

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000506-WC

GREG GRAHAM

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-83161

OFFLOADERS UNLIMITED, INC.;
HON. KEVIN KING, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Greg Graham has petitioned for review of an opinion of the Workers' Compensation Board, which affirmed the opinion of the Administrative Law Judge, which dismissed Graham's claim pursuant to KRS¹ 342.165(2) based upon findings that he falsely represented his physical condition and medical history on an employment application, that his employer, Offloaders Unlimited, Inc., had substantially relied upon those misrepresentations when hiring him, and that his subsequent

¹Kentucky Revised Statutes.

injury was causally related to those misrepresentations. Having concluded that the ALJ's findings of fact are supported by substantial evidence, we affirm.

Graham started working for Offloaders, a business that specializes in unloading trucks at warehousing facilities, on March 27, 2000. As part of the hiring process, he completed an employment application in which he indicated that he could lift up to 90 pounds on a continual basis. On the same application, Graham also denied having any prior injuries to his lower back.

Contrary to the representation on his employment application, Graham had sought treatment for low back injuries in 1996. He was diagnosed with significant herniated discs at the L3-4, L4-5, and L5-S1 regions of his lower back. Following lumbar disc surgery to treat Graham's condition, his doctor instructed him to find alternative employment which did not involve heavy lifting.

On May 1, 2000, approximately one month after starting work for Offloaders, Graham injured his back while unloading a truck. Offloaders disputed the allegations of injury, and Graham filed a claim for workers' compensation benefits on June 19, 2000. The ALJ dismissed Graham's claim pursuant to KRS 342.165(2), which provides:

(2) No compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable falsely represents, in writing, his physical condition or medical history, if all of the following factors are present:

(a) The employee has knowingly and willfully made a false representation as to his physical condition or medical history;

(b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring; and

(c) There is a causal connection between the false representation and the injury for which compensation has been claimed.

Graham appealed the ALJ's dismissal to the Board and argued that the ALJ erred in finding a causal connection between his false representations and the injury for which he claimed compensation. Graham specifically asserted that because no direct medical evidence linked his preexisting condition to the cause of his current injury, a causal connection could not exist as a matter of law. The Board unanimously affirmed the opinion of the ALJ, ruling that the ALJ's determination was supported by substantial evidence. This petition for review followed.

Since Graham concedes that he misrepresented his physical condition and medical history to Offloaders and that his misrepresentations were a substantial factor in Offloaders's decision to hire him, the first two prongs of the statute were met. Graham argues that under the third requirement the ALJ erred in finding a causal connection between his false representations and the claimed injury. Specifically, Graham challenges the sufficiency of the evidence upon which the ALJ based his decision. Graham argues that a causal connection, as a matter of law, cannot exist in the absence of direct medical evidence of that connection.

Since Offloaders was attempting to defeat Graham's claim by invoking the prohibition provided for in KRS 342.165(2), it had the burden of proof on this issue. "When the decision of the fact-finder favors the person with the burden of proof, his

only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did."² A finding of the ALJ on a question of fact will not be disturbed on appeal if there is substantial evidence to support it.³ "Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person."⁴ This Court's function in reviewing the Board's decision is "to correct the Board only where the [] 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."⁵

The record before the ALJ contained conflicting evidence. Graham's medical records indicate that in 1996 he suffered herniated discs at the L3-4, L4-5, and L5-S1 regions of his lower back. Graham's records further indicated that Dr. Richard Jelsma, his neurosurgeon, cautioned him at that time against taking a job which required heavy lifting.⁶ Dr. Jelsma

²Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

³Jackson v. General Refractories Co., Ky., 581 S.W.2d 10, 11 (1979).

⁴Bowling v. Natural Resources, Ky.App., 891 S.W.2d 406, 409 (1994) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972); and Blankenship v. Lloyd Blankenship Coal Co., Inc., Ky., 463 S.W.2d 62 (1970)).

⁵Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

⁶In his records, dated March 27, 1996, Dr. Jelsma stated:

(continued...)

undoubtedly gave this advice because Graham's physical condition made him more prone to lower back injuries.

Graham was referred to Dr. Martyn A. Goldman, an orthopedic surgeon, for an Independent Medical Examination. In a report dated September 18, 2000, Dr. Goldman stated that "an MRI with gadolinium would be appropriate to define whether or not there has been a significant change in the bulging disk at L4-5 noted on his previous studies in 1996." In regard to Graham's low back condition in 1996, Dr. Goldman testified that he would have limited Graham to "[n]o bending forward with the knees straight, no lifting of more than 25 to 35 pounds." He stated "those are the same restrictions I gave anyone I operated upon for a ruptured dis[c]." He further testified that "[a]nyone who has had lumbar dis[c] surgery and would entertain lifting 90 pounds on a repeated basis is almost guaranteed to have further trouble."

For a period of time, Graham followed Dr. Jelsma's advice and pursued a sedentary career as a security guard.

⁶(...continued)

The patient has midline herniated discs at L3-L4, L4-L5 and L5-S1. Any one or all of these could be symptomatic disc.

. . .

For the long term this patient will need to change his work. He is lifting 50-70 lbs. continually at work and will need to change to light or sedentary work permanently. Otherwise he is very likely to have increasing problems with his lower back leading to disability.

On May 30, 1996, Dr. Jelsma performed a lumbar disc excision of L5-S1 left.

During this span of employment, Graham remained injury-free. In fact, the record shows that Graham did not incur a work-related injury until he took the position with Offloaders where considerable strain was placed on his back.

Based on our review of the record, we hold that the ALJ's determination was supported by substantial evidence. While it might have been desirable to have had direct evidence from a physician based on reasonable medical probability that Graham's current injury is related to his condition which existed before he took employment with Offloaders, we must recognize the authority vested in the ALJ to draw a reasonable inference from the evidence. The ALJ has the sole authority to judge the weight, credibility, substance and inferences to be drawn from the evidence.⁷ "[W]hen more than one reasonable inference can be drawn from the evidence, it is for the fact-finder to decide."⁸ It is not the role of the appellate courts "to decide questions regarding reasonable inferences from the evidence."⁹ Considering the medical testimony of Dr. Jelsma and Dr. Goldman in light of all the other evidence in the case, we believe it was reasonable for the ALJ to find a causal connection between Graham's false representations and his current injury.¹⁰

⁷Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985); Roberts v. Estep, Ky., 845 S.W.2d 544, 547 (1993).

⁸Whitaker Coal Co. v. Melton, Ky.App., 18 S.W.3d 361, 365 (2000) (citing Jackson, supra).

⁹Western Baptist, supra at 687.

¹⁰See Guttermuth v. Excel, Ky., 43 S.W.3d 270, 273 (2001).

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Wayne C. Daub
Louisville, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, OFFLOADERS
UNLIMITED, INC.:

Judson F. Devlin
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