RENDERED: November 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000467-WC

FLOYD SCHANZ PLUMBING — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-97-68531

JAMES EVANS;
HONORABLE LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: This is an appeal by Floyd Schanz Plumbing from an opinion of the Workers' Compensation Board which affirmed an award of total permanent disability benefits to appellee James Evans.

Evans was born on February 2, 1944, and is a resident of Louisville, Kentucky. He has a ninth grade education with no specialized or vocational training. His relevant work experience consists of employment as a carpenter, a plumber's helper, and a quality control inspector performing foundry and lathe work.

Evans began his employment as a carpenter and plumber's helper with Floyd Schanz Plumbing in 1993.

On September 2, 1997, while attempting to lift a sewer machine weighing between 150 and 200 pounds into a truck, Evans sustained a work-related injury to his lower back. Evans felt a pop in his lumbar region and immediately experienced pain radiating into his left hip and down his left leg. By the next morning, Evans reported that he could "hardly walk." He remained on light duty at Floyd Schanz Plumbing until November 3, 1997. He has not returned to work anywhere since that time.

Evans underwent treatment for his condition. He was diagnosed with a herniated disk at L4-5 with spinal stenosis and degenerative disk disease at multiple levels. In February 1998, he underwent a lumbar diskectomy. Thereafter, Evans underwent an extensive course of physical therapy, but continued to experience back pain. On October 29, 1998, Dr. Raque pronounced that Evans had reached maximum medical improvement. Based upon the DRE of the AMA Guides, Evans was assessed a 10% permanent functional impairment. Evans was restricted to a "low medium category of work" with no lifting in excess of 35 pounds or pushing or pulling in excess of 45 pounds. Evans was further limited to stair climbing only occasionally provided he did not carry objects up and down the steps. He was directed to avoid activities that required repetitive bending and twisting at the waist, and was restricted to only occasional crouching, crawling, or kneeling.

On December 14, 1998, Evans filed an application for resolution of injury claim. On December 22, 1998, the case was assigned to an Arbitrator. On March 12, 1999, the Arbitrator rendered a benefit review determination granting Evans benefits based upon a 10% permanent partial disability rating. Thereafter, pursuant to KRS 342.275, Evans requested a de novo hearing before an Administrative Law Judge (ALJ). His claim was assigned to an ALJ.

In June 1999, Evans was examined by a vocational specialist, Dr. Robert Tiell. Dr. Tiell concluded that Evans, in his current condition, could no longer engage in substantial gainful employment. He further stated that Evans was not a legitimate retraining candidate.

On September 27, 1999, the ALJ rendered his Opinion, Order, and Award wherein he determined Evans to be permanently and totally occupationally disabled. The ALJ also noted that Dr. George Raque had assigned the entire 10% functional rating under the DRE to Evans's work injury. In light of that opinion, the ALJ concluded that a "carve out" due to the natural aging process, which is excluded expressly from the definition of injury contained in KRS 342.0011(1), was not appropriate.

Floyd Schanz Plumbing appealed the decision of the ALJ to the Workers' Compensation Board. On January 28, 2000, the Board rendered its opinion affirming the decision of the ALJ. This appeal followed.

First, Floyd Schanz Plumbing contends that Evans does not qualify for a permanent total disability award because he

does not have a complete inability to perform "any type of work" as a result of his injury.

KRS 342.0011(11)(c) defines "Permanent total disability" to mean, in pertinent part, "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury[.]" KRS 342.0011(34), in turn, defines "Work" to mean "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy."

In his September 27, 1999, Opinion, Order, and Award, the ALJ stated that

> [t]he definition of work contained in KRS 342.0011 requires the ability to function on a regular and sustained basis in the competitive economy. In this instance, Mr. Evans has described the work history of medium to heavy labor requiring the repetitive bending, stooping and lifting. The restrictions placed on him by Dr. Raque, while permitting lifting up to 35 pounds, prohibit crouching, crawling and repetitive twisting and bending at the waist and permit him to climb steps on an occasional basis but prohibit the carrying of objects while doing so. While he has, on a limited basis, engaged in hunting activities with his sons, the evidence in the claim persuades me that he does not have the ability to engage in work activities on a regular and sustained basis, and in view of his age, education and work experience, physical limitations placed upon him by Dr. Raque, his description of his pain, as well as the definition of work, I am persuaded the Petitioner, James Evans, is permanently and totally disabled as defined by KRS 342.0011(c) and KRS 342.0011(34).

