

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000235-WC

FRITO LAY (RSKCO)

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NOS. WC-89-30116, WC-95-11954,  
WC-98-80322, and WC-99-00924

JAMES RATLIFF;  
HON. ROBERT WHITAKER,  
DIRECTOR OF SPECIAL FUND;  
HON. JOHN B. COLEMAN, ALJ;  
FRITO LAY (CRAWFORD & CO.);  
FRITO LAY (TRAVELERS INSURANCE); and  
KENTUCKY WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND COMBS, JUDGES.

BUCKINGHAM, JUDGE: Frito Lay, as insured by RSKCo (RSK), petitions for our review of an opinion of the Workers' Compensation Board which affirmed an opinion and award by an administrative law judge (ALJ). The ALJ had found that James Ratliff was totally occupationally disabled and that the primary cause of that disability resulted from an injury in 1998 while working for Frito Lay who was then insured by RSK. We affirm.

Ratliff began working with Frito Lay during 1985. He was a route salesman who traveled to various grocery stores and gas stations selling and delivering Frito Lay products. Ratliff suffered his first workplace injury to his low back on November 1, 1987. In 1988, Dr. Henry Tutt performed a discectomy of the L5-S1. Crawford & Company insured Frito Lay for this injury, and Ratliff's claim resulted in a settlement for the equivalent of a sixteen percent permanent partial disability which was paid equally between the employer and the Special Fund.

On February 10, 1995, Ratliff suffered another workplace injury to his low back. A second discectomy was performed on Ratliff following that injury. Frito Lay was insured by Travelers' Insurance Company for this injury, and Ratliff's claim was settled for the equivalent of a five percent permanent partial disability.

Ratliff's third injury occurred on January 7, 1998, and was again to Ratliff's low back. Frito Lay was insured by RSK for this injury. Ratliff asserted that this injury occurred while lifting boxes of chips. He continued working through May 1998 until he underwent a third surgery which included a fusion at the L5-S1 level. Because he maintains that his pain is too great, he has not worked since that time.

The ALJ entered an opinion and award on July 20, 2001. First, the ALJ stated that he was unconvinced that Ratliff's current condition was caused by a worsening attributable to his prior work-related injuries. Next, relying on the testimony of Dr. Daniel Primm, the ALJ found that the January 1998 event was

the proximate cause of Ratliff's condition which ultimately led to his spinal fusion. Further, citing the medical evidence as well as Ratliff's testimony, the ALJ found that Ratliff met the definition of permanent total disability and that Ratliff had a complete and permanent inability to perform any type of work on a regular and sustained basis.

The ALJ determined that Ratliff's disability from the 1987 injury was no greater than the sixteen percent for which it was settled. Therefore, Frito Lay was given credit for that sixteen percent prior active disability which was noncompensable. In addition, the ALJ held that Frito Lay should be given credit for a five percent occupational disability based on the settlement of Ratliff's claim for the 1995 injury. Thus, the ALJ determined that immediately before the 1998 injury, Ratliff had a twenty-one percent prior occupational disability.

The ALJ then determined that Ratliff's condition was caused in part by the arousal of pre-existing degenerative changes. Citing McNutt Constr./First General Servs. v. Scott, Ky., 40 S.W.3d 854 (2001), the ALJ noted that when a work-related trauma causes a dormant degenerative condition to become disabling, the trauma is the proximate cause of the harmful change. Id. at 859. The ALJ concluded that Ratliff was totally occupationally disabled and entitled to benefits for seventy-nine percent of the total amount. The ALJ stated that the amount was directly attributable to the 1998 injury and was payable by RSK as the insurer for Frito Lay on that date. The Board affirmed

the ALJ's opinion and award, and this petition for review by Frito Lay (RSK) followed.

RSK's first argument in its petition is that there was not substantial evidence to support the ALJ's finding that the 1998 event was the proximate cause for Ratliff's condition which ultimately led to his spinal fusion. RSK asserts that the proximate cause of Ratliff's condition was the fact that he had a pre-existing congenital condition of segmental instability and had also undergone two prior surgeries for his 1987 and 1995 injuries. Relying on the medical testimony submitted in the case, RSK argues that there was a lack of substantial evidence to support the ALJ's award.<sup>1</sup>

In addition, RSK asserts that Ratliff was not actually injured in 1998 and that he did not give a history of having experienced a traumatic incident to the physicians who examined him. We have examined the evidence and disagree with RSK's assertion. Ratliff specifically testified that on January 7, 1998, while lifting boxes of chips, he felt a pain in his low back extending down his right leg. He reported the injury to the employer and related the injury to the examining physicians who noted it in Ratliff's medical history.

Further, there was additional evidence upon which the ALJ relied in determining that the workplace event was the proximate cause of Ratliff's condition. Dr. Primm, who examined Ratliff at the referral of RSK, assessed Ratliff with a twelve

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<sup>1</sup> If there is substantial evidence of probative value to support the ALJ's decision, it should be affirmed. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984).

percent impairment with one-half being attributable to the arousal or aggravation of degenerative conditions by a work-related event in January 1998. Relying on this testimony, the ALJ determined that the January 1998 event was the proximate cause of Ratliff's condition which led to the spinal fusion. Further, the ALJ noted that Ratliff had continued to work after the surgeries following his two prior injuries and that he was now no longer able to return to regular employment. In short, we conclude that there was substantial evidence to support the ALJ's determination that the January 1998 event was an injury which was the proximate cause of Ratliff's condition.

RSK's second argument is that there is not substantial evidence to support the ALJ's finding that Ratliff is totally occupationally disabled. It is an ALJ's function to determine occupational disability,<sup>2</sup> and "[t]he crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." Ira A. Watson Dept. Store v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000). Based upon the testimony of Ratliff<sup>3</sup> and the medical restrictions placed upon him, the ALJ concluded that Ratliff met the definition of permanent total disability. The ALJ noted Ratliff's age, education, and past work experience

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<sup>2</sup> "It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability." McNutt, 40 S.W.3d at 860.

<sup>3</sup> "A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured." McNutt, 40 S.W.3d at 860.

along with his medical impairment, restrictions, and his complaints of pain. We conclude that the evidence supporting the ALJ's finding of total occupational disability was substantial.

The Board's opinion affirming the ALJ's opinion and award is affirmed.

ALL CONCUR.

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