

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2004-CA-001565-WC

ELLIS BOWLING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-01257

LESLIE COUNTY BOARD OF
EDUCATION; HON. KEVIN KING,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Ellis Bowling petitions for a review of a decision of the Workers' Compensation Board which affirmed a decision of the Administrative Law Judge which denied benefits for an alleged work injury to appellant's back. The question came down to an issue of fact as to whether the disability was due to a work-related injury or a subsequent non-work-related injury. A review of the conflicting evidence reveals no flagrant errors in assessing the evidence, therefore we affirm.

The facts of the case, as stated by the Board are
that:

Bowling testified he suffered a work-related accident on August 3, 2001. On that occasion, he was lifting a box of paper which was "stuck to the floor" when he experienced low back pain. Bowling described his pain on that date as being slightly above his belt line on the right. He left work early and sought medical treatment the following day at the Mary Breckinridge Hospital emergency room. At the emergency room, he was given an injection of Demerol. A First Report of Injury regarding the incident was prepared by Leslie County on August 6, 2001.

The emergency room record from Mary Breckinridge Hospital, dated August 4, 2001, logged that Bowling reported his injury occurred at home, rather than at work, and that he had experienced a prior back injury and prior back pain. Bowling denied the accuracy of that record. X-rays of Bowling's lumbosacral spine made August 6, 2001, revealed slight narrowing of the disc space at L5-S1. Bowling admitted that when he was 19 years old, he had been diagnosed with arthritis in his back. Following the accident, Bowling was off work for approximately three weeks. Thereafter, he was released without restrictions on August 22, 2001, at which time he went to work for Begley.

Bowling worked at Begley for five weeks pulling and stacking lumber. Bowling testified that on August 31, 2001, during his employment at Begley, he struck his head on an I-beam and sought medical treatment at Mary Breckinridge Hospital where his head and neck were x-rayed. Apparently, this accident resulted in no permanent injury.

In October 2001, Bowling was offered another bus route by Leslie County. As a result, he re-entered Leslie County's employ where he continued to work until July 20, 2002. Bowling testified he quit work at that time because of ongoing problems with his low back.

In August 2002, Bowling again sought medical treatment for his low back. Prior to that time he had not seen a physician as a result of his alleged accident at Leslie County since August 22, 2001. After resuming treatment the following year at Beechfork Clinic, Bowling was referred to Dr. Joseph Williams. On September 18, 2002, Bowling underwent an MRI at the After Hours Clinic in Hazard, Kentucky, which revealed an L5/S1 disc herniation on the left. Bowling testified that based upon that MRI, Dr. Williams recommended surgery. On November 21, 2002, Dr. Williams performed a left unilateral L5/S1 laminectomy with discectomy and foraminotomy. Subsequent to surgery, Dr. Williams treated Bowling in follow-up through May 2, 2003. Bowling has since come under the care of Dr. John Gilbert, Dr. Williams' partner.

Bowling testified he has not returned to work since July 2002 because he has not yet been released by his treating physicians. At present, he continues to experience pain in his low back and right leg, which is aggravated by prolonged sitting, prolonged standing and general physical activity. His low back pain also interferes with his ability to sleep.

Bowling filed an Application for Resolution of Injury Claim with the Department of Workers' Claims on June 27, 2003. Thereafter, by order of the Commissioner issued August 15, 2003, Bowling's case was assigned to ALJ King for purposes of final adjudication. In addition to Bowling's testimony by deposition and at

hearing, evidence submitted for the ALJ's consideration consisted of medical records and reports from Dr. Williams, Dr. Gilbert, Excel Rehabilitation Services, Mary Breckinridge Hospital, Hazard ARH and Dr. Timothy C. Kriss. Also submitted was a copy of Bowling's July 10, 2002, CDL medical examination report.

The ALJ reviewed the conflicting evidence and concluded that any work-related injury received on August 3, 2001, had resolved itself by August 22, 2001, and that the current complaint, surgery, etc., related to a subsequent non-work related injury. The Board affirmed and Bowling appeals to this Court.

The claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky.App. 1979). The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Since Bowling was unsuccessful below, the question on appeal is whether the evidence was so overwhelming as to compel a finding in his favor. Paramount Foods, 695 S.W.2d 418. Compelling evidence has been defined as evidence so persuasive that it was clearly unreasonable for the ALJ not to be convinced by it. Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969). We must also be mindful that it is not enough for Bowling to show that the record contains some evidence which might support a reversal of the ALJ's decision. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's determination is supported by any evidence of substance, it cannot be said that the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky. 1992), our Supreme Court set the standard of review as: "[t]he WCB is suppose to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result." Id. at 687. In further review before the Court of Appeals,

[t]he WCB is entitled to the same deference for its appellate decisions as we intend when we exercise discretionary review of Kentucky Court of Appeals decisions in cases that originate in circuit court. The function of further review of the WCB in the Court of Appeals is to correct the Board

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 gross injustice.

Id. at 687-688.

The issue on appeal in this case relates to a finding of fact. In our review of the record, we find no compelling evidence in favor of Bowling. The evidence is conflicting, but the evidence is not so overwhelming as to compel a different result.

For the foregoing reasons, we do not believe the ALJ and the Board were clearly erroneous and therefore we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Monica Rice Smith
Hyden, Kentucky

BRIEF FOR APPELLEE, LESLIE
COUNTY BOARD OF EDUCATION:

Donald Walton
Melanie Gabbard
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