RENDERED: JUNE 8, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002139-WC

JEFFREY WAYNE BARKER — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-03825

JAMES ADKINS, INDIVIDUALLY;
JAMES ADKINS PLUMBING; UNINSURED
EMPLOYER'S FUND; HON. RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Jeffrey Wayne Barker has filed a petition for review of an opinion of the Workers' Compensation Board rendered on August 20, 1999, which affirmed an Administrative Law Judge's opinion, award and order which denied Barker's claim for permanent partial disability benefits. Having concluded that the Board has misconstrued the law and improperly assessed the evidence in this matter, we reverse and remand.

In the Board's 2 to 1 opinion, Member Lovan concisely set forth the relevant factual background and we adopt that part of the Board's opinion:

> Barker, born April 12, 1961, has worked as a driver/aide for a mental health facility and has also worked as a laborer for a state highway crew and for two construction companies. In these jobs, he has operated a crusher and other equipment. Barker was employed by James Adkins Plumbing ("Adkins") as an apprentice plumber and heavy equipment operator from January 1994 until December 1995. On April 4, 1995, Barker was using a piece of equipment to cover a sewer line when he was thrown from the equipment and broke is [sic] his tibia and fibula. He was taken to the hospital where he remained for three days and had a rod inserted in his tibia. He was off work from the time of the accident until returning to work on September 5, 1995. During that time, his salary was continued at $9.00 per hour for 40 hours per week. After returning to work on September 5, Barker continued to work for Adkins until December 20, 1995. On that date, he broke the rod that had been inserted in his tibia.
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> Dr. Serey took Barker off work and he has not worked for Adkins since that time. In April 1996, his old rod was removed and replaced with a larger rod. On September 1, 1996, Barker returned to work for another employer, Technical Piping, but testified he had a difficult time doing his work because of pain and the amount of medication he was having to take. His pain eventually reached the point that he was no longer able to work at Technical Piping and he has not worked since April 27, 1997.
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> Dr. Pugh performed surgery to remove the second rod from Barker's leg and discovered a screw was broken. Barker was placed in a cast while he remained off work. In May of 1996, Dr. Pugh discovered Barker's fracture was not healing. A bone stimulator was utilized in an effort to stimulate bone growth. In March of 1998, Barker had a fourth surgery on his leg. Dr. Pugh placed a steel plate with screws and used a bone graft taken from the hip. He continued to treat

Barker on a regular basis until November 1998.

Barker testified that Dr. Pugh had never released him to return to work. He continues to have pain and is under continuous restrictions which prevent much of the activity he would otherwise be able to do. He is now studying computer aided drafting at Rowan Technical College.

Barker submitted medical evidence from Dr. Kevin Pugh. Dr. Pugh was deposed on January 16, 1997 and completed a Form 107 in July 1998. Dr. Pugh began treating Barker in March of 1996. X-rays at that time revealed a broken nail in Barker's tibia with a nonunion at the distal end of the tibia. In April 1996, Dr. Pugh removed the broken nail and inserted a new nail. After several months, it was felt the fracture had healed and Barker was permitted to return to work. Barker returned in 1997 with complaints of pain over the site of the previous fracture. X-rays indicated the fracture was healed and it was thought there may be some problem with the nail that had been inserted. Surgery was performed to remove the nail in May 1997. In June, Barker's fracture was not healed and a bone stimulator and walking cast were used. Dr. Pugh saw Barker on the morning of his deposition and Barker reported that his symptoms had decreased considerably over the last two weeks. X-rays appeared to show that the fracture was going to heal. At that time, Barker had not yet reached maximum medical improvement and Dr. Pugh had not yet returned him to work.

He stated Barker should walk around but should not climb ladders and stairs nor should he crawl on pathways. At that time, Barker was still in a cast and could probably not carry more than 10 or 15 pounds since he would only be able to use one hand and was using that other hand for a cane. Dr. Pugh's Form 107 indicated that he had removed the nail and installed further hardware in 1998. X-rays taken July 7, 1998 showed a well united fracture nonunion and no evidence of recurrent fracture or hardware failure. Dr. Pugh assessed a 0% whole body impairment rating as there was no ankylosis or mal-alignment. Barker would have restrictions in

that he should not climb ladders and should be allowed to sit occasionally. He indicated it would be difficult for Barker to return to the type of work performed at the time of the injury due to pain from prolonged walking or standing. He noted Barker had difficulty kneeling and crawling.

After summarizing the evidence, the ALJ found that Barker's attempts to return to work at Adkins and at Technical Piping were unsuccessful returns to work. With respect to permanent impairment, the ALJ found as follows:

> 8. . . . Although an award can be made to plaintiff for occupational disability, any such award is dependent upon medical evidence sufficient to establish a finding of occupational disability as well as an impairment rating determined by the physician using the AMA Guidelines. Stated in an entirely different way, although the ALJ has the authority to determine a claimant's vocational disability and to make an award upon that disability, the ALJ is not permitted to create a percentage of disability when no supporting medical evidence exists. In this case, the most recent evidence is the Form 107 report of Dr. Kevin Pugh of July 1998 in which he stated that the previous nonunion of fracture had now healed and that plaintiff had a well united fracture as demonstrated by x-ray on July 7, 1998. Although the physician believes it would be difficult for plaintiff to return to type of work he was doing at the time of injury and he felt that plaintiff should not climb ladders and should be allowed to sit occasionally, the physician reported that plaintiff's

> injury disclosed no ankylosis or mal-alignment and that his whole body impairment under the AMA Guidelines was 0%. Under such a state of the evidence, any finding of vocational disability by the ALJ would be mere speculation and conjecture. Accordingly, plaintiff will receive no award for permanent disability.[1]

Barker appealed to the Board and argued that the ALJ erred when he denied him permanent partial disability benefits. Barker argued that even though Dr. Pugh assessed no functional impairment, the evidence clearly showed that he had suffered a decrease in his earning capacity due to his injury and that he is entitled to benefits under KRS 342.0011(11). He pointed to the fact the Dr. Pugh had assigned him restrictions; Dr. Pugh had stated that it would be difficult for him to return to his previous type of work; he still had pain; and he had not made a successful return to work.

