

RENDERED: DECEMBER 16, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court Of Appeals**

NO. 2005-CA-001574-WC

PIKE COUNTY BOARD OF EDUCATION,  
AS INSURED BY FRANK GATES SERVICE COMPANY

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NOS. WC-00-97419 & WC-02-67088

NICKY COLEMAN;  
PIKE COUNTY BOARD OF EDUCATION,  
AS INSURED BY KENTUCKY INSURANCE GUARANTY  
ASSOCIATION; PIKE COUNTY BOARD OF EDUCATION,  
AS SELF-INSURED;  
HON. MARCEL SMITH,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: The Pike County Board of Education (Board of Education), as insured by Frank Gates Service Company (Gates), appeals from a June 24, 2005, opinion by the Workers'

Compensation Board (Board) which affirmed an administrative law judge's (ALJ) award of permanent partial occupational disability benefits to Nicky Coleman. Gates argues that the evidence compelled a finding that Coleman's low-back condition was attributable, in part or whole, to work-related injuries which Coleman suffered while the Board of Education was insured by other carriers. We find that the ALJ's determination was supported by substantial evidence and hence, we affirm the Board.

Coleman began working for the Board of Education in 1982 as a mechanic. At the time of his injuries, he was a lead mechanic primarily responsible for servicing school buses. Coleman suffered two work-related injuries prior to the incidents which are the subject-matter of these claims. In January of 2000, Coleman sustained a left leg and knee injury. Following surgery on his knee, Coleman returned to work at the same position and his claim was settled based on a 4% impairment rating. In September 2001, Coleman complained of low back pain after lifting heavy tires at work. Coleman received treatment for the back pain and no claim was filed. Following each injury, Coleman was seen by his family physician, Dr. Nawed Siddiqui, and was referred to Dr. Naveed Ahmed.

In August or September of 2002,<sup>1</sup> a large tire weighing between sixty and seventy-five pounds fell off a rack and hit Coleman in the back. He was knocked to the floor, hitting both knees. Additionally, Coleman twisted his right knee while stepping off a bus in October, re-injuring it. Coleman came under the care of Dr. Ahmed who diagnosed chronic back pain. Coleman continued to treat with Dr. Ahmed for his back injury until June 30, 2003. Coleman was dissatisfied with Dr. Ahmed's treatment and began treating with Dr. Paul Brooks in September 2003.

In January 2004, Coleman felt a sharp pain in his back while lifting a brake drum. At that time he was already scheduled for a follow-up appointment with Dr. Brooks and did not seek medical treatment immediately. He has since returned to work at his prior position, but subject to a lifting restriction of no more than thirty pounds.

Following the injury in 2001, Dr. Ahmed diagnosed degenerative disc disease of the cervical spine with herniated nucleus pulposus at the C4-5 level with rightward protrusion and lumbar strain. Before his September 2002, injury, Coleman

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<sup>1</sup> Coleman gave conflicting dates of August 23, 2002, and September 14, 2002, for this injury. However, the Board of Education did not contest the compensability of this injury. In the interest of consistency, we will use the September 14, 2002, date.

complained of some neck and back pain and difficulty with lifting. However, an MRI taken of Coleman's spine in April of 2002 came back normal. Following the 2002 injuries, Dr. Ahmed diagnosed post traumatic lumbar strain with possible degenerative disc disease of the L5 spine along with degenerative joint disease of the cervical spine.

Dr. Brooks first saw Coleman on September 3, 2003, on referral from Dr. Siddiqui for difficulties involving low back pain and bilateral knee pain. Dr. Brooks received a history of the falling tire incident. He also noted Coleman had a previous back injury three years earlier for which he had therapy and he was not having any difficulties prior to the most recent incident. Dr. Brooks reviewed films and an MRI. From the films, it appeared it was likely Coleman had a "left L5-S1 old pars defect and questionable in the 5." He had a prominent L5 lateral process of what looked to be an iliopsoas spasm. Dr. Brooks also noted the normal MRI report from 2002. Dr. Brooks's assessment was likely pars defect on the left and questionable on the right.

