

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001401-WC

KROGER DISTRIBUTION CENTER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-91268

JAMES W. COOK, SR.; HON. DONALD G.
SMITH, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Kroger Distribution Center has petitioned for review of an opinion of the Workers' Compensation Board entered on June 16, 2004, which affirmed in part, reversed in part, and remanded the opinion and award of the Administrative Law Judge. Having concluded that the Board has not overlooked or misconstrued controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause a gross injustice, we affirm.

James W. Cook, Sr. began his employment with Kroger Distribution Center as a tractor-trailer truck driver in May of 1985. On July 30, 2000, Cook was involved in a head-on collision with another vehicle while driving a delivery route in Lexington, Kentucky. Several hours after the accident, Cook returned to Louisville, Kentucky, where he resided with his wife and children, and he then sought treatment at Baptist Hospital. Upon arriving at the hospital, Cook complained of neck pain and a tingling sensation in his left hand. According to Cook's medical history, he had previously suffered from neck pain and weakness and numbness in his right arm in 1993, and had right shoulder pain in 1998. Also in 1998, Cook was diagnosed with cervical degenerative disc and joint disease, and he had seen a chiropractor for a number of years for his neck.

Cook received treatment from a number of physicians for the work-related injuries he sustained in the automobile accident. While Cook missed work occasionally due to an injury flare-up or to receive medical care as a result of the injuries he sustained in the July 2000 accident, he did not miss work for any extended period of time. Cook underwent an MRI on October 19, 2000, which indicated that he had a congenitally small cervical canal at the C5-6 and C6-7 level. There were also signs of disc narrowing and extensive anterior spurring, as well as a minimal degree of compression of the cord at these levels.

The test also showed a moderate degree of left-sided foraminal narrowing at the C3-4 level and bilateral foraminal stenosis at C6-7, greater on the left than the right.

Cook filed a Form 101, Application for Resolution of Injury Claim, on July 22, 2002, to recover workers' compensation benefits for the injuries he suffered in this accident. During the hearing before the ALJ on September 24, 2003, Cook introduced the following medical reports from his treating physicians: Dr. Blaine Lisner, a neurologist and neurosurgeon; Dr. Greg Smith, a neurologist; Dr. Wayne Villeneuve, a neurosurgeon; and Dr. Ellen Ballard, a physical medicine and rehabilitation specialist. Kroger submitted medical reports from Dr. Morton Kasdan, an orthopedic hand specialist, and the deposition of Dr. Thomas Gabriel, an orthopedic surgeon and hand specialist.

In an order dated November 21, 2003, the ALJ made findings of facts and conclusions of law, which included the following:

The parties also raised an issue regarding causation for the cervical condition. It is undisputed that the Plaintiff did have occasional stiffness in his neck for which he sought treatment. Plaintiff's testimony was credible regarding the treatment of those prior problems and the development of additional problems following the 2000 work injury. The various medical records document problems with the cervical region following the work injury. Dr. Lisner found that these problems were caused

by the work injury. The Administrative Law Judge finds him to be persuasive on this issue. Therefore the Plaintiff's current cervical problems were found to have been caused by the 2000 work injury.

. . .

[T]he Administrative Law Judge must first determine whether the Plaintiff retains the physical capacity to return to the type of work performed at the time of the injury. Dr. Gabriel placed no significant restrictions on the Plaintiff that would prevent him [sic] returning to his past work. Plaintiff's testimony was credible regarding his pain and restrictions. Yet he has continued to work as a truck driver, although on a different schedule. Based on this evidence, the Administrative Law Judge does believe the Plaintiff could return to his prior work. The Administrative Law Judge does not believe Plaintiff is totally disabled at this time. The Defendant further conceded that the Plaintiff now makes less than his average weekly wage at the time of injury, albeit by a small amount. It is noted that Dr. Gabriel is the most persuasive doctor to give an impairment rating under the AMA Guides, and therefore Plaintiff is found to have a 3% impairment rating. Therefore it appears that the Plaintiff's benefits would be calculated as follows: $\$381.77$ [average weekly wage multiplied by two-thirds, but limited to 75% of the state average weekly wage] \times 3% [impairment rating] \times 0.65 [factor under KRS 342.730(1)(b)] \times 2.00 [2.00 multiplier under KRS 342.730(1)(c)(2) when Plaintiff returns to work at lower wages] = $\$14.89$. That is the amount Plaintiff would be entitled to on a weekly basis in this claim.

On December 5, 2005, Cook petitioned the ALJ to reconsider the opinion and award. The ALJ overruled Cook's petition for reconsideration in an order dated December 23,

2003, claiming the petition "merely tends to reargue the merits of the claim."

