

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000452-WC

READY MIX CONCRETE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-00-59587

ROGER SIZEMORE; ROGER RIGGS,  
Administrative Law Judge; and  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: COMBS, McANULTY, and SCHRODER, Judges.

COMBS, JUDGE: Ready Mix Concrete petitions for review of a January 30, 2002, opinion of the Workers' Compensation Board, which affirmed the decision of the Administrative Law Judge (the ALJ) awarding permanent total occupational disability benefits to the appellee, Roger Sizemore. Ready Mix raises three arguments: (1) there are no objective medical findings to bring Sizemore's injury within the meaning of KRS<sup>1</sup> 342.0011(1); (2) the evidence is insufficient to support the ALJ's finding of total disability; and (3) the Board erred in assuming that the ALJ used the correct

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<sup>1</sup>Kentucky Revised Statutes.

standard in finding Sizemore to be totally disabled. After a review of the record and the applicable authorities, we affirm.

Sizemore worked as a truck driver for twenty-seven years prior to suffering an injury to his back while working for Ready Mix. Sizemore testified that on November 18, 2000, he felt a sharp pain in his lower back while adjusting the seat of his truck and that later in the day, he "locked up in pain" while positioning the tarp on the truck. He has not been able to perform any significant work since the injury. He filed a claim for workers' compensation benefits in January, 2001.

At the hearing conducted on July 3, 2001, the contested issues were identified as: the extent and duration of Sizemore's disability; whether he had sustained an injury as defined by KRS 342.0011(1); and whether the disability rating assigned by Sizemore's physician, Dr. Harry Weiser, was in accordance with the AMA guides.

In his decision awarding benefits to Sizemore based on a total disability, the ALJ found as follows:

[Sizemore] has a long history of hard physical labor prior to his work related injury. He even continued working for several weeks after experiencing the injury until he was no longer able to continue. [Sizemore] is a credible witness who has convincingly testified that he is not physically capable of returning to the type of work which he was doing prior to the work related injury. Mr. Sizemore has only a 6<sup>th</sup> grade education and has done nothing during his work career other than heavy manual labor on the farm or driving a commercial truck. Dr. Weiser's testimony is convincing that Mr. Sizemore had experienced a physical impairment as a result of his work injury and that he cannot return to any form of significant manual labor.

When one considers Mr. Sizemore's age, work experience, and limited education along with the fact that he has no transferable job skills, it is determined that based upon the credible testimony of Mr. Sizemore along with the opinion of Dr. Weiser, the plaintiff is 100% occupationally disabled under the guidelines of Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968).

Ready Mix filed a petition for reconsideration and argued that the ALJ failed to address the issue of whether Sizemore sustained an injury as defined by KRS 342.0011(1); that is, one involving a harmful change in the human organism evidenced by objective medical findings. It further contended that the abnormalities reported by Dr. Weiser were "false and incorrect reports of what the diagnostic study interpretations described." Sizemore responded that Dr. Weiser had reviewed and interpreted that actual studies performed on his back, including the x-rays and MRI files; he contended that the doctor's opinion based on those tests provided objective evidence of his work-related injury. The ALJ denied the petition of Ready Mix, stating as follows:

Dr. Weiser has stated that the February 24, 2001 MRI reflected herniated discs at T6-7 and collapsed, herniated disc at L5-S1 with bilateral lateral recessed stenosis at that level. He went on to assign a 13% impairment due to the work related injury.

The Board affirmed the ALJ. This appeal followed.

The first two arguments of Ready Mix concern the ALJ's reliance on Dr. Weiser's report in making an award for total occupational disability benefits. Ready Mix argues that the report provided subjective rather than objective evidence of injury as required by KRS 342.0011(1). It also contends that

there is insufficient evidence to support an award for total disability. Repeatedly in its brief, Ready Mix cites to the fact that three doctors failed to find that Sizemore had suffered any significant injury. Ready Mix contends that the Board erred in affirming the ALJ's decision, and that contention is well summarized as follows:

The ALJ's award must be vacated since it is not supported by objective medical evidence. In fact, the objective evidence of this case indisputably shows that Sizemore does not have an injury under K.R.S. 342.0011(1). As the Board recognized, three out of four of the physicians involved in this case reviewed the exact same evidence as Dr. Weiser. However, only Dr. Weiser found that this evidence was indicative of a compensable injury. Since Dr. Weiser's report is based on subjective evidence, the award of total disability benefits must be reversed.

We disagree with Ready Mix's argument that the Board erred in its assessment of the evidence upon which the ALJ relied. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). The following, well-reasoned portion of the Board's opinion thoroughly addresses the issue of the sufficiency of the evidence supporting the ALJ's decision – including his reliance on Dr. Weiser's report. We, therefore, adopt it as our own:

Ready Mix first argues there is no substantial evidence to support a finding that Sizemore suffered an injury as defined by KRS 342.0011(1). In making this argument, Ready Mix expresses consternation over the decision of the ALJ to rely on the report of Dr. Weiser as opposed to the reports of Drs. Tutt and Sheridan. Ready Mix believes it is inconceivable that an MRI scan interpreted as normal by the treating physician could be interpreted by a different physician as

showing a herniated disc. Ready Mix characterizes this as a "discrepancy of whether Dr. Weiser actually read the thoracic spine MRI dated February 24, 2001." Thus, Ready Mix argues the ALJ has not set forth the basic facts necessary to support his ultimate conclusion.

