

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002589-WC

DAVIS CONSTRUCTION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-95997

RAMON GARCIA; DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI, HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: The administrative law judge (ALJ) determined that Ramon Garcia was totally and permanently occupationally disabled and awarded him corresponding disability benefits. Davis Construction appealed to the Workers' Compensation Board (Board), which affirmed the ALJ's decision. On petition for review to this court, we affirm the Board's decision.

Garcia became employed by Davis Construction in late 1999 as a construction laborer. On February 2, 2000, while in the course of his employment, Garcia tripped and was injured while carrying a heavy molding form used for setting concrete.

Garcia fell backwards, and the molding form then fell on top of him.

Following the accident, Garcia complained of neck, back, and stomach pain. He was subsequently sent to the hospital and was taken off work. Garcia was treated by Dr. Theodore Davis, a neurosurgeon, who diagnosed Garcia with cervical and lumbar strains. Dr. Davis assessed Garcia with a 5% whole person impairment rating under the AMA Guidelines.

On January 5, 2001, Garcia filed an Application for Resolution of Injury Claim against Davis Construction. In the application, Garcia alleged that he sustained work-related injuries in the February 2, 2000, accident. The case was subsequently assigned to an ALJ, and an evidentiary hearing was held.

On July 5, 2001, the ALJ entered an opinion and award which determined that Garcia was totally and permanently occupationally disabled under KRS¹ 342.730(1)(a), and awarded him total permanent occupational disability benefits. Davis Construction subsequently appealed to the Board, and on November 1, 2001, the Board entered an opinion affirming the ALJ. This petition for review followed.

Davis Construction contends that Garcia failed to meet his statutory burden of proof under KRS 342.730(1)(b) sufficient to allow the ALJ to make a finding of a permanent impairment rating. Specifically, Davis Construction alleges that the medical reports failed to identify the specific injuries which

¹ Kentucky Revised Statutes.

resulted in the 5 percent impairment rating; that the reports failed to identify which edition of the AMA Guidelines was used to arrive at the rating; that the medical reports failed to identify which sections of the AMA Guidelines were considered; that the reports failed to identify which portion of the body the doctor believed to have a permanent impairment rating; and that the reports failed to state objective medical findings demonstrating that there had been a harmful change in the human organism.

The fact-finder, the ALJ, rather than the reviewing court, has the sole discretion to determine the weight, credibility, quality, character, and substance of evidence and the inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). The ALJ has the discretion to choose whom and what to believe. Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 422 (1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the adversary party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

Where, as here, the party with the burden of proof was successful before the ALJ, the issue on appeal is whether substantial evidence supported the ALJ's conclusion. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Substantial evidence is evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474

S.W.2d 367 (1971). Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). This court will correct a Board decision only when we "perceive[] 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." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

The appellant's arguments primarily address the alleged inadequacies of the two medical reports prepared by Dr. Davis. The first report, dated October 2, 2000, stated as follows:

I have seen and treated Mr. Garcia since February 14, 2000 for an injury which occurred at work on February 02, 2000. He suffered a cervical and lumbar strain. He has minimal degenerative changes in cervical and lumbar region, which do not play a role in his symptomatology.

He would suffer a 5% whole person impairment, according to the AMA Guides to Evaluation of Permanent Impairment, to the body as a whole. Presently he should avoid heavy bending and lifting, and repetitive bending, lifting and twisting to the lower back and overhead activities.

Again, he does not have significant preexisting condition that was attributable to any symptomatology or that appears to have been aroused in any manner or fashion.

The patient has been off work, unable to return to the type of work that he did before from the time of the injury to the present.

The second report, dated April 9, 2001, stated as follows:

Ramon Garcia, as of visit in office of August 15, 2000, would be considered at maximum medical improvement.

He has been unable to return to work throughout the course of treatment.

I don't expect him to return. If he did, he would have to be placed in some sedentary form of work. His impairment with perhaps the English language may impact his ability to secure sedentary work, as does his chronic pain. He is not able to perform the physical labor that he did before.

He has an impairment rating of 5% to the whole person.

He should avoid activities of repetitive bending, lifting, and twisting activities that would impact either the neck or lower back.

Vocational retraining would have to take into account his primary language and lack of specialized training.

In addition to the medical reports, various other records – patient notes, physical therapist reports, hospital reports, radiological reports, and MRI reports – also appear in the record. Having reviewed all of these records, we conclude that the medical evidence adequately identifies the injuries which resulted in the impairment rating. For example, the above medical reports both identify Garcia's injuries as being in the cervical/neck and the lumbar/lower back regions. The other records also reflect that Garcia's injuries were to these regions.