We believe the Board correctly summarized the law as to Barker's burden of proof and the role of the ALJ and the Board as follows:

> Before the ALJ, Barker had the burden of proving each of the essential elements of his claim. Snawder vs. Stice, Ky.App., 576 SW2d 276 (1979). Since he had the burden of proof and was [not] successful, the question on appeal is whether the evidence is so overwhelming as to compel a finding in his favor. Paramount Foods, Inc., vs. Burkhardt, Ky., 695 SW2d 418 (1985). Compelling

[1]The ALJ did find Barker to be temporarily totally disabled from April 4, 1995, to and including September 4, 1995, from December 21, 1995, to and including August 31, 1996, and again beginning April 28, 1997, to an including July 7, 1998.

> evidence is evidence so persuasive that it is clearly unreasonable for the ALJ not to be convinced by it. Reo Mechanical vs. Barnes, Ky.App., 691 SW2d 224 (1985). It is not enough to merely show that the record contains evidence which would support a contrary result. McCloud vs. Beth-Elkhorn Corp., Ky., 514 SW2d 46 (1974). As fact finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc., vs. Burkhardt, supra. The ALJ may chose [sic] to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof. Caudill vs. Maloney's Discount Stores, Ky., 560 SW2d 15 (1977). Further, the Board may not substitute its judgment for that of the ALJ in matters involving the weight to be accorded the evidence in questions of fact. KRS 342.285.

We review opinions of the Board in accordance with Western Baptist Hospital v. Kelly,[2] wherein our Supreme Court held that "[t]he function of further review of the WCB in the Court of Appeals is to correct the Board only where the the [sic] 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."

In construing the relevant statutes in the case sub judice, the Board correctly stated:

> Since the ALJ determined Barker had not successfully returned to work, he could have awarded a total disability under KRS 342.730(1)(a) or a partial disability under 342.730(1)(c) if he felt the evidence warranted it. Section (1)(c) provides for a permanent partial disability based upon the percentage of functional impairment or as determined under KRS 342.0011(11), whichever is greater. Here, there was no functional

[2]Ky., 827 S.W.2d 685, 687-88 (1992).

> impairment assigned so any award for permanent partial disability would have to be based upon KRS 342.0011(11).

However, we believe the Board erred in its next statements:

> Here, the ALJ was aware of his ability to make that award, but did not find the evidence persuasive. Stated differently, the ALJ apparently did not feel Barker had produced clear substantial evidence upon which he could base an award of a percentage of permanent disability. Functional impairment, while not a determinative factor in a determination under KRS 342.0011, is nonetheless still a factor to be considered in that determination. Other factors are the kind of work the employee is customarily able to do, the area where he lives, his age, occupation, education and the effect upon his general health of continuing the kind of work he is customarily able to do. While the restrictions assigned by Dr. Pugh and the fact that Barker has not yet made a successful return to work are evidence which might support a finding of some degree of occupational disability, we do not believe the evidence as a whole in this case compels a finding of occupational disability. We therefore affirm the ALJ's decision in this regard.

We believe Member Stanley in his dissent correctly construed the law and properly assessed the evidence when he stated:

> Kentucky's workers' compensation system should never fail to justly compensate the truly injured worker, yet that in my opinion is clearly the situation in Barker's case. The principles of equity cry out for an award of permanent disability benefits in this claim, or at lest [sic] an open-ended award of temporary total disability. This unfortunate man suffered a bona fide injury. He has undergone three harrowing surgeries and, according to unrebutted evidence, continues to suffer pain and symptoms. Most importantly, he has never been released to return to work by his treating physician.

> Yet, in spite of a mountain of evidence demonstrating occupational disability, the ALJ focused on the fact that the AMA Guides allow for no percentage rating for the type of injury at issue and dismissed Barker's claim. In so ruling, the ALJ states that he "is not permitted to create a percentage of disability when no supporting medical evidence exists."
>
> Here, however, there is an abundance of medical evidence all of which I believe to be unrebutted and all of which mandates an award. As noted by the majority, the question before this Board is whether the evidence compels a different result than that reached by the ALJ. Paramount Foods, Inc., vs. Burkhardt, supra. Compelling evidence is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. Reo Mechanical vs. Barnes, supra. In my opinion, and in what I believe would be the opinion of all reasonable people. The evidence in this case is so persuasive in Barker's favor that it was unreasonable for the ALJ not to be convinced by it. As such, I would qualify the ALJ's decision as arbitrary.
>
> I understand and agree with the majority that there is a strong need to respect and preserve the broad discretion granted to ALJs by law and that we are in a sense watchdogs charged with that principle's protection. However, I do not believe the ALJ's discretion is so absolute that it must be staunchly guarded to the degree that we are required to endorse arbitrary and unjust results.

We agree with this dissent and reverse and remand to the ALJ for further consideration consistent with this Opinion.

TACKETT, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Michelle R. Williams Mt. Sterling, KY	No brief filed.