RENDERED: October 31, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000310-WC

SELLERS ENGINEERING, INC., AS INSURED BY
MIDWESTERN INSURANCE ALLIANCE APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-84715

BOBBY ROACH, SELLERS ENGINEERING,
INC., AS INSURED BY AMERICAN
INTERSTATE INSURANCE COMPANY,
WORKERS' COMPENSATION BOARD AND
HON. LLOYD R. EDENS, ALJ APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, COMBS, AND TACKETT, JUDGES.

TACKETT, JUDGE. Appellant, Sellers Engineering, Inc., (Sellers Engineering), as insured by Midwestern Insurance Alliance, petitions for review from a January 15, 2003 opinion of the Workers' Compensation Board (Board) that affirmed a July 31, 2002 opinion, order and award entered by the Honorable Lloyd R.

Edens, Administrative Law Judge (ALJ). In the July 31, 2002 opinion, the ALJ found that appellee, Bobby Roach (Roach), suffered from a seventy-five percent (75%) permanent partial disability and awarded him the sum of $175.13 per week for 520 weeks. The ALJ found that Roach's disability had resulted from a 1996 injury that was aggravated by a subsequent incident in 1999. At the time of the 1996 injury, Midwestern Insurance Company insured Sellers Engineering. By 1999, American Interstate Insurance Company insured Sellers Engineering. In Roach's application for resolution of injury, he alleged two injuries, one sustained in 1996 and the other sustained in 1999. In its opinion, the ALJ concluded that Sellers Engineering, Inc., as insured by Midwestern Insurance Alliance (Sellers/ Midwestern) was solely liable for the entirety of Roach's disability and would be solely responsible for all of Roach's future medical expenses. Sellers/Midwestern appealed to the Board, which affirmed the ALJ's opinion.

On April 3, 1996, Roach climbed a ladder, which had been placed in mud, to attach a piece of metal to the eave of a building by driving a nail through the metal. While attempting this, the ladder sunk into the mud causing Roach to nearly fall. In desperation, Roach dropped the hammer and with his left hand grabbed the eave of the building. While momentarily hanging from the roof, Roach twisted around and placed all of his weight

on his left arm. Roach immediately experienced pain in his left elbow and shoulder. A co-worker quickly replaced the ladder and Roach climbed down. Shortly after the accident, Roach found that the pain had subsided. However, on that same day, Roach attempted to remove a nut from a bolt. The nut broke free with a jerk, and Roach again experienced immediate and intense pain in his left elbow and left shoulder. As Roach testified, he has experienced pain to some degree in his left arm ever since.

On April 12, 1999, Roach experienced a second incident with his left arm. While attempting to pull a pipe wrench toward himself, he realized that he could not and, in his own words, "realized my arm was going to still be hurting[.]" Roach reported this incidence to Sellers Engineering. Despite Roach's protests to the contrary, Sellers Engineering decided to treat this 1999 incident as a second work-related injury, instead of an aggravation of the 1996 injury.

On May 22, 2000, Roach left Sellers Engineering because he could no longer bear the pain in his left arm. By that time, Roach had been examined and treated by various physicians and had undergone two surgeries to relieve the pain in his left shoulder. Later, after he filed his workers' compensation claim, Roach endured yet another surgery, at the time to repair his left elbow.

On April 20, 2000, Roach filed his workers' compensation claim. He alleged two work-related injuries, the ladder incident from April 3, 1996, and the pipe wrench incident from April 12, 1999. At a hearing on September 28, 2000, Roach disavowed any second injury. He testified that he had experienced pain constantly from April 3, 1996 and that the April 12, 1999 incident was merely part of the original 1996 injury. Various physicians, including Sellers/Midwestern's own medical expert opined that the 1999 incident had aggravated Roach's 1996 injury. On July 31, 2002, the ALJ rendered a final opinion, order and award in Roach's favor and, as previously stated, held Sellers/Midwestern solely liable. The Board affirmed the ALJ's opinion, and this appeal followed.

Sellers/Midwestern argues that the Board misapplied the holding of Calloway County Fiscal Court v. Winchester, Ky. App., 557 S.W.2d 216 (1977); and that the evidence compels that at least some portion of Roach's disability should be attributed to Roach's work activity at Sellers Engineering, Inc., as insured by American Interstate Insurance Company.
According to Calloway County Fiscal Court, in Kentucky, a second, subsequent employer is liable for the subsequent exacerbation of an employee's prior work-related injury, unless the exacerbation was temporary in nature and/or of no consequence. Id. at 218. According to Sellers/Midwestern, the

1999 incident aggravated Roach's prior 1996 injury to such an extent that it permanently worsened his condition. Since Roach was permanently affected, Sellers/Midwestern concludes that Sellers/American was, at the very least, partially liable for Roach's disability. Citing Old King Mining Co. v. Mullins, Ky., 252 S.W.2d 871 (1952), Sellers/Midwestern argues that an exacerbation is a compensable event in and of itself. Sellers/Midwestern claims that, since the 1999 incident was an exacerbation, it was a compensable event by itself, and Sellers/American should be, at least, partially liable for Roach's disability. Finding that the Board did not misapply Calloway County Fiscal Court and finding that the ALJ's conclusion that Sellers/Midwestern was solely liable for Roach's disability was supported by substantial evidence, we affirm.

