

RENDERED: May 14, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002053-WC

TERRY HARRINGTON

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-82353

TFE GROUP;
HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND MINTON, JUDGES.

BUCKINGHAM, JUDGE. Terry Harrington petitions for review of an opinion of the Workers' Compensation Board affirming the decision of the administrative law judge that dismissed Harrington's claim for workers' compensation benefits based on his failure to prove causation sufficient to establish a work-related injury. We affirm.

Harrington is 51 years old with a high school education and a work history as a security manager, a paste maker at a factory, a stock worker, and a sales clerk. In June 1999, he became employed as a material handler operating a powerjack at TFE Group's warehouse in northern Kentucky, which processes orders for and distributes apparel products. A powerjack is a battery-powered forklift with the forks at the rear that is used to move stacks of products on a skid from the receiving area to storage areas inside the warehouse. Because Harrington was left-handed, he typically operated the powerjack by standing on the side of the front platform, holding on to a bar with his right hand and using his left hand to manipulate the controls for steering, raising, and lowering the forks. The distance from the platform of the powerjack to the floor is approximately 10-11 inches.

On Monday and Tuesday, June 3 and 4, 2002, Harrington was on sick leave after notifying TFE personnel that he had a severe sunburn. Harrington reported for work at 6:00 a.m. on June 5. Later in the morning, he told his supervisor, Tammy Zachary, that he had injured his back stepping off his powerjack as he was taking a scheduled fifteen-minute break from work. He stated that he felt as if he was going to turn his right ankle as he was stepping down, so he jerked to the left to counterbalance his weight, and then felt a "twinge" of pain in

his back. Harrington did not fall and was able to walk to the breakroom, but he experienced increasing pain and numbness in his low back and right leg as he sat there.

After attempting to return to work on his powerjack for approximately 15-20 minutes, Harrington went to Zachary complaining of pain and reported the incident. Zachary notified Kelly Throckmorton, TFE's Human Resources Manager, who instructed her to have Harrington taken to the hospital, where he was examined and released with a prescription for pain medication. Harrington returned to the warehouse for a short time where he was interviewed by Throckmorton about the incident.

In July 2003, Jeff Weaver, an investigator for TFE's insurance carrier, interviewed Harrington and asked him to recreate the incident. As part of its investigation, TFE developed a videotape from the series of time-lapse photographs taken by security cameras of Harrington's movements around the time of the alleged incident.

Harrington was initially treated conservatively with medication and physical therapy. The results from a magnetic resonance imaging (MRI) procedure performed on June 24, 2002, revealed a herniated disc in the lumbar spine at the L3-L4 level with a free disc fragment migrating superiorly and to the right lying in the medial aspect of the L3-L4 foramen resulting in L3

radiculopathy and pressure on the thecal sac. In July 2002, Harrington was referred to Dr. Lester Duplechan, a neurologist, who performed epidural steroid injections, which were unsuccessful. Harrington did not return to work after the June 5 incident. He eventually underwent surgery to remove the disc fragment.

Harrington received temporary total disability benefits and medical benefits from June 6, 2002, to July 10, 2002. However, on July 16, 2002, TFE's workers' compensation carrier notified him that these benefits would be terminated and his claim for further benefits was being denied based on a conclusion following its investigation that his injury did not arise out of and in the course of his employment.

On October 6, 2002, Harrington filed an Application for Resolution of Injury Claim seeking benefits for a work-related injury to his spine that allegedly occurred when he stepped off his powerjack on June 5, 2002. He filed a motion to bifurcate the issues of causation and permanent disability with the causation issue being decided first. TFE did not object to the motion, noting its position that Harrington did not injure his back at work on June 5, 2002. The ALJ granted the motion, and the case proceeded on the issue of causation alone. The parties then took the depositions of Harrington, Throckmorton, Zachary, and Weaver.

On January 29, 2003, Dr. Kenneth Graulich performed an independent medical evaluation of Harrington on referral from TFE. In his report, Dr. Graulich diagnosed Harrington as suffering from a herniated disc with a free fragment and right radiculopathy. He stated that Harrington's "description of the mechanism of injury is compatible with the MRI scan findings, clinical symptoms, and physical examination findings." Given this compatibility, Dr. Graulich tentatively concluded that Harrington's condition was causally related to the incident at work. However, he did not believe the incident alone would have caused an injury severe enough to herniate a normal disc, so he felt Harrington must have had significant underlying degenerative disc disease.

In February 2003, Dr. Graulich reviewed the time-lapse videotape of June 5 and a time-line description prepared by TFE.¹ After viewing the videotape, Dr. Graulich modified his opinion, stating that any injury Harrington may have suffered from the incident stepping off the powerjack would have been trivial and that the main cause for his herniated disc was likely degenerative arthritis. Dr. Graulich also opined that Harrington's claim of severe sunburn as the reason for missing the two previous days of work was suspicious and more likely due to back pain from his underlying degenerative arthritis.