Based on the fact Coleman had attempted to go back to work at his previous employment and was not able to tolerate it, Dr. Brooks placed restrictions of no lifting, pushing, or pulling greater than thirty-five pounds. Dr. Brooks testified that the results of the physical exam performed on January 26,

2004, were the same as the previous exam when he last saw Coleman on September 24, 2003. He further testified an MRI of the low back taken in May 2004 showed no worsening from the MRI results in 2002. Dr. Brooks stated his treatment of Coleman had changed since the initial visit and he was prescribing medications and treating him conservatively. On cross-examination, Dr. Brooks agreed the 2004 incident caused Coleman's back condition to become worse and, in a sense, more symptomatic and more disabling.

Dr. Joseph Rapier evaluated Coleman on August 12, 2004, at his attorney's request. Coleman's chief complaints were bilateral knee pain and low back pain. Dr. Rapier received a history of the September and October 2002 injuries, but apparently he did not receive a history of the January 2004 incident. He reviewed Dr. Brooks's report of September 3, 2003, and a report from Dr. Ahmed dated April 1, 2002, at which time Coleman was complaining of neck pain. Dr. Rapier noted Dr. Ahmed's impression was post traumatic cervical strain, post traumatic lumbar strain, post traumatic cervical HNP and post traumatic lumbar HNP. Concerning Coleman's back, Dr. Rapier diagnosed strain/contusion to the back aggravating preexisting dormant degenerative changes and assessed a 5% impairment to the lumbar spine based on a DRE Category II. He also assessed an

additional 2% impairment for Coleman's knee conditions, for a 7% whole body impairment.

Dr. Richard Sheridan evaluated Coleman on August 26, 2004. He assessed a 0% impairment for any 2002 lumbar injury involvement. He did not address Coleman's January 2004 low back injury.

Dr. Gregory Snider evaluated Coleman on August 19, 2004, at the request of the Board of Education. Dr. Snider received a history of the January 2000 and the August 2002 injuries and reviewed numerous medical reports. He diagnosed chronic low back pain and minor lumbar contusion. Dr. Snider opined Coleman suffered a minor lumbar contusion and knee sprain with the injury of September 2002. Dr. Snider indicated Coleman had a clear history of chronic low back pain for which he was undergoing treatment at the time of the injury. Finding no evidence that Coleman's back condition changed significantly, Dr. Snider assessed a 1% impairment pursuant to the AMA Guides, for "subjective reports of increased low back pain over baseline." It does not appear Dr. Snider received a history of the January 2004, injury from Coleman.

Dr. Gregory Gleis also conducted an independent medical evaluation of Coleman. After examining Coleman and reviewing his history and records, Dr. Gleis stated that the January 20, 2000, left-knee injury had improved but still had

some symptoms prior to the 2002 injury. Dr. Gleis concluded that the 2002 injury aggravated Coleman's earlier left knee injury, causing it to become more symptomatic.

After reviewing the lay and medical testimony in the record, the ALJ concluded that based on Dr. Rapier's evidence Coleman suffered a 7% impairment due to his work-related injuries. With regard to pre-existing active impairment, the ALJ found that Coleman's left knee impairment was causally related to the January 20, 2000, injury, and that the right knee injury is causally related to the September 14, and October 11, 2002, injuries. The ALJ found that the January 23, 2004, injury did not contribute to the right-knee impairment.

Concerning Coleman's low back condition, the ALJ concluded as follows:

With regard to the low back complaints, I am persuaded by the records of Dr. Ahmed who saw plaintiff several times following the 2001 injury, for which no claim was made. Dr. Ahmed diagnosed a strain which had improved prior to the 2002 injuries. I find none of the back impairment as actively pre-existing the 2002 injuries. I am persuaded by Dr. Brooks who found no objective change between the 2002 injuries and the January 23, 2004 back injury. I find that all the back impairment is causally related to the September 14, 2002 injury and therefore actively pre-existed the January 23, 2004 injury.

On appeal, Gates contested the ALJ's finding that Coleman's low back condition is attributable solely to the

September 2002, injury. Gates argued that the evidence compelled a finding that Coleman suffered pre-existing active impairment prior to 2002 which must be apportioned to the Kentucky Insurance Guaranty Association, which was the Board of Education's insurer in 2000. Gates also argued that the ALJ erred in finding that the January 2004 incident did not contribute to Coleman's low-back condition, and in failing to apportion benefits for that injury to the Board of Education as self-insured. The Board disagreed and affirmed the ALJ's findings.

