

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000947-WC

JAMES NEACE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-05514 & WC-96-05791

HENDERSON ELECTRIC;
HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal by James Neace from an opinion of the Kentucky Workers' Compensation Board (Board) affirming an opinion and order of the Administrative Law Judge (ALJ) dismissing Neace's claim against appellee, Henderson Electric.

On June 7, 1996, Neace executed an application for workers' compensation benefits.¹ The application alleged that on

¹Additionally, Neace filed a claim against Addington Resources seeking benefits for the occupational disease of coal workers' pneumoconiosis. The Special Fund was a party to the original claim against Henderson Electric but eventually entered

(continued...)

February 29, 1996, Neace, while an employee of Henderson Electric, was working at the Toyota plant work-site when he was injured in a fall. Neace contends that he was installing pipe in the pit area of the paint scrubber unit, and was bringing pipe out of the top of a control panel. To facilitate the job, he leaned a scaffold board against a wall from the railing of the scrubber, and had one foot on the board and one foot on a railing. While he had his hands overhead adjusting the pipe, the pipe dropped down about six inches and knocked him off balance. He thereafter spun around and fell back against the scaffold board, injuring his neck and back.

Subsequent medical evaluations diagnosed Neace's condition as lumbar disc herniations at L3-4, L4-5, and L5-S1. Following the alleged injury, Henderson Electric voluntarily paid temporary total disability benefits at the rate of \$415.94 per week from March 1, 1996 to August 19, 1997; medical expenses totaling at least \$55,827.68; and vocational and physical rehabilitation benefits in the amount of \$3,858.55.

Following discovery and a hearing, on November 16, 1999, the ALJ entered her opinion and order. The ALJ determined that Neace had been untruthful at his December 9, 1996, deposition in several respects, including when he testified that he had never experienced any prior back problem "that really mattered to anything"; when he testified that his only prior

¹(...continued)

into a settlement and is no longer involved in this matter. The claim against Addington Resources was otherwise resolved and is likewise not at issue.

injury had been two fractured ribs in 1992 or 1993 while employed by a mining company; and when he denied any previous formal workers' compensation claim prior to the instant claim. Because of his false testimony regarding these issues, the ALJ determined that there were grave questions regarding the credibility of Neace's remaining testimony.

David Murphy, Henderson Electric's foreman at the Toyota plant, was Neace's supervisor. He testified that Neace had been hired on February 19, 1996; that his work had been unsatisfactory; and that comments by Neace raised concerns about possible illegal drug use. On February 27th, Murphy gave the union steward a verbal warning that if Neace's work did not improve, his employment would be terminated. On the morning of February 29th, Neace told Murphy that at the end of the work day of February 28th he had fallen against a pipe and hurt his low back. When questioned why he had not mentioned the injury at the time that it happened, Neace told Murphy that he thought he could continue working and only realized the seriousness of the injury when he arrived at work the morning of February 29th. Murphy subsequently learned that after this conversation, Neace reported the injury to the union steward and superintendent, and claimed that the incident had occurred on the morning of February 29th. Murphy knew that the latter scenario could not be true because Neace had spoken to him before he even began work on February 29th. After talking to Neace, Murphy questioned the two co-workers who were working approximately ten feet from Neace at the time of the alleged injury, neither of whom had seen or heard

anything unusual. Murphy also investigated the scene of the alleged injury. Murphy was unable to reconstruct any possible situation in which the injury could have occurred as described by Neace.

Although Neace denied any prior back injuries, the record establishes that he sustained a May 22, 1995, work-related back injury while employed by Barth Electric in Indiana. The injury occurred when Neace suffered an electrical shock while standing six feet above the ground on a ladder; the electrical shock knocked him to the ground and he complained of constant low back pain, with radiation into his thigh, thereafter. The records of the Indiana Industrial Commission establish that Neace settled his Indiana claim for the May 22, 1995, injury, including the injury to his low back, on September 8, 1995. In his January 6, 1998, deposition, Neace testified under oath that his only other workers' compensation injury had been related to broken ribs.

At his January 6th deposition, Neace also specifically denied any prior use of, or hospitalization for, drugs. He also denied any prior detoxification treatment. However, unrefuted medical records establish that Neace was prescribed narcotic pain medication on several occasions beginning in 1991 for abdominal problems, fractured ribs, low back pain, hemorrhoids, right elbow problems, and other complaints over the years. Neace was hospitalized for detoxification for ethanol abuse at Charter Ridge Hospital in 1994.