The standard in reviewing decisions of the Worker's Compensation Board is to reverse the Board only when we determine that it has overlooked or misconstrued the controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. Daniel v. Armco Steel Company, Ky. App., 913 S.W.2d 797, 798 (1995). Consequently, the ALJ's decision must also be reviwed. Where the ALJ has found in favor of the claimant who had the burden of proof, we must determine whether the ALJ's findings were supported by substantial evidence. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643

(1986); See also Wolf Creek Collieries v. Crum, Ky., 673 S.W.2d 735 (1984). The Kentucky Supreme Court has defined substantial evidence as, "some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people." Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971). Stated more simply, substantial evidence is, "evidence which would permit a fact-finder to reasonably find as it did." Special Fund v. Francis, supra at 643. The ALJ, not this Court nor the Board, has sole discretion to determine the quality, character and substance of the evidence presented before it. Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999), quoting Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); See also Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Furthermore, as the fact-finder, the ALJ may choose to believe or disbelieve any part of the evidence presented, regardless of its source. Whittaker v. Rowland, supra at 481, quoting Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

Upon review of the Board's analysis on the issue of liability, we have determined that its reasoning cannot be improved upon and, therefore, we adopt the following portion of the Board's opinion:

> We likewise affirm the ALJ in his placement of the entire liability upon Sellers/Midwestern and his reliance upon

Calloway County Fiscal Court vs. Winchester, Ky., 557 SW2d 216 (1977). The initial claim as filed by Roach alleged two specific work events, one in April 1996 and a second in April 1999. In challenging the ALJ's conclusion, Sellers/Midwestern apparently believes this should be treated as a cumulative trauma injury. It is Sellers/Midwestern's belief and argument that no reasonable person could view the evidence and reach the conclusion that the subsequent working activities did not contribute to Roach's overall problems. The medical evidence is diverse and would have supported a variety of conclusions. However, that statement in and of itself clearly supports the ALJ's conclusion and a contrary conclusion was not compelled. Wolf Creek Collieries vs. Crum, Ky.App., 673 SW2d 735 (1984); Paramount Foods, Inc., vs. Burkhardt, Ky., 695 SW2d 418 (1985) and Special Fund vs. Francis, Ky., 708 SW2d 641 (1986).

Dr. Frank Burke, who initially saw Roach shortly after the April 1996 injury, and subsequently after fully reviewing all of the medical treatment and receiving a complete history, concluded the entirety of Roach's problems related to the April 1996 injury. Contrary to the arguments of Sellers/Midwestern, we do not believe that in order for Calloway County Fiscal Court vs. Winchester, supra, to be applicable subsequent activities may only be temporary aggravations or exacerbations. Here, as in Calloway County Fiscal Court vs. Winchester, the individual had an injury which created the ultimate weakened physiological condition such that subsequent activities created a more serious physiological condition than would have occurred absent that initial event. It is not dissimilar to the "but for" test that existed in addressing Special Fund liability in the mid-1980s. Dr. Burke, within a reasonable degree of medical probability, opined the

> entirety of the disability and impairment related to the original event. Dr. Primm, upon whom Sellers/Midwestern relied, acknowledged this event set in motion the physiological stage upon which further disability developed. The reports of Drs. Scott Scutchfield and Martin Favetto reflect treatment diagnoses and opinions supporting the ALJ's conclusion. The testimony of Roach himself confirmed ongoing problems and symptomatology [sic] from 1996 to present. That the entirety of this work was at Sellers and that Roach was motivated to continue to work in spite of restrictions and continued to work at the same location does not provide a sound basis for reaching a contrary conclusion. In our opinion, there was more than ample evidence for the ALJ to find all subsequent work activities were merely aggravations of an already existing condition and were therefore proximately and casually related to the 1996 event, both in terms of disability and medical treatment. As we noted, while the evidence would have supported some other conclusion, the existence of contrary evidence is not a basis for altering the ALJ's opinion on appeal. McCloud vs. Beth-Elkhorn Corp., Ky., 514 SW2d 46 (1974). Ultimately, it became a question of the ALJ analyzing the medical testimony and determining whom and what to believe based upon his assessment of weight and credibility. Codell Construction Co. vs. Dixon, Ky., 478 SW2d 703 (1972). Such authority, of course, rests solely with the ALJ. Smyzer vs. B.F. Goodrich Chemical Co., Ky., 474 SW2d 367 (1971).

Even a cursory examination of Calloway County Fiscal Court reveals this Court did not hold that a subsequent employer would be liable for the subsequent aggravation of an employee's prior work-related injury, unless such aggravation was temporary in

nature. Sellers/Midwestern has misconstrued the holding of Calloway County Fiscal Court and has read into the opinion a legal conclusion that simply does not exist. The Board correctly applied the holding of the case.

Accordingly, the Board's opinion of January 15, 2003, and the ALJ's opinion, order and award of July 31, 2002, are affirmed.

ALL CONCUR.

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