While it is understandable that Ready Mix is perplexed that the ALJ relied on Dr. Weiser when three other doctors reviewed the same files and found no abnormalities, this is simply not the standard of review. As the Supreme Court clearly pointed out in McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974), " probative value of evidence is not determined by the number of doctors who testify." Unfortunately for Ready Mix, Dr. Weiser stated without equivocation that the February 24, 2001 MRI demonstrated a herniated disc. While it is abundantly clear the remaining physicians of record found no such abnormality, this "discrepancy in the proof" goes to weight of the evidence, not its admissibility. Ready Mix's argument, no matter how it is characterized, represents nothing more than a disagreement with how the ALJ approached conflicting evidence within the record. The authority to judge weight, credibility, substance and inference to be drawn from the evidence lies exclusively within the prerogative of the ALJ. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

In this claim, Ready Mix, the party without the burden of proof, was unsuccessful before the ALJ and the question on appeal is whether the findings of the ALJ were supported by substantial evidence. Smyzer v. B. R. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). Ready Mix can only succeed in its argument if Dr. Weiser's report is deemed inadmissible. We have searched the record and found not a single objection registered as to the introduction of Dr. Weiser's proof. More importantly, that report constitutes evidence of substance and relevant consequences that have the fitness the [sic] induce conviction in the minds of reasonable persons. Union Underwear v. Scearce, Ky., 896 S.W.2d 7 (1995). As we have so often stated, it is not the function of this Board, nor it is [sic] within our authority, to

substitute our opinion for that of the fact finder, even if we were to believe another fact finder may have found differently. KRS 342.285(1). On this issue, we affirm the ALJ.

Ready Mix secondly argues Sizemore has not suffered an injury within the definition contained in KRS 342.0011(1), arguing there are no objective medical findings upon which the ALJ could have based an award. This argument, of course, pyramids Ready Mix's first argument and, per force, must fail.

In Gibbs v. Premiere Scale Co., Ky., 50 S.W.3d 754 (2001), the Supreme Court determined that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011(1) and (33) if based upon symptoms of a harmful change that are documented by means of direct observation and/or testing applying objective or standardized methods. The Court further determined that although a harmful change must be documented by objective medical findings, there was no requirement that causation be proved by such findings. See also Staples v. Konvelski, Ky., 56 S.W.3d 412 (2001).

Here, Dr. Weiser, after physical examination, noted decreased range of motion secondary to pain and positive pain to palpation at facets L4-L5. While technically it is correct that those findings may in reality be more subjective than objective, those findings were supported, at least in Dr. Weiser's opinion, by diagnostic testing that demonstrated herniated discs at two levels. The bald statement by Ready Mix that Dr. Weiser's report is riddled with inaccuracies and misrepresentations does not supply a basis for a determination that Dr. Weiser's report is without probative value.

Last, Ready Mix argues that the Board erred in assuming that the ALJ used the appropriate legal standard in making his award. As it did before the Board, Ready Mix contends that in assigning liability to Ready Mix for a "huge workers'

compensation award," the ALJ mentioned only the definition of total disability contained in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). The Board declined to remand the matter to the ALJ, stating that the proper standard for total disability as enacted in 1996 was "well-known" and that to conclude that the ALJ failed to use the proper standard "would ascribe an inexcusable level of inattention to the fact finder."

Again, we find no error in the Board's review. As our Supreme Court has emphasized, some – if not most – of the principles in Osborne "remain viable" in determining a workers' degree of disability. See, Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48, 50 (2000). Ready Mix argues that the claimant's ability to find work in the locale where he resides is no longer pertinent. However, the ALJ did not make any findings with respect to Sizemore's ability to work in any specific geographic area. See, infra at 3. Rather, the ALJ considered the type of work that Sizemore had previously performed, his age, his educational background, his physical restrictions, and his physical condition as contained in Dr. Weiser's medical report and as testified to by Sizemore. The ALJ determined that Sizemore had suffered a total occupational disability. These factors remain pertinent even after the 1996 legislative changes with respect to the concept of occupational disability. Id.

We have already determined that Sizemore met his burden of proof with regard to the nature of his work-related injury and the extent of his disability. While Ready Mix is correct in

citing the existence of other expert testimony in conflict with that of Dr. Weiser, the employer has not demonstrated that the ALJ's finding of permanent, total disability is "so unreasonable that it must be viewed as erroneous as a matter of law." McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854, 861 (2001).

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE ROGER  
SIZEMORE:

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