¹ The videotape is not included in the record on appeal.

On March 27, 2003, the ALJ conducted a hearing with Harrington as the only witness. On May 21, 2003, the ALJ entered an opinion and order dismissing the workers' compensation claim. The ALJ held that Harrington had not satisfied his burden of proving that he suffered a work-related injury on June 5, 2002.

The ALJ believed there were inconsistencies in Harrington's description of the incident, and he questioned Harrington's assertion that he had experienced severe sunburn on the prior weekend. As support for this latter finding, the ALJ mentioned climatological records showing that both weekend days were relatively cloudy, testimony from two witnesses (presumably Zachary and Throckmorton) who saw Harrington on June 5 that indicated "he had no signs of any sunburn," and the fact that Harrington neither sought nor received any medical care for his sunburn. The ALJ also noted that Jeffrey Weaver stated that Harrington could not recreate the injury incident during his interview of him. The ALJ concluded:

From my review of this record including all other reports and deposition testimony and from my observations of the demeanor of the witness and the formal hearing, I remain unpersuaded that Mr. Harrington's back injury is a result of the actions he described at the workplace on June 5, 2002. I agree with Dr. Graulich that it would be more likely to conclude he missed work because he was having back pain - a common

occurrence in his age group with such severe underlying degenerative arthritis.

Harrington filed a petition for reconsideration, which was summarily denied.

On September 10, 2003, the Board entered an opinion affirming the ALJ's decision. While acknowledging weaknesses in the evidence submitted by both parties, the Board characterized its role as determining whether the inferences drawn by the ALJ were reasonable. It stated:

Although only by the barest of margins, we cannot legally say the ALJ's conclusions with regard to these questions are totally without merit. The fact that this Board or another fact finder might have interpreted the evidence differently does not matter in the law's mind's eye. When the testimony of Throckmorton and Weaver is considered along with Dr. Graulich's conclusions of February 28, 2003, and the ALJ's statement that he did not find Harrington to be a particularly credible witness, the matter is entirely one of assignment of weight and credibility by the fact-finder. While we may be sympathetic to the frustrations expressed by Harrington in this appeal, as a matter of law, we must affirm.

In a workers' compensation action, the claimant bears the burden of proving by substantial evidence every essential element of a claim. Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 928 (2002); Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000). Among those elements are that a work-related injury proximately caused the impairment resulting in

occupational disability, see, e.g., Jones v. Newberg, Ky., 890 S.W.2d 284 (1994) and KRS 342.0011(1) and (11), and the extent and duration of the injury, see Stovall v. Collett, Ky. App., 671 S.W.2d 256 (1984), and Codell Const. Co. v. Dixon, Ky., 478 S.W.2d 703 (1972). Causation is a factual issue to be decided by the fact-finder. Coleman v. Emily Enterprises, Inc., Ky., 58 S.W.3d 459, 462 (2001).

As the fact-finder, the ALJ has the authority to determine the quality, character, and substance of the evidence. Burton, 72 S.W.3d at 928; Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993). Similarly, the ALJ has the sole authority to determine the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/PepsiCo, Inc., Ky., 951 S.W.2d 329, 331 (1997); Luttrell v. Cardinal Aluminum Co., Ky. App., 909 S.W.2d 334, 336 (1995). The fact-finder also may reject any testimony and believe or disbelieve various parts of the evidence, even if it came from the same witness. Magic Coal, 19 S.W.3d at 96 and Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999).

A party challenging the ALJ's factual findings must do more than present evidence supporting a contrary conclusion to justify reversal. Transportation Cabinet, Department of Highways v. Poe, Ky., 69 S.W.3d 60,62 (2001); Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000).

Where the party with the burden of proof is not successful before the ALJ in a workers compensation matter, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it. Carnes v. Tremco Mfg. Co., Ky., 30 S.W.3d 172, 176 (2000); Bullock v. Peabody Coal Co., Ky., 882 S.W.2d 676, 678 (1994). Upon review of the Board's decision, the appellate court's function is limited to correcting the Board only where it has overlooked or misconstrued controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992); Phoenix Manufacturing Co. v. Johnson, Ky., 69 S.W.3d 64, 67 (2002).

Harrington challenges the ALJ's opinion as being based on speculation and conjecture. First, Harrington contests the ALJ's and Dr. Graulich's conclusion that he more likely injured his back the weekend prior to, rather than on, June 5. He asserts that this conclusion is rank speculation unsupported by the evidence in the record. See, e.g., Young v. L.A. Davidson, Inc., Ky., 463 S.W.2d 924, 926 (1971)(medical opinion evidence must be founded on probability and not on mere possibility or speculation). TFE contends that Dr. Graulich's opinion was not mere speculation because it was based on a review of the entire record including the trivial nature of the alleged incident, the

security videotape and accompanying time-line, Harrington's "suspicious" history about missing two days of work due to sunburn, and Harrington's degenerative arthritis.

