

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000761-WC

ROY W. BROWN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-93-12041

SILVER NUGGETS, INC.; P & C MINING COMPANY/  
CRAWFORD COAL COMPANY; IRENE STEEN,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CHIEF JUDGE GUDGEL, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is a petition for review from an opinion of the Workers' Compensation Board ("Board") affirming a decision of the Administrative Law Judge ("ALJ") which denied appellant's motion to reopen. Appellant alleges a worsening of his condition as a result of two prior occupational injuries. As there was substantial evidence that appellant had not experienced a significant change in occupational disability due to a worsening of his condition, we affirm.

Appellant, Roy Brown, sustained his first injury while working for P & C Mining Company ("P & C") in 1981. On July 24, 1981, a cutter bar fell, injuring Brown's right thigh and fracturing his right ankle. His ankle was ultimately fused, and Brown thereafter received an award of 40% permanent partial disability. Brown returned to work in coal mining in 1988. On March 24, 1993, while working as a roof bolter for Silver Nuggets, Inc. ("Silver Nuggets"), Brown sustained a severe laceration to his right wrist from a roof strap, which affected the nerves in his wrist. With his claim for the 1993 injury, Brown moved for reopening as to the 1981 injury. As to the 1993 injury, the ALJ awarded Brown 45% permanent partial disability. As to the 1981 injury, the ALJ found that there had been no increase in occupational disability as a result of that injury. Thus, Brown had a total permanent partial disability of 85%. Taking into consideration Brown's age at the time, which was 31, the ALJ concluded that Brown was not totally occupationally disabled, but that occupational rehabilitation was appropriate pursuant to KRS 342.710.

On September 14, 1998, Brown moved to reopen, alleging a worsening of his occupational disability and that he was now totally occupationally disabled as a result of both injuries. After the Arbitrator's finding that Brown had failed to sustain his burden of proof to establish a worsening of his condition, Brown sought a de novo determination by an ALJ. After a hearing on the matter, the ALJ likewise found that Brown failed to sustain his burden of proof as to the worsening of his condition

as a result of the two prior injuries. From the Board's opinion affirming the ALJ, this petition for review followed.

Brown's 1994 deposition testimony indicates that he has not worked since the 1993 injury. As a result of that injury, he underwent some physical therapy and was provided with a wrist glove/splint. In the 1994 deposition, Brown stated: that he had extreme sensitivity in his right hand; that he had practically no grip strength left; and that he could do very little with his right hand, even to the point where his wife had to cut his food.

In his 1998 deposition, Brown indicated that he did not have any feeling in his fingers and that he had extreme sensitivity and a cold, achy feeling in his hand and fingers. He again complained of very little grip strength and that he had trouble picking things up.

As to the leg injury, Brown's 1995 deposition testimony indicated that he still experienced problems with his right foot and leg due to the limited motion in his ankle as a result of the fusion. In Brown's 1998 deposition, he complained of pain in his right knee around the knee cap area that he had had since 1981, and that it had been getting worse as time went by.

Also in Brown's 1998 deposition, he stated that he had pretty much given up hunting and fishing and that he primarily spends his day watching television. He stated that he had been advised to go for a vocational evaluation in Paducah, to which he never went.

At the hearing before the ALJ, Brown testified that his condition continues to get worse, both as to his right arm and

right leg, and that he continues to have problems with circulation, causing his extremities to become cold and achy. He stated that he continues to have periodic bouts with phlebitis and that his right knee also aches. He testified that his ankle swells if he does not keep it elevated. It was Brown's opinion that he was not capable of performing any type of work at this time.

In support of his motion to reopen, Brown presented the deposition of Dr. David Muffly, an orthopedic surgeon who first examined Brown in April, 1995, and then again in August, 1998. As to the wrist injury, Dr. Muffly stated in 1995 that Brown had sustained a 60% laceration of the median nerve, as well as a laceration of the palmaris longus tendon. Dr. Muffly noted that Brown had a hypersensitive scar over the median nerve, as well as continued numbness in the thumb, index, long, and part of the ring finger. Dr. Muffly further noted: positive Tinnel's sign; that Brown only had an 8 mm 2-point discrimination within the median nerve distribution and 4 mm in the ulnar distribution; and that Brown could fully flex and extend the wrist, although his grip strength on the right was only 20 pounds, as opposed to 85-100 pounds on the left.

As to the leg injury, Dr. Muffly stated in 1995 that Brown had undergone a fusion of the right ankle, but that Brown had also developed complications regarding osteomyelitis. Dr. Muffly also noted that Brown has undergone repairs of the lacerations of the quadriceps of the right thigh, and that he was now experiencing a constant limp and knee pain. Examination of

Brown's right leg revealed: multiple scars around the right ankle; soft tissue defects, both of the mid and distal end of the thigh with depressed areas; 3 cms of atrophy of the right thigh; 6 cms of swelling of the right supramalleolar areas; knee reflexes were 2 + and symmetric; 2 + ankle jerk on the left; no ankle jerk on the right; and generalized weakness of the right leg muscles, especially in the quadriceps area.

X-rays of the right ankle demonstrated a solid fusion with bone changes suggestive of chronic osteomyelitis, and shortening of the right leg. At that time (1995), Dr. Muffly assessed a 14% whole body impairment relative to the wrist injury, 12% to the right ankle injury, 4% to the quadriceps weakness, and 5% to a lumbar compression fracture. As a result of this combined impairment, Dr. Muffly felt that Brown was basically restricted to left-handed work.

When Brown was examined in 1998, Dr. Muffly again observed Brown limping, as well as a popping when Brown bent his right knee. Dr. Muffly noted that the right knee had demonstrated some degenerative changes in the medial aspect, and there was a positive McMurray test consistent with a medial meniscus tear. X-rays of the right knee in 1998 indicated narrowing of the medial joint line with calcification, indicating that only 3 mm of cartilage remained. X-rays of the right ankle revealed bone changes suggestive of chronic osteomyelitis. It was Dr. Muffly's opinion that there had been some progression of right knee osteoarthritis. At this time (1998), Dr. Muffly

assessed an overall 37% whole body impairment and opined that Brown was now totally disabled.

Silver Nuggets had Brown examined by Dr. Daniel Primm on June 9, 1994. At that time, it was Primm's opinion that Brown's tendon lacerations had healed with no significant residuals, as his motor strength had revealed a 4/5 on the right and 5/5 on the left. According to Dr. Primm, Brown's main problem appeared to be residuals of numbness and sensitivity from this laceration. There was no evidence of thenar muscle wasting in the hand, and Dr. Primm encouraged Brown to continue with scar massage on a regular basis. It was Dr. Primm's opinion that Brown could return to work, particularly if he primarily used his left hand and used his right hand only for assistance. Dr. Primm acknowledged that it would be difficult for Brown to return to work which required heavy lifting or fine manipulation of the right hand. At that time, Dr. Primm assessed an impairment rating of 8%-10%.

On November 3, 1998, Dr. Primm re-examined Brown and found basically no differences between the 1995 and 1998 examination. Dr. Primm saw no evidence of acute or chronic osteomyelitis in Brown's right ankle. He noted that both knees were normal except for mild or early degenerative changes. Dr. Primm found no evidence of any objective changes in Brown's overall condition, noting that Brown was not taking any medication and had not been undergoing any regular medical treatment.

The 1994, 1996, and 1998 reports of Dr. O. M. Patrick were also presented. Dr. Patrick noted that when he examined Brown in 1998, Brown complained of pain and loss of sensation in his right wrist and swelling in his right leg and back pain. However, it was Dr. Patrick's opinion that there had been no worsening of Brown's work-related conditions as they were essentially unchanged. It was his opinion, however, that Brown would be restricted in many activities, although he could perform light manual and sedentary activities.

KRS 342.125(1)(d) provides that a claim may be reopened upon a "[c]hange of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order." It has been held that a claimant seeking reopening has the burden of proving by competent evidence that there has been a significant change in occupational disability. Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991). The ALJ, as fact-finder, has the sole authority to judge the weight, credibility, substance, and inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Furthermore, the ALJ may choose to believe part of the evidence and disbelieve other portions of the evidence, whether the evidence came from the same witness or from the same party's total proof. See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); Brockway v. Rockwell International, Ky. App., 907 S.W.2d 166 (1995). If the ALJ's decision is supported by

substantive evidence of record, it must be upheld. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Brown argues that the testimony of Dr. Muffly was such that it compelled a ruling in his favor. See Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). We disagree. We do not see that the evidence provided by Dr. Muffly was so overwhelming that no reasonable person could have reached the conclusion of the ALJ. See REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). The ALJ simply chose not to rely on the opinion of Dr. Muffly that Brown's work-related conditions had worsened to the point that he was now totally disabled. Rather, the ALJ found the evidence provided by Drs. Primm and Patrick more credible. Although Drs. Primm and Patrick recognized that Brown had certain physical limitations, Dr. Patrick and Dr. Primm both found no overall increase in impairment. As that was substantive evidence to support the ALJ's decision, that decision must be upheld.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, SILVER  
NUGGETS, INC.:

Monica J. Rice  
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