RENDERED: October 8, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000107-WC

FREDRICK ROBERTS — APPELLANT

V.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-02-01763

LODESTAR ENERGY AND
KENTUCKY WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, MCANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: Fredrick Roberts seeks review from a December 17, 2003, opinion of the Workers' Compensation Board ("Board"). Roberts was allegedly injured while working as a blaster for Lodestar Energy, a mining company. The Administrative Law Judge ("ALJ") found Roberts's injuries were not work-related and that Roberts had failed to file notice of his claim in a timely manner. The Board affirmed the ALJ's decision and Roberts appealed. We affirm.

BACKGROUND SUMMARY

Roberts is a 46-year-old man who had worked in the mining industry since graduating from high school. He began working as a blaster for Lodestar Energy in 1996 but left the company on June 14, 2002. He has been unemployed since that time.

On June 5, 2002, Roberts was working on a drill when he allegedly slipped and injured his neck. At the time of the incident, Roberts did not report any injury to his foreman or supervisors. He allegedly advised two co-workers that he had experienced "the awfulest crick in my neck ever was today," but he did not seek medical attention.

The first report of the injury was made on June 21, 2002. Roberts informed his supervisor, Jimmy Johnson, that he had been injured almost two-weeks prior. Johnson told Roberts to report the incident to his foreman, Donald Holliday. Roberts recounted the incident to Holliday on June 24, 2002, at which time he filed an accident report. When asked why he waited so long to notify Lodestar of his injury, Roberts responded that he reported the incident when he found out he was hurt.

Roberts went to the emergency room on June 14, 2002, complaining of chest tightness and shortness of breath. No mention was made of any work-related injuries. The hospital report states that Roberts indicated he had "lifted a 4-wheeler"

the previous day. In his deposition, Roberts claimed the report was erroneous in that he did not state he lifted a 4-wheeler, but rather a "4-wheeler tire."[1] Roberts was diagnosed with congestive heart failure and released from the hospital.

Roberts again visited the hospital on June 19, 2002, this time complaining of severe pain radiating down his right arm. Again, no mention was made of any work-related injuries. Roberts was released after being diagnosed with herniated nucleus pulposis at C6-C7 level with radiculopathy of the right arm and hand. He underwent surgery on August 22, 2002, for a discectomy; and his condition was deemed to be "completely resolved."

In the opinion dismissing Roberts's claim, the ALJ found Roberts had not established that his injury was work-related. Specifically, the ALJ found Roberts did not seek medical treatment for the alleged injury until two weeks after the incident supposedly occurred; and he did not mention the work-relatedness of his injury to anyone at the hospital. The ALJ also found Roberts had failed to file timely notice of the incident with Lodestar.

The Board affirmed the decision of the ALJ and Roberts appealed. We affirm.

[1] Deposition of Fredrick Roberts, at page 17.

WORK-RELATED INJURY

Roberts first argues that the ALJ's findings of fact with regards to the work-relatedness of his injury were erroneous. In support of this claim, Roberts alleges the following findings were incorrect: first, that there was no mention of a work-related injury in the hospital records; second, that there is no evidence Roberts gave notice of a work-related injury to anyone until June 21, 2002; and third, that Roberts told his treating physician that his pain started after he lifted a four-wheeler tire. We disagree.

It is well settled that "the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record."[2] The decision of the ALJ may be appealed to the Board; but "no new evidence may be introduced before the Board, and the Board may not substitute its judgment for that of the ALJ concerning the weight of the evidence on questions of fact."[3] The role of this Court in reviewing decisions of the Board "is to correct the Board only when we perceive that the Board has overlooked or misconstrued

[2] Miller v. East Kentucky Beverage/Pepsico, Inc., Ky., 951 S.W.2d 329, 331 (1997).

