmad. The Board's opinion summarized Dr. Mortara's examination findings as follows:

The history Martin gave [Dr. Ahmad] was of low back pain, left leg pain, and numbness from his hip to his knee which Martin related to his work injury. The neurological examination revealed no evidence of pain on percussion or palpation. He found no evidence of paraspinous muscle spasm. Martins was able to flex at least to 90 degrees and extend to 30 degrees. His lateral motion was normal. Dr. Mortara found no evidence of atrophy in either the upper or lower extremities. The straight leg raising test was negative without back or leg pain. Dr. Mortara did not numbness in his left thigh and his impression was: "He has a normal exam except for some sensory deficit which I cannot explain. I think it is reasonable to get an MRI scan of his lumbar spine . .

. . I have also asked him to continue on his physical therapy . . . ." Dr. Mortara noted that the sensory deficit was a subjective complaint from Martin, rather than any objective test finding.

The MRI scan of Martin's lumbosacral spine on June 19, 1999, revealed discs of normal height and well hydrated. There was no evidence of bulging or herniated disc disease. There was no evidence of spinal stenosis. The spinal canal was of normal dimensions. There was no encroachment upon the neural foramina. There was no evidence of metastatic disease.

Dr. Mortara's opinion was that Martin's back condition fell within a DRE impairment rating, Category I under the AMA Guides which meant there was no impairment. Dr. Mortara also saw no necessity for any further medical treatment. The DRE Category I is based simply on complaints or symptoms from a patient and is labeled with 0% impairment of the whole person.

The claimant in a workers' compensation case has the burden of proof and bears the risk of persuasion.<sup>5</sup> In this case, the burden was on Martin to prove that he had incurred a work-related traumatic event in the course of employment which was the proximate cause in producing a harmful physical change, evidenced by objective medical findings.<sup>6</sup> There was conflicting medical

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<sup>5</sup> Snawder v. Stice, Ky. App., 576 S.W.2d 276, 279 (1979).

<sup>6</sup> KRS 342.0011(1).

evidence in this case. Dr. Ahmad concluded that Martin had a permanent partial disability, whereas Dr. Mortara determined that he did not. Where the medical evidence is conflicting, the ALJ must choose which evidence to believe.<sup>7</sup> The ALJ chose to believe Dr. Martara over Dr. Ahmad. The ALJ, as the finder of fact, and not the Board or a reviewing court, has the sole authority to determine the quality, character and substance of the evidence.<sup>8</sup> "Where there is evidence of substantial quality to support the ALJ's decision, the reviewing tribunal is bound by the record."<sup>9</sup> Although others may have chosen to believe Dr. Ahmad, it was the ALJ's prerogative to accept Dr. Mortara's testimony, and we are not at liberty to second-guess his decision on whom to believe.<sup>10</sup>

To prevail on appeal, an unsuccessful claimant before the Board must demonstrate that the evidence was "so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor."<sup>11</sup> Compelling evidence is evidence "so overwhelming that no reasonable person could reach the conclusion[.]"<sup>12</sup> "[T]he function of the Court of Appeals in reviewing decisions of the

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<sup>7</sup> Square D v. Tipton, Ky., 862 S.W.2d 308, 309 (1993); Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977).

<sup>8</sup> Square D Company at 309 (1993); Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

<sup>9</sup> Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 423 (1997).

<sup>10</sup> Pruitt, 547 S.W.2d at 124.

<sup>11</sup> Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984).

<sup>12</sup> REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985).

Workers' Compensation Board is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice." <sup>13</sup> In this case, the Board has not overlooked or misconstrued controlling law, nor has it committed an error in assessing the evidence so flagrant as to cause gross injustice.

Martin also contends that KRS 342.730, as amended in 1996, is unconstitutional. Martin provides little, if any, analysis in support of his constitutional claim, alleging only that "[Martin] believes that the statute is clearly unconstitutional as it deprives him of his right to Due Process and Equal Protection by taking away his right to receive benefits when he clearly sustained a permanent injury," and that "[Martin's] position is . . . that this statute is clearly unconstitutional as it has failed to properly protect injured workers in the state of Kentucky from the receipt of benefits to which they are entitled after a work related injury."

Martin's failure to more specifically argue his constitutional claim hampers our ability to review his challenge on the merits. There being no specific points of argument to address, we will simply note that the statute at issue here concerns an economic right, and its constitutionality need only be reviewed under the rational basis test. Under this test, for a statute to be upheld as constitutional against a due process or equal

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<sup>13</sup> Daniel v. Armco Steel Company, L.P., Ky. App., 913 S.W.2d 797, 797-798 (1995); Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

protection challenge, it need only be rationally related to a legitimate state objective.<sup>14</sup> KRS 342.730 is rationally related to the state's legitimate objective of assuring that those who sustain a work-related injury are fairly compensated for their disabilities. The constitutionality of the Workmen's Compensation Act was upheld in Greene v. Caldwell<sup>15</sup> and Wells v. Jefferson County.<sup>16</sup> "[O]nce the concept of workmen's compensation is found to be a constitutional alternative to common law recovery, the Legislature is free to prescribe the time . . . and manner in which compensation benefits are to be paid."<sup>17</sup> KRS 342.730 is constitutional.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald C. Cox  
Harlan, Kentucky

BRIEF FOR APPELLEE:

James M. Kennedy  
Lexington, Kentucky

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<sup>14</sup> Earthgrains v. Cranz, Ky. App. 999 S.W.2d 218, 223 (1999).

<sup>15</sup> 170 Ky. 571, 186 S.W. 648 (1916).

<sup>16</sup> Ky., 255 S.W.2d 462 (1953).

<sup>17</sup> Livingston County Farm Supply, Inc. v. Spencer, Ky., 593 S.W.2d 76, 77 (1979).