RENDERED: October 11, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000706-WC

ANDREW WALDRIDGE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-62470

ORR SAFETY CORPORATION; DONNA H. TERRY, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF, MILLER, AND TACKETT, JUDGES.

TACKETT, JUDGE: The Administrative Law Judge (ALJ) determined that Andrew Waldridge suffered work-related injuries and that, as a result, he sustained a 2% percent occupational disability. Waldridge appealed to the Workers' Compensation Board (Board), arguing, among other things, that the ALJ had incorrectly determined his disability rating and that the proper rating should have been assessed as 4 1/2%. The Board affirmed the ALJ's decision, and we now affirm the Board.

Waldridge was hired by Orr Safety Corporation in 1990. In June 1998, Waldridge was involved in a non-work-related

automobile accident. Following the accident Waldridge complained of low back pain. On September 2, 1998, Waldridge was diagnosed with lumbar strain with mild disc protrusion at L4-L5. As a result of his accident injuries, Waldridge missed about three to four weeks of work. On March 17, 1999, Waldridge was involved in a second non-work-related automobile accident. Following the accident, Waldridge again complained of low back pain, and was off work for about two to three months.

In September 1999, Waldridge was classified as a lead man, performing and overseeing order picking, receiving, and shipping in a warehouse environment. On September 8, 1999, Waldridge sustained a work-related lifting injury to his lower back while unloading a UPS truck. Waldridge testified that as he was lifting up a box he felt something tighten up "real bad" on the right side of his back.

Waldridge was treated by Dr. Gregory Nazar. An MRI taken in December 1999 revealed a herniated disc at L4-5. After unsuccessful conservative treatment and physical therapy, on January 14, 2000, Dr. Nazar performed a right L4-5 diskectomy. Dr. Nazar assessed a 10% permanent impairment to the whole body. In his deposition testimony, Dr. Nazar indicated that he agreed with the assessment of Dr. Frank Wood's apportionment of the total impairment rating among the June 1998 motor vehicle accident (5%); the March 1999 motor vehicle accident (3%); and the September 1999 work injury (2%). On July 20, 2001, Nazar sent a letter to Waldridge's counsel providing additional explanation regarding his impairment rating assessment. As

explained later, it is this letter which forms the basis for Waldridge's objection to the ALJ's decision.

At the request of Orr Safety Corporation, Waldridge was given and independent medical examination by Dr. Wood. On March 23, 2001, Dr. Wood's independent medical examination report was filed into the record. The report stated, in part, "of [Waldridge's] 10% total whole-person impairment, 5% is due to the motor vehicle accident of 06/25/98 [sic], 3% to the motor vehicle accident of 03/15/99 and 2% to the occupational injury of 09/08/99."

On December 14, 2000, Waldridge filed an Application for Resolution of Injury Claim with the Department of Workers Claims. Following a hearing, on September 19, 2001, the ALJ issued an opinion and award determining that Waldridge had a permanent partial occupational disability of 2%. The opinion and order awarded Waldridge benefits of $4.82 per week for a period not to exceed 425 weeks. Waldridge subsequently appealed the ALJ's decision to the Board; on March 6, 2002, the Board entered a decision affirming the ALJ's decision. This petition for review followed.

Waldridge contends that the evidence of record compels a 4 1/2% impairment rating being assigned to Waldridge instead of the 2% assigned by the ALJ.

In awarding benefits based upon a 2% impairment, the ALJ stated as follows:

> The extent and duration of disability attributable to the work injury must be determined. This issue is inextricably intertwined with the question of the extent

> of pre-existing active disability arising from the two motor vehicle accidents. For injuries occurring on or after December 12, 2000, the extent of permanent partial disability is determined by reference to a permanent impairment rating calculated pursuant to the AMA Guides to Evaluation of Permanent Impairment. KRS 342.0011(11)(b) and KRS 342.730. In this case, both Dr. Woods and Dr. Nazar have agreed that Mr. Waldridge now has a 10% permanent impairment rating. Amazingly enough, both physicians also agree that only 2% of that impairment rating is attributable to the September 8, 1999, incident, and that 5% is due to the June 25, 1998 motor vehicle accident and 3% is due to the March 17, 1999 motor vehicle accident. Thus, the Administrative Law Judge finds that Mr. Waldridge currently has a 10% impairment rating under the AMA Guides, of which 2% is attributable to the work injury, based upon the above expert opinions. In reaching this conclusion, the Administrative Law Judge has also considered Dr. Nazar's July 20, 2001 letter to Mr. Waldridge's counsel which somewhat varies the opinion rendered in his July 30, 2001 deposition. However, it is clear that both Dr. Wood and Dr. Nazar would have imposed a permanent impairment rating prior to the September 8, 1999 injury if requested and thus, the impairment set forth hereinabove, is adopted.