While we believe the record supports some suspicion concerning Harrington's excuse for missing work the two days prior to the alleged incident, there is no evidence that Harrington suffered an injury over the weekend or missed work due to back pain. Logic does not support a conclusion that Harrington missed work because of back pain even if he did not have a severe sunburn and had degenerative arthritis. TFE has not pointed to anything on the videotape to suggest that Harrington was suffering from back pain prior to the time of the alleged incident. As Harrington states, the conclusion that he missed work because of back pain is generated from stacking several inferences and excluding merely one of a myriad number of possible reasons for why he could have decided to miss work.

Even though the conclusion that Harrington missed work due to back pain may have been unreasonable, the ALJ's consideration of that fact does not render his decision invalid. Harrington has the affirmative obligation to prove a work-related injury; TFE does not have to establish that the impairment was not work-related. Given the absence of direct, independent evidence that the incident involving his alleged misstep occurred, Harrington's credibility became a central

issue. As the ALJ noted, there was conflicting evidence relevant to Harrington's credibility with respect to his missing work because of having suffered a severe sunburn.

Harrington stated that he was sunburned on a large part of his body including his head, face, arms, and legs. He responded affirmatively when asked if his fellow workers could have noticed that he was sunburned. However, Throckmorton and Zachary testified that they saw no indication that Harrington was sunburned when they saw him on the day of the alleged incident.² In addition, the climatological records from data collected at the Cincinnati Airport showed trace amounts of rain with hazy skies on June 1, 2002, and broken cloud cover on June 2, 2002. Harrington testified that it was sunny with no rain at his residence, which is several miles from the airport, on both days.

More probative is the evidence involving Harrington's description of the alleged injury. During his interview of Harrington, Weaver attempted to have Harrington demonstrate the incident, but the transcript indicates that he had difficulty doing so.³ Weaver testified that there were inconsistencies in

² Zachary actually testified when asked if Harrington appeared to be sunburned, "Terry always has a red face." This statement is somewhat ambiguous but does suggest that he looked normal. Throckmorton's testimony was not as equivocal.

³ Weaver created an audiotape of the interview and a transcription is included in the record.

Harrington's description of the incident and that Harrington "could never provide to me any satisfactory version of how he injured himself." See Record of the Workers' Compensation Board at 320. Inconsistencies in Harrington's description appear elsewhere in the record. For instance, in Weaver's interview, Harrington indicated in his deposition that he operated the powerjack standing on the left hand side of the platform and his right foot touched the ground first, but Harrington testified at the hearing that he stood on the right hand side and his left foot hit the ground first. See id. at 349, 351, and 575. At the hearing, Harrington testified as follows:

JUDGE SMITH: Okay. So you stand on one side and you ride this power jack; is that right?

HARRINGTON: Yes, sir.

JUDGE SMITH: And you were on the right-hand side?

HARRINGTON: Yes, sir.

. . . .

JUDGE SMITH: At some point you're getting off this power jack.

HARRINGTON: Yes, sir.

JUDGE SMITH: And the first foot to touch the ground is the left foot or the right foot?

HARRINGTON: The left foot, sir.

JUDGE SMITH: So you back off the power jack, you step backwards or something?

HARRINGTON: No, you step off this way, sir.

JUDGE SMITH: When you say, that way, because you're facing forward, right?

HARRINGTON: Yes, sir, I'm facing forward.

JUDGE SMITH: And you're on the right-hand side. So when you put the left foot down, where is the left foot?

HARRINGTON: It varies from, you know.

JUDGE SMITH: As you can remember on that --

HARRINGTON: It would be roughly about here and then I stepped off with my right foot here and realized, so I come back across.

JUDGE SMITH: Okay. Here's what I'm thinking he's describing to me.

MR. MEHLING [Harrington's attorney]: Uh-huh.

JUDGE SMITH: I'm thinking he's describing that he stepped off with his left foot on the right-hand side, is that what he's describing?

MR. MEHLING: That's the way I took it.

HARRINGTON: Yes, sir.

. . . .

JUDGE SMITH: Okay. So you step off with the left foot but you said it was the right foot that was going to twist.

HARRINGTON: Right. I stepped off with the left and as I come down with my right to balance myself, my ankle turned, and to keep from twisting my ankle, I just twisted my whole body ever so briefly.

JUDGE SMITH: So your left foot was already on the ground?

HARRINGTON: Yes, sir.

JUDGE SMITH: But your right foot's going to turn.

HARRINGTON: Yes, sir.

We agree with the Board that the evidence presented by both parties was ambiguous, and we might have decided the case differently. Under the limited role of review in workers' compensation cases, however, the ALJ has the primary authority in determining credibility and the weight to be given the evidence. Viewing the entire record, we believe that Harrington has not shown the ALJ erred in concluding that he did not satisfy his burden of proving causation for a work-related injury by evidence so overwhelming that it compelled a decision in his favor. As a result, we cannot say that the Board overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice.

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

ALL CONCUR.

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