

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000527-WC

TONY FLENER,
D/B/A TF ROOFING AND
CONSTRUCTION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-00048

MICHAEL EDWARDS;
UNINSURED EMPLOYERS FUND;
HON. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUIDUGLI, McANULTY AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Tony Flener, d/b/a TF Roofing and Construction ("Flener") appeals from an opinion of the Workers' Compensation Board ("the Board") affirming the ALJ's award of benefits based on a 56% occupational disability. We affirm.

Flener owns and operates a roofing business. In 1997, Michael Edwards ("Edwards") began working for Flener as a roofer. Edwards had an eighth grade education and work experience consisting of manual labor. On August 16, 1999, Edwards was

injured when he fell from a roof during the course of his employment. The record indicates that Edwards broke bones in his back, wrists, and nose as a result of the fall. Further medical testing revealed bulging discs in Edwards' lower back. Two physicians gave Edwards a total impairment rating of 24% and 28%, respectively.

Thereafter, Edwards filed the instant claim seeking benefits. Upon taking proof, the ALJ awarded benefits based on a 56% occupational disability, enhanced by a factor of 1.5 pursuant to KRS 342.730(1)(c)(1) upon finding that Edwards did not retain the physical ability to return to the work he was performing at the time of the injury. Flener appealed to the Board, arguing that the ALJ erred in applying the multiplier to the award and in finding that Edwards was an employee rather than independent contractor. The Board affirmed the ALJ's award, and this appeal followed.

Flener first argues that the Board erred in affirming the ALJ's application of the 1.5 multiplier because its application is not supported by substantial evidence. He maintains that the record contains no objective evidence that Edwards is unable to work, and points to a post-award videotape showing Edwards performing manual labor. He seeks to have the Board's decision on this issue reversed.

We have closely examined Flener's argument, and find no error on this issue. KRS 342.730(1)(c)(1), as it existed at the time of Edwards' injury, provided that if an employee did not retain the physical capacity to return to the type of work he

performed at the time of the injury, the permanent partial disability benefit shall be multiplied by one and one-half (1.5). The dispositive question is whether the ALJ may properly conclude that a claimant is unable to return to the type of work he performed at the time of the injury when there is no express medical testimony in the record so stating. We believe that the Board properly found that the ALJ may reach such a conclusion.

In examining Edwards' claim, the ALJ was availed of evidence that Edwards broke his back and both wrists in the accident, and that Edwards suffered ongoing pain and a diminution in function. Upon examining the degree of functional impairment in the record and the testimony that Edwards was unable to engage in the same type of physical activity that he could prior to the injury, the ALJ concluded that Edwards' was no longer able to work as a roofer. We find no error in this conclusion. While an injury must be established by objective medical findings pursuant to KRS 342.0011, the ALJ may translate this evidence into a finding of occupational disability. Transportation Cabinet v. Guffey, Ky., 42 S.W.3d 618 (2001). This is precisely what occurred in the matter at bar.

Flener also argues that the Board erred in affirming the ALJ's conclusion that Edwards was an employee of Flener rather than an independent contractor. He notes that Edwards possessed carpentry skills, provided his own tools, signed an independent contractor statement, and that taxes were not withheld from his paycheck. He maintains that both parties

regarded Edwards as an independent contractor, and that the ALJ erred in failing to so rule.

The ALJ is vested with the sole authority to determine the weight, credibility and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage, Ky., 951 S.W.2d 329 (1997). Where the evidence is conflicting, the ALJ may determine which evidence to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). In determining whether a party is an employee or independent contractor, one must look to several factors including the nature of the work, the extent of the control exercised by the alleged employer, the skill level of the alleged employee, and the intent of the parties. See generally, Ratliff v. Redmon, Ky., 396 S.W.2d 320 (1965); Uninsured Employers Fund v. Garland, Ky., 805 S.W.2d 116 (1991).

Edwards testified that Flener controlled the time and location of his work, and provided all of the supplies. He stated that he used Flener's truck, had a work history consistent with general employment rather than independent contracting, and that he believed himself to be an employee. While Flener offers countervailing evidence, Edwards testimony formed a sufficient basis for the ALJ to have properly concluded that Edwards was an employee. The Board properly affirmed on this issue. Miller, supra.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE, MICHAEL EDWARDS:

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