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 inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (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 same adversary party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16

(1977). 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). In instances where the medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977). The ALJ resolved the issue against Waldridge, who had the burden of proof on the issue. Where, as here, the party with the burden of proof was unsuccessful before the ALJ, the issue on appeal is whether the evidence compels a finding in his favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985); Daniel v. Armco Steel Co., L.P., Ky. App., 913 S.W.2d 797, 800 (1995). To be compelling, evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985).

Waldridge contends that the ALJ erred in her disability assessment because Dr. Nazar's July 20, 2001 letter to Waldridge's counsel qualified his earlier 2% disability rating. The letter stated, in relevant part, as follows:

> With regards to your first question about the assigned impairment rating in 1998 of 5%, I do not believe this would change my opinion from Dr. Wood's assessment. I believe the assigned impairment rating[s] that Dr. Wood has suggested are correct and that the March 1999 auto accident would add an additional 3% and that the work related injury in September 1999, would be a 2% rating. Thus, his total impairment rating is 9%.
>
> This is with the assumption that he has already concluded the impairment rating for the work accident in 1998 with 5%. If there

> was no impairment rating assigned at that time, then we would have to start from the beginning again, and thus, one would assign 5 1/2% impairment to the 1999 injury and 4 1/2% to the September 1999 injury. However, if the impairment rating was assigned [5%] prior to the 1999 injury, then things would stand as Dr. Wood suggested.

Waldridge contends that the July 20, 2001 letter reflects that Dr. Nazar agreed to a 2% work-related disability assessment only in the event that an impairment rating had been assigned following the original motor vehicle accident. Since no rating was in fact made following the original accident, Waldridge contends that the evidence compels a finding that a 4 1/2% disability rating should have been assigned to Waldridge as a result of the work injury.

Though Dr. Nazar's July 20, 2001 letter modified his original deposition testimony, we first note that Dr. Wood's testimony alone is sufficient to sustain the 2% work-related impairment rating. In light of Dr. Wood's impairment rating assessment, even if we accept Waldridge's interpretation of the July 20, 2001 letter, the evidence does not compel a result in his favor. Dr. Wood's medical findings support the ALJ's finding of a 2% impairment rating.

In addition, we agree with the Board that Waldridge has misconstrued the overall tone and meaning of Dr. Nazar's statements. We therefore adopt the Board's discussion of the issue:

> It is the second portion of the above-quoted letter that forms the ground for Waldridge's argument on appeal. Waldridge interprets Dr. Nazar's letter as indicating that he only agreed with Dr. Wood's apportionment of the

impairment between the injuries if Dr. Nehil had assigned an impairment rating at the time of the 1998 motor vehicle accident. Although we perceive some ambiguity in the letter, for a number of reasons we believe Waldridge has misconstrued the overall tone and meaning of Dr. Nazar's statements. First, from his brief on appeal it is apparent that Waldridge believes Dr. Nazar was referring to Dr. Nehil in the second paragraph of the July 20, 2001 letter when he wrote "[t]his is with the assumption that he has already concluded the impairment rating . . . ." (The Board's emphasis.) However, when reading this statement in the context of the entire letter, there can be no doubt that Dr. Nazar was referring to Dr. Wood. Secondly, a reference to Dr. Nehil in the letter is illogical because Dr. Nehil treated Waldridge for his second motor vehicle accident in 1999, not the first, as Waldridge suggests. Further, there would have been no reason for any physician to assign an impairment rating at the time of either the 1998 or 1999 motor vehicle accident and, in fact, no impairment ratings were ever requested. Initially, Dr. Wood was the only physician who attempted to assign an impairment to the 1998 injury. Dr. Wood testified that based on his review of Waldridge's medical records, diagnostic tests, and complaints, he was able to determine that Waldridge's impairment for the 1998 injury was 5%. Finally, Dr. Nazar's treatment notes do not indicate he was provided with a history of the 1998 motor vehicle accident and the record is unclear as to when he first became aware of that accident. Thus, Dr. Nazar's opinion as to apportionment is based on his apparent agreement with Dr. Wood's assessment of the effects of the 1998 auto injury.

While Waldridge urges a different interpretation of Dr. Nazar's letter, his position represents nothing more than a possible alternative inference that could be drawn from the evidence. To the contrary, our independent review of Dr. Nazar's testimony convinces us the ALJ accurately assessed the evidence, which she has neither misinterpreted nor misapplied. The ALJ, as a matter of law, is empowered to choose to believe part of the evidence while at the same time disregard other portions of the

> evidence whether the evidence came from the same witness or the same party's total proof. Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999); Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

As the Board has not overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice, we affirm. Western Baptist Hospital. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

ALL CONCUR.

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