[3] Smith v. Dixie Fuel Co., Ky., 900 S.W.2d 609, 612 (1995).

controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice."[4]

The claimant in a workers' compensation case has both the burden of proof and the risk of persuasion.[5] If the claimant is unsuccessful, the question on appeal "is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor."[6]

Roberts claims that specific findings of fact made by the ALJ were erroneous. However, he provides no indication of why the findings were incorrect. His brief merely states, "[w]hen [Roberts] was admitted into the emergency room, the first thing he said was that he had been having right shoulder pain for approximately one week. He made no mention of a four wheeler [sic] accident at that time."[7] Roberts's first argument is without merit. It is founded on the supposition that because he was having right shoulder pain, he was necessarily injured in a work-related incident. The second argument is similarly baseless since the ALJ did not assume nor find that Roberts had been in a four-wheeler accident. He merely reiterated what

---

[4] Daniel v. Armco Steel Company, L.P., Ky.App., 913 S.W.2d 797, 798 (1995), *quoting* Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

[5] Snawder v. Stice, Ky.App., 576 S.W.2d 276, 279 (1979).

[6] Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984).

[7] Brief for Appellant.

Roberts had stated in his deposition: that he told his attending physician he had lifted a four-wheeler tire the previous day.

The ALJ's findings are firmly supported by evidence introduced by the parties. It is clear from the hospital records Roberts did not state his injuries were work-related. It is also clear Roberts did not report the injury to his supervisor until June 21, 2002. Although Roberts argues the ALJ should have believed the testimony of his co-workers affirming that Roberts, in fact, had gotten a "crick" in his neck on June 5, 2002, it is within the province of the ALJ to decide which testimony to believe. Finally, Roberts affirmatively stated in his deposition that he told the hospital he had lifted a four-wheeler tire the previous day.

Based on these findings, we find nothing in Roberts's argument that would require us to reverse the ALJ's findings. The evidence provided by Roberts is not "so overwhelming" as to compel us to find in his favor. Therefore, we hold that the ALJ's findings were proper.

TIMELY NOTICE

Roberts's second argument is that the ALJ's finding regarding the timeliness of his notice to Lodestar was erroneous. Again, we disagree.

As stated, the ALJ has the role of weighing the credibility of evidence. The ALJ's findings will not be disturbed on appeal unless it is clear that affirming the decision would be manifestly unjust.

Roberts cites to Smith v. Cardinal Construction Company[8] in support of his argument. In Smith, appellant was injured when he fell while working at a landfill. Appellant sought medical treatment shortly after the accident, at which time his injury was linked to his work-related fall. He filed an accident report with his employer approximately two months after the initial incident. However, the report only mentioned a lumbar injury. Appellant claimed he had also suffered a cervical injury; but his employer denied the claim, stating notice of the cervical injury had not been filed until seven months after the initial injury. The ALJ found the notice to be untimely and appellant sought review. The Supreme Court reversed, holding that appellant's initial report of the lumbar injury was sufficient to put his employer on notice of the cervical injury. Likewise, the Court found there was sufficient evidence that his injury was work-related, namely, the fact that the doctors had specifically attributed his back problems to the fall. Therefore, the appellant's delay in reporting the incident did not prejudice his employer.

[8] Smith v. Cardinal Construction Company, Ky., 13 S.W.3d 623 (2000).

The facts in Smith are clearly distinguishable from the facts in this case. The appellant in Smith sought medical treatment shortly after his injury occurred. He identified the cause of his injury to his doctors as work-related; moreover, his treating physician attributed the injury to his fall at work. Although formal notice was not given to his employer until some months later, there was sufficient medical evidence to relate his injury to the work-related incident.

In this case, Roberts continued working for nine days after his injury without any mention of the incident. He did not seek medical treatment until nearly two weeks after the fact. Even then, he went to the emergency room for chest pains and shortness of breath. He made no mention during any one of several hospital visits of a work-related injury. The only incident mentioned was lifting a four-wheeler tire the day before he was treated for pain in his right shoulder. Roberts did file a report some twenty days after the injury occurred, but there was nothing in the report to link his injury to the alleged work-related accident. Therefore, permitting Roberts to recover for this incident would be prejudicial to Lodestar.

Although the Court in Smith ultimately reversed the findings of the ALJ, the case nonetheless stands for the proposition that the ALJ is in the position to make a determination regarding the timeliness of notice. Although that

determination may be reversed on review, such reversal will only occur if the evidence compels a finding in favor of the claimant. We hold that the evidence in this case does not.

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Ira E. Branham Pikeville, Kentucky	Stanley S. Dawson Louisville, Kentucky