It is well-established that the function of this Court in reviewing the Board "is to correct the Board only where the the [sic] 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."<sup>2</sup> After reviewing the record, we find that the Board properly analyzed the contested issues, and we adopt the following portion of Board Chairman Gardner's opinion:

The Board of Education points to Dr. Ahmed's records which indicate Coleman saw Dr. Ahmed for complaints of back pain prior to August 2002. It contends the ALJ erroneously relied on Dr. Rapier's assessment of 5% because he did not have Coleman's history of prior back problems. It

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<sup>2</sup> Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).



submits the only physician who testified regarding Coleman's preexisting active condition that had an accurate history of his previous treatment was Dr. Snider, and therefore the ALJ should have relied on this physician. The Board of Education contends Dr. Rapier's opinion must be disregarded because he did not have all of Coleman's injuries or treatment, *citing* Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004) and Osborne v. Pepsi-Cola Co., 816 S.W.2d 643 (Ky. 1991). It argues the records of Dr. Ahmed and Dr. Siddiqui do not indicate Coleman's condition got better prior to August 2002.

Here, while each physician may not have had a complete history of all of Coleman's prior injuries and treatment, it does not render those doctors' opinions without probative value. The Board of Education's arguments address the weight and credibility to be assigned the medical evidence, which is solely within the province of the ALJ. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Where the evidence is conflicting, the ALJ has the sole authority to believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Here the evidence was conflicting and the fact that the Board of Education is able to point to evidence in the record that would have supported a contrary conclusion does not compel reversal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Any deficient history received by physicians in the herein claim does not rise to the level of purposeful deceit carried out by the claimant in Cepero, *supra*.

Coleman testified that prior to the August 2002 incident he was having no

problems with his low back. Dr. Ahmed's medical records immediately preceding the August 2002 injury, in May and July 2002, do not mention complaints of low back pain by Coleman. Contrary to the Board of Education's arguments, Dr. Rapier referenced a report of Dr. Ahmed dated April 1, 2002 indicating Coleman had previous cervical and lumbar sprains. Likewise, Dr. Brooks had a history of a previous back strain.

Furthermore, no physician of record assessed an impairment rating for Coleman's condition as it existed prior to the September 2002 injury. "An exclusion from a partial disability award must be based upon a pre-existing impairment." Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181, 183 (Ky. 2003). Dr. Snider's assessment of a 1% impairment rating for "subjective reports of increased low back pain over baseline" does not compel any particular result. Since the ALJ's decision is supported by substantial evidence, she did not err in refusing to carve out a preexisting impairment.

The Board of Education's second argument concerns the ALJ's determination that the January 2004 incident was not contributory to Coleman's current low back condition. It argues the ALJ misunderstood Dr. Brooks' evidence. It takes issue with the ALJ's reliance on Dr. Brooks' testimony that there was no objective change between the 2002 and 2004 injuries. Again, the Board of Education points to evidence in the record which would support a finding that Coleman's back condition worsened following the January 2004 incident involving lifting a brake drum. It contends Dr. Brooks believed the January 2004 incident was a new injury that caused Coleman's back condition to worsen. It submits Dr. Brooks' testimony does not support the ALJ's findings regarding causation, apportionment, and preexisting active impairment.

As previously pointed out, the ability of a party to identify favorable evidence in the record does not mandate reversal in the

face of substantial evidence to the contrary. Dr. Brooks testified that the MRI following the January 24, 2004 injury showed no significant changes from the April 2002 MRI. Dr. Brooks further noted that results of the physical examination on January 27, 2004 were the same as the results of the previous visit in September 2003. Furthermore, Coleman himself testified his back pain remained constant throughout this treatment, before and after the January 2004 incident.

Given these circumstances, we cannot say the decision of the ALJ to assign liability to the Board of Education is so wholly unreasonable that it must be reversed as a matter of law.

In this appeal, Gates also argues that the ALJ erred by not specifying that the carrier for the 2004 injury (the Board of Education as self-insured) is responsible for payment of medical benefits as related to that injury. However, this issue was not raised before the Board and cannot be raised for the first time on appeal to this Court.<sup>3</sup>

Accordingly, the June 24, 2005, opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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<sup>3</sup> Breeding v. Colonial Coal Co., 975 S.W.2d 914, 916-17 (Ky. 1998).

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