Similarly, the failure of Dr. Davis to identify in his medical reports the particular edition of the AMA Guidelines he relied upon and/or the specific sections or tables relied upon is

not a basis for reversal. We perceive no reason to suppose that Dr. Davis would have used any edition of the AMA Guidelines other than the current edition. Moreover, the appellant fails to cite us to any authority which requires the sections or tables of the Guidelines the physician used to calculate the impairment rating to be included in the medical reports. The omission of these details is not, alone, a grounds for reversal. We further note that if the appellant suspected that Dr. Davis had used the wrong edition of the Guidelines or the wrong tables or sections, it could have sought to take his deposition and undertook to discredit his conclusions on these grounds.

The appellant's final argument is that the reports failed to state objective medical findings demonstrating that there had been a harmful change in the human organism as required under the definition of "injury" as set forth in KRS

"KRS 342.0011(1) means 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. KRS 342.0011(1). For the purposes of Chapter 342, "injury" is now defined in terms of an event which proximately causes a harmful change rather than in terms of the

²Included in the administrative record at pgs. 49 - 51 is "Employer's Witness and Exhibit Lists, Stipulations and Contested Issues." In Stipulation three, Davis Construction stipulates that the "[e]mployee sustained a work-related injury on February 2, 2000." Davis identifies the only contested issue as the extent and duration of the injury. Having previously stipulated that there is an injury, it is questionable whether the appellant has preserved its right to challenge whether objective medical findings were stated to establish the existence of an injury.

harmful change itself. Gibbs v. Premier Scale Company/Indiana Scale Co., Ky., 50 S.W.3d 754, 760 (2001). "Objective medical findings" means information gained through direct observation and testing of the patient applying objective or standardized methods. KRS 342.0011(33).

A diagnosis alone is not an objective medical finding; rather, the diagnosis must be supported by objective medical findings in order to establish the presence of a compensable injury. Gibbs at 761. Moreover, a patient's complaints of symptoms are not, alone, objective medical findings as the term is defined by KRS 342.0011(33). Id. However, the change need not be, nor be capable of being, documented by means of sophisticated diagnostic tools such as the x-ray, CAT scan, EEG, or MRI in order to be compensable. Gibbs at 762. Likewise, a harmful change need not be both directly observed and apparent on testing in order to be compensable as an injury. Id. Instead, a harmful change may be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrate the existence of symptoms of such a change, and a diagnosis which is derived from symptoms that were confirmed by direct objective and/or testing applying objective standardized methods complies with the requirements of KRS 342.0011(1). Id.

In its review of the medical evidence, the appellant appears to limit its evaluation to the results of the major sophisticated diagnostic testing methods, i.e., the MRI, myelogram, and CAT scan test results. As asserted by the

appellant, the results of these tests produced essentially normal findings. If harmful change had to be proved by major sophisticated diagnostic testing methods, the appellant would prevail. However, as just noted, that is not the case. Gibbs, supra.

Other medical records, most notably the various "Patient Notes" disclose that, in addition to the major testing methods, Dr. Davis also undertook less sophisticated testing and engaged in direct observation in conjunction with arriving at his diagnosis. For example, the May 15, 2000, Patient Note stated, in part, that Garcia "still has some neck pain and low back pain. Forward flexion is about 20 - 30 degrees. Straight leg raising about 60 degrees. He has some mild impaired motion of his neck."

Similarly, the June 6, 2000, Patient Note stated, in part, that Garcia "has continued low back pain. Most of the pain goes toward the right lower extremity. Forward flexion is about 30 - 40 degrees. No definite spasm at rest. Straight leg raising is unrestricted on the left, 60 [degrees] or so on the right. He has no gross weakness that I can detect." The August 15, 2000, Patient Note stated, in part, as follows: "Forward flexion of [Garcia's] back is 45 degrees, straightening of the curve. Some mild tightness of musculature is palpable. Straight leg raising is 60 degrees on either side."

The Patient Notes reflect that Dr. Davis employed direct observation and testing applying objective and standardized methods to determine flexion and motion in the injured regions. We are persuaded that the methods used by Dr.

Davis meet the minimum requirements for establishing objective medical findings demonstrating the existence of a harmful change pursuant to Gibbs, supra. See also Staples v. Konvelski, Ky., 56 S.W.3d 412 (2001).

Although the evidence concerning the severity and permanency of the harmful change as a result of Garcia's injuries was subject to a different interpretation, it is apparent that substantial evidence in the record supported the finding that Garcia suffered a disabling physical injury. The ALJ's finding that Garcia sustained a total permanent disability impairment as a result of his physical injury was supported by substantial evidence in the record and, therefore, it will not be disturbed on appeal.

The decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven C. Jackson
Paducah, Kentucky

BRIEF FOR APPELLEE:

Mark Edwards
J. Grant King
Paducah, Kentucky