The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality,

character, and substance of the evidence. Square D Company v. Tipton, Ky., 862 S.W.2d 308, 309 (1993); Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). "Where there is evidence of substantial quality to support the ALJ's decision, the reviewing tribunal is bound by the record." Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 423 (1997); Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). "[T]he function of the Court of Appeals in reviewing decisions of the 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." 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). Where the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. Square D, 862 S.W.2d at 309; Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977).

Dr. Tiell, the occupational evaluation expert stated in his deposition that

> it's my opinion that [Evans] has in fact sustained an occupational loss as a result of this low back injury of September '97. And I -- for all practical purposes, I estimate that occupational loss to be certainly 100 percent as it relates to his work history, and I think very close to 100 percent as it relates to the labor market as a whole, if not actually 100 percent.
>
> . . . .
>
> I think if I were in a position where I had to try to place this gentleman in a job, I

> would not be very optimistic about being able to succeed with that.
>
> . . . .
>
> I would -- I would certainly not be adverse to trying to [rehabilitate Evans back to gainful employment], but as I just indicated a minute ago, I would not be particularly optimistic about being successful with it for all the various reasons that I just gave. I think he would ultimately be viewed by employers as a higher risk.
>
> My concern, for starters, would be just the matter of how he would -- the impression that he would leave physically, and walking in for an interview, and just kind of dealing with that whole interview screening process. The way he ambulates, the way he -- the appearance that he projects, the fact he struggles so in terms of that clerical reading and writing function, all of those things I think would weigh very much against his prospects of being able to impact favorably and to have somebody give him a shot at it.

Dr. Tiell's testimony is evidence of substantial quality supporting the ALJ's determination that Evans is permanently and totally disabled. While other evidence was presented that suggested that Evans continued to hunt and fish and perhaps could perform some sedentary job, the occupational medical expert identified Evans's occupational disability as being at or near 100%, and the ALJ acted within his discretion in accepting this medical evidence of Evans' disability. Further, we cannot say that the ALJ or the Board misconstrued the 1996 amendments to Chapter 342 insofar as they modified the definitions of "disability" and/or "work."

Next, Floyd Schanz Plumbing contends that the ALJ erred by failing to carve out an amount from the award due to the

effect of the natural aging process. Based on the medical records from 1995, Floyd Schanz Plumbing contends that the evidence is undisputed that Evans had a pre-existing disc degeneration and spinal stenosis, two years prior to the injury. KRS 342.0011(1) defines "injury" as

> any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. "Injury" when used generally, unless the context indicates otherwise, shall include an occupational disease and damage to a prosthetic appliance, but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury. (Emphasis added.)

In support of its position that Evans suffered from back problems as a result of the natural aging process, Floyd Schanz Plumbing cites us to medical records it filed into the record from Evans's previous treatments by Dr. John A. Lach, Jr. We have reviewed these records and find only two references related to preexisting diagnoses concerning Evans's back: (1) an August 14, 1995 entry which states, "On x-ray we seem [sic] the beginning of osteoarthritic changes in the spine."; and (2) an August 14, 1995, entry which states, "I think if we [sic] don't start to take a little better care of ourself [sic], a problem might come to the front, such as osteoarthritis, pulmonary disease, and chronic low back pain."

However, the medical records filed into the record by Evans include a letter from Dr. George H. Raque to Nurse Debra Lanham of Occupational Managed Care Alliance, Inc., which states, in part, that

> [Evans] has suffered a partial permanent impairment and according to the AMA Guides of Evaluation of Permanent Impairment, II edition, Page 113, Table 75 the patient carries a 10 percent impairment of the body as a whole for surgically treated disc lesion with residual medical documented pain and rigidity.
>
> . . . .
>
> As the patient gives no history of back problems[1] prior to his work related injury I feel that his current restrictions and impairment are secondary to his work injury and not to pre-existing conditions. (emphasis added).

Again, we are persuaded that Dr. Raque's opinion that Evans' occupational disability was not related to a pre-existing condition constitutes substantial evidence such that we must defer to the ALJ's judgment on the matter. While Floyd Schanz Plumbing has identified evidence that Evans had begun to experience osteoarthritic changes in his spine in 1995, where the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. Pruitt v. Bugg Brothers, supra.

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

---

[1] In his "Plaintiff's Answers to Defendants' written questions" filed January 22, 1999, Evans stated that "I had no back problems prior to the September 2, 1997, injury. The September 2, 1997 back injury is not due to a previous condition."

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Kenneth Nevitt
G. Phil Williams
Williams, Wagoner & Nevitt
Louisville, Kentucky

BRIEF FOR APPELLEE JAMES EVANS:

Robert M. Lindsay
Segal, Stewart, Cutler, Catlett, Lindsay & Jones, PLLC
Louisville, Kentucky