

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002230-WC

CLINTON CONSTRUCTION COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-93563

JOHN EDWARD CAUDILL;
HON. HOWARD E. FRASIER, JR.,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER, SPECIAL JUDGE.¹

SCHRODER, JUDGE: This is a petition for review from an opinion of the Workers' Compensation Board affirming the Administrative Law Judge's decision to award permanent partial disability benefits based on a work-related injury. Relying on Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), the employer argues that the ALJ's findings were not supported by substantial

¹ Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

evidence because the underlying medical opinions of the credited physicians were based on inaccurate and incomplete medical history. From our review of the case, the findings of the ALJ on causation and impairment were supported by substantial medical evidence. Hence, we affirm.

John Caudill, who was 51 years old at the time of the hearing, testified that he had worked for 33 years as a dozer, backhoe, loader and excavator operator, and that he had worked as such for 5 years for appellant, Clinton Construction Company ("Clinton"). Caudill stated that on February 19, 2004, when he was operating a D8 dozer for Clinton, the dozer slipped off the edge of a rock as he was backing up on an incline. The dozer then fell off to the left side, dropping approximately 5-6 feet straight down. At the time of the fall, his head was turned to the side and the back of his head hit the side window. He immediately had neck and left arm pain. He finished his shift and went to the doctor. According to Caudill, he attempted to work the following day, but could not move his left arm. He testified that he had to take his right arm and place the left up on the controls. He left work that day and went back to the doctor.

Caudill testified that since the February 19, 2004, accident, he has not been able to work because his left arm does not function and he physically cannot control the machinery. He

stated he also continues to have neck pain that is constant and that he takes medication daily for the neck pain. With any exertion, the pain intensifies and his left arm becomes numb. He maintained that he uses a traction device for his left arm which has restored general function to it.

Caudill acknowledged that for several years prior to the accident, he had received treatment (alignments and adjustments) for back pain. He stated there was no specific event that precipitated his prior back pain, surmising the pain was probably not unusual for a 51-year-old heavy equipment operator. He testified that despite his back problems, prior to the February 19, 2004, accident, he was able to maintain his job at Clinton. Caudill denied having any problem with his left arm prior to the accident, but admitted to treatment for bursitis in early February 2004, which he said was in his chest area. He also admitted he had some neck pain prior to the accident that he described as just soreness like a "crook neck" or muscle strain. Caudill described his neck pain since the accident as constant, burning, stinging pain. Caudill could not remember missing any work prior to the accident because of his neck.

MEDICAL EVIDENCE: PRE-FEBRUARY 19, 2004

Records from East Kentucky Chiropractic Center indicate that Caudill was first seen on August 2, 2001, for neck and shoulder pain and numbness that had been present for three

months and was getting progressively worse. The condition was noted as a work-related injury that occurred in 1999. The initial diagnosis was cervicalgia and radiculitis of the cervical spine and pain in the thoracic spine.

The records document numerous visits from August 2001 through January 2002, three visits at the end of 2002, and visits on February 9 and 12, 2004, just days before his accident. These visits were primarily for neck and thoracic complaints which were noted to be work-related. The February 9, 2004, visit was for exacerbation of moderate neck and left shoulder pain. The February 12, 2004, visit was for mild neck and shoulder pain.

Clinton filed medical records from Dr. Umar Murad indicating that Caudill sought treatment for pain between the shoulder blades running into the left shoulder in November of 2000, and for neck and shoulder pain in February of 2002. The records from Hazard ARH were also submitted by Clinton which showed that Caudill underwent an MRI of the cervical spine on July 20, 2001, which revealed degenerative changes at C5-6 and a bulge at C5-6 and C6-7 indenting the thecal sac.

The records of the Hazard Clinic revealed that Caudill was treated there twice in November of 2002, for neck and left shoulder pain. There was a noted history of past injuries. On February 6, 2004, he was seen there for neck pain radiating into

the left shoulder and upper arm that had been present for two weeks. Caudill reported his pain was 10 on a scale from 1 to 10.