William Hines, claims manager for Underwriters Safety & Claims, the benefits administrator for Henderson Electric's workers' compensation insurer, testified that he initially contacted Neace to discuss the instant claim in March 1996, and that he specifically inquired at that time whether Neace had experienced any prior significant back injuries. Neace denied, falsely, that he had experienced any major prior back problems. Hines testified that had Neace been forthright in disclosing the prior back injury, an investigation would have been launched with a good chance that Underwriters would not have approved payment of thousands of dollars in medical benefits and disability income payments.

In July 1997, Neace had been examined by Dr. Timothy Wagner in relation to his alleged February 1996 injury. During that examination, Neace, consistent with his ongoing false story, had told Dr. Wagner that he had no previous back problems other than muscle pain which had caused one lost day from work. However, after being presented with the medical records relating to Neace's 1995 back injury, Wagner concluded that he did not believe that Neace's back condition was caused by the alleged February 29, 1996, injury.

As a result of Neace's false testimony in regard to his previous back injury; inconsistencies regarding his February 26, 1996, injury; lack of corroboration of the circumstances surrounding the injury; and the testimony of accident reconstruction specialist William Cloyd, the ALJ rejected Neace's claim that he had received a work-related injury as represented,

and dismissed his claim. Further, the ALJ determined that because Neace had knowledge of the falsity of his representations when they were made and continued to testify falsely on numerous occasions while under oath, he had violated KRS 342.335(1).² The ALJ also referred the case to the commissioner of the Department of Workers' Claims for investigation for possible referral to the Workers' Compensation Fraud Unit of the Kentucky Department of Insurance. Finally, the ALJ determined that Neace should make monetary restitution pursuant to KRS 342.990(11) to Henderson Electric and/or Underwriters Safety & Claims for all income, medical expenses, and rehabilitation expenses paid in the instant claim.

Neace thereafter appealed to the Workers' Compensation Board which, in an opinion rendered March 24, 2000, affirmed, in all respects, the ALJ. This appeal followed.

On appeal, Neace contends that the ALJ's decision is not supported by substantial evidence because she relied upon inadmissible expert opinion testimony. Specifically, Neace alleges that the ALJ relied substantially upon the expert

²"No person shall knowingly file, or permit to be filed, any false or fraudulent claim on his behalf to compensation or other benefits under this chapter, or by fraud, deceit, or misrepresentation procure or cause to be made or receive any payments of compensation or other benefits under this chapter to which the recipient is not lawfully entitled, or conspire with, aid, or abet another so to do. No person shall by deceit or misrepresentation or with intent to defraud cause or procure or conspire with, aid, or abet another in so causing or procuring any person entitled to compensation or other benefits under this chapter to delay or omit to claim title thereto or to accept the payment of a less sum than that to which he may be lawfully entitled to thereunder."

testimony of William Cloyd to make a determination that a work-related injury did not occur. Cloyd is an expert accident reconstructionist, and based upon his study of the evidence of the record and his accident scene investigation, he concluded that Neace did not incur a work related injury.

Relying upon Wells v. Conley, Ky., 384 S.W.2d 496 (1964), and Alexander v. Swearer, Ky., 642 S.W.2d 896 (1982), Neace contends that KRE³ 703 requires that testimony such as Cloyd's "must be based upon physical evidence, not assumptions." Neace argues that Cloyd's assumptions as to how the accident occurred were inadmissible and do not supply the ALJ with substantial evidence upon which she could base her decision.

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

³Kentucky Rules of Evidence.

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).

We disagree with the premise of Neace's argument that the ALJ "substantially relied" upon the conclusions of Cloyd in her decision to deny Neace's claim. We construe the ALJ's opinion and order as relying primarily upon the medical evidence that Neace had incurred his back injuries in the prior Indiana accident; his misrepresentation of his previous back injury; his inconsistent testimony regarding when the accident occurred; the lack of corroborating witnesses to the accident; and, Neace's diminished credibility because of his pattern of misrepresentations throughout the claims process. In view of the ample evidence of substantial quality to otherwise support the decision of the ALJ, any improper reliance on the testimony of Cloyd would be harmless error.

Moreover, we are not persuaded that Cloyd's testimony was inadmissible. Rulings upon admissibility of evidence are within the discretion of the presiding officer; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion. Simpson v. Commonwealth, Ky., 889 S.W.2d 781, 783 (1994). Cloyd was an accident reconstructionist who relied upon Neace's description of the accident, an investigation of the site, and principles of physics and mechanics in arriving at his opinions. Neace does not challenge Cloyd's credentials as an expert. We agree with the Board that at most, the issue is not one of admissibility, but, rather, one of the weight to be

accorded the expert opinion. Allowing Cloyd's testimony was not an abuse of discretion and did not constitute error.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
HENDERSON ELECTRIC:

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