Cook then filed an appeal to the Board on January 22, 2004, alleging the ALJ had made three errors. First, Cook claimed the ALJ was clearly erroneous in limiting his permanent partial disability (PPD) benefits for his carpal tunnel injury to a three percent impairment rating because the physician who gave the impairment rating admittedly failed to apply the appropriate criteria set forth by the AMA Guides to the Evaluation of Permanent Impairment. Next, Cook argued the ALJ erred by refusing to award the 18% impairment rating assessed by Dr. Lisner for his compensable cervical injury. Finally, Cook alleged the ALJ erred in determining he had the physical capacity to return to the type of work he performed at the time of his injury.¹

In response to these allegations, Kroger argued to the Board that Cook had had a long-standing history of cervical problems, and that the ALJ had determined that Dr. Gabriel's impairment rating was the most credible evidence on this issue. Kroger further cross-appealed the ALJ's decision that the 2x multiplier applied to Cook's workers' compensation benefit.

¹ The Board affirmed the ALJ on this issue relying on the unpublished case of Teleplan v. Conner, 2003 WL 22975457 (Ky. December 18, 2003). Cook did not file a cross-petition on this issue; however, we note that Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004), and Ford Motor Co. v. Lynn, 2004 WL 2913244 (Ky. December 16, 2004), support Cook's position.

On June 16, 2004, the Board entered an opinion affirming in part, reversing in part, and remanding the ALJ's award. The Board determined that the ALJ had not erred in determining that Cook had the physical capacity to return to the type of work he had performed at the time of the injury. However, the Board determined that Cook's impairment rating for the carpal tunnel syndrome injury should be assessed at six percent, rather than three percent, given the fact that Dr. Gabriel admitted that the higher rating is appropriate according to the AMA Guides. Thus, the Board reversed the ALJ in part and remanded this matter for the appropriate award for Cook's carpal tunnel syndrome based on an impairment rating of six percent. The Board also reversed the ALJ on his failure to award Cook income benefits resulting from his compensable cervical condition, since the uncontroverted evidence compelled income benefits based on the 18% permanent impairment rating assessed by Dr. Lisner. This matter was further remanded for the appropriate award for Cook's cervical condition based on the 18% impairment rating. On Kroger's cross-appeal, the Board reversed the ALJ's determination that Cook was entitled to a 2x multiplier under KRS² 342.730(1)(c)2.³ The Board determined that

² Kentucky Revised Statutes.

³ KRS 342.730(1)(c)2. states:

since, upon returning to work, Cook had failed to earn wages equal to or greater than his average weekly wage at the time of his injury, he was not eligible for the 2x multiplier.⁴ This petition for review followed.

In its petition, Kroger claims (1) that the ALJ "has the right to pick and choose amongst conflicting testimony he found most persuasive with regard to the extent of permanent functional impairment due to the injury"; and (2) that the "finding of a compensable injury does not compel an ALJ to award permanent disability benefits." While both of these arguments are correct statements of the law, we do not agree with Kroger's assertion that the Board's decision failed to correctly apply the law.

Our Supreme Court has held that a reversal of the Board by the Court of Appeals is appropriate "only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause a gross

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

⁴ Cook did not file a cross-appeal on this issue.

injustice.”⁵ It is well-settled that “the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented[.]”⁶ The fact-finder also has the authority to reject any testimony and to believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the adversary party’s proof.⁷

In this case, the Board stated that given Dr. Gabriel’s expansive testimony on Cook’s impairment rating for his carpal tunnel syndrome, “we believe it was reasonable for the ALJ to find Dr. Gabriel’s opinions more persuasive than those of Dr. Lisner with respect to Cook’s carpal tunnel syndrome.” However, the Board further ruled that the ALJ erred by accepting the three percent impairment rating given by Dr. Gabriel instead of the six percent rating. The Board concluded that “Dr. Gabriel’s admission that the appropriate permanent impairment rating as determined by the AMA Guides under the particular facts of this case (i.e. a pre-surgical and not a post-surgical case) would be 6% constitutes not only substantial but compelling evidence of such a percentage.” From the record, it is clear that Dr. Gabriel knew that Cook had not undergone a

⁵ Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 688 (Ky. 1992).

⁶ Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985).

⁷ Caudill v. Maloney’s Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).

surgical procedure for his carpal tunnel syndrome; but, in his deposition, he admitted that he arrived at the three percent impairment rating by applying the rating used for post-operative cases. During Dr. Gabriel's deposition, he stated:

Q. [By Mr. Levy] So, using that - using Table 16-15 - 16-10 through 16-15, there is a 6 percent impairment?

A. [By Dr. Gabriel] You could consider a 6 percent. I still will stand by the way I did it. You're correct in saying that's for post-op. That's generally the one that I use, but if you -- because I think the other ones are so arbitrary in terms of how much, you know, distortion of sensibility that the patient subjectively complains to you.

The reason why I use the one that's in there is it specifically says if a person has an abnormal EMG, they will get a 5 percent, you know, impairment. Does it undershoot it a little bit? I guess it probably does, but you could have three or four people look at those same two tables that I just looked at and probably come up with variations in terms of exactly what they perceive the patient to be complaining about, because it's very arbitrary, that Table 16-10, where it asks, you know, do they have distorted sensibility, do they have pain, abnormal pain.

If you asked a patient, they would say, well, I have pain all the time, and, you know, it's very arbitrary, and even then if you are able to isolate it down to, okay, I think this is a Level IV, it's still between 25 and 40 percent. So it leaves a lot of leeway for which one of those numbers you choose. So, that's why I don't particularly use it.

The ALJ's assignment of a three percent impairment rating was inconsistent with the statutory requirement that the permanent impairment rating be determined in accordance with the latest available edition of the AMA Guides.⁸ Therefore, while the ALJ is authorized to pick and choose from the evidence, in this case the conflicting evidence was not between two physicians who have assigned different impairment ratings; but instead, the conflict was between an impairment rating assessed by a physician and the impairment rating as set forth by the AMA Guides. Given this evidence, we conclude that the Board was correct in ruling that the evidence compelled a six percent impairment rating for Cook's carpal tunnel syndrome.

Kroger also claims that the Board erred by remanding this case for an award based on a 18% impairment rating for Cook's cervical condition. Kroger argues that even though the evidence from Dr. Lisner assessing Cook's impairment rating for his cervical condition at 18% was uncontroverted, there was substantial conflicting evidence as to whether this impairment was caused by the work accident. However, as Cook correctly notes, the ALJ specifically stated that "the Plaintiff's current cervical problems [are] found to have been caused by the 2000

⁸ KRS 342.0011(35) states:

"Permanent impairment rating" means percentage of whole body impairment caused by the injury or occupational disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest available edition.

work injury." This finding was not appealed to the Board and it is binding on Kroger.

In Dr. Gabriel's testimony, he repeatedly stated that he did not "do cervical spines." He stated that his evaluation of Cook related to his carpal tunnel syndrome only, not to his cervical condition. Meanwhile, Dr. Lisner in his report stated, "the patient has a 27% whole body impairment for the left upper extremity plus 18% equals a 40% whole body impairment rating [under] the AMA Guides Combined Value Chart on page 604 secondary to the injuries of the motor vehicle accident of July 30, 2000." Thus, Dr. Lisner's report was the only evidence submitted which imposed an impairment rating for Cook's cervical condition, which the ALJ found to be work-related. The ALJ erred when he failed to assign impairment ratings for the two separate work-related injuries. Therefore, the Board, having noted that the ALJ found Cook's cervical spine injury to be work-related, correctly remanded this matter for the assignment of the uncontroverted impairment rating of 18%.

In Collins v. Castleton Farms, Inc.,⁹ the Court determined that the fact-finder may refuse to follow uncontradicted evidence in the record, but he must explain the basis for such a rejection. The Court in Shields v. Pittsburg &

⁹ 560 S.W.2d 830, 831 (Ky. 1977).

Midway Coal Mining Co.,¹⁰ stated that "it is required that basic facts be clearly set out to support the ultimate conclusions. . . in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision." Where a question is properly within the province of medical experts, the ALJ may not disregard uncontroverted evidence without offering a legally sufficient reason for doing so.¹¹

In this case, the ALJ made the determination that Cook's cervical injury was work-related, but he then failed to impose an impairment rating for the injury, and he further failed to set forth his rationale for rejecting the uncontradicted impairment rating offered by Cook's physician. The rating assessed by Dr. Lisner for Cook's cervical spine injury was the only impairment rating submitted regarding Cook's cervical condition. Thus, it was not refuted in the record. Although an ALJ may not be compelled to award permanent disability benefits, he cannot disregard the uncontroverted evidence and select an erroneous impairment rating. Rather, the ALJ is required to determine the totality of the impact of the compensable injury. Therefore, once it was determined that Cook's cervical injury was work-related, the ALJ was required to

¹⁰ 634 S.W.2d 440, 444 (Ky. 1982).

¹¹ See Bullock v. Gay, 296 Ky 489, 177 S.W.2d 883 (Ky. 1944); and Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky.App. 1981).

accept the uncontroverted 18% impairment rating or to state a sufficient reason for not doing so. Thus, the Board properly remanded this matter for entry of an award based on an 18% impairment rating for Cook's work-related cervical condition.

Based on the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Patrick Fulton
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BRIEF FOR APPELLEE:

Udell B. Levy
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