MEDICAL EVIDENCE: POST-FEBRUARY 19, 2004

Caudill submitted medical records and a Form 107 from Dr. Phillip A. Tibbs, a neurosurgeon, who examined Caudill on May 12, 2004. Dr. Tibbs took a history of a bulldozer accident on February 19, 2004, at Clinton. The history contained no mention of any prior cervical injury or treatment. Dr. Tibbs indicated that the MRI of the cervical spine, dated April 23, 2004, showed a small herniation to the left at C5-C6 into the foramen. Dr. Tibbs diagnosed cervical disc herniation with radiculopathy. Based on the history, Dr. Tibbs related the cause of the symptoms to the 2004 bulldozer accident. Dr. Tibbs indicated that Caudill did not have an active impairment prior to the 2004 work injury and assessed a 16% impairment rating under the DRE Cervical Category III. As for restrictions, Dr. Tibbs advised that Caudill avoid heavy lifting and bending and twisting of the neck. Dr. Tibbs also reported that Caudill did not retain the physical capacity to return to the type of work performed at the time of injury.

Dr. James Templin, an occupational medicine specialist, examined Caudill on November 17, 2004. He took a history of the bulldozer injury at Clinton on February 19, 2004.

In his report dated November 17, 2004, Dr. Templin noted, "Interestingly, the medical records are significantly different than the history provided by Mr. Caudill." Dr. Templin's report then summarizes the Hazard Clinic medical records revealing that Caudill received treatment for neck and shoulder pain on February 6 and 9, 2004, from an injury he reportedly received at work on February 4, 2004, lifting a 50-pound bag of grass seed. Dr. Templin reported that Caudill admitted that he had been treating with a chiropractor since 1997, but that:

[Caudill] said he does not recall any specific area of treatment with the low back, neck, shoulder, arms, etc., receiving equal treatment. [Caudill] does not recall any specific injury to the neck or left shoulder prior to the work-related injury of 02-19-04. . . . [Caudill] does not understand why the entry of 02-19-04 does not reflect the dozer injury, but instead addresses throwing bags of seed.

Dr. Templin also reviewed Caudill's x-rays and the MRI scan from April 23, 2004. Dr. Templin diagnosed Caudill with osteophyte disc complex at C5-C6 and C6-C7 with evidence of a herniated nucleus pulposus at C5-C6, degenerative changes of the lower cervical spine, chronic left shoulder pain syndrome, and chronic cervical pain syndrome. Dr. Templin opined that these conditions were caused by the work injury on February 19, 2004, and assessed a 13% functional impairment rating under the most recent AMA Guidelines, an 8% impairment for the cervical spine

and 5% impairment for loss of range of motion in the left upper extremity. Dr. Templin reported that Caudill had a pre-existing active impairment of 5%. Dr. Templin determined that Caudill did not have the physical capacity to return to his former work and assigned restrictions to avoid activities requiring extensive use of the left arm for pushing, pulling, lifting, twisting, turning, grasping, holding, carrying, or any activities above shoulder level.

Clinton submitted the report of Dr. Richard T. Sheridan, a Board-certified orthopaedic specialist, who conducted an independent medical examination on August 26, 2004. Dr. Sheridan took a history of a work-related injury sustained from a fall on a bulldozer on February 19, 2004. Dr. Sheridan reviewed the MRI from April 23, 2004, and found that it showed moderate narrowing at C5-6 and C6-7 and a small disc herniation at C5-6 towards the left. Dr. Sheridan also reviewed Caudill's medical records. Dr. Sheridan's diagnosis of Caudill's cervical condition related to the February 19, 2004, work injury was a resolved acute cervical strain. Dr. Sheridan opined that Caudill's current medical complaints were not related to the work injury of February 19, 2004. Dr. Sheridan felt that Caudill's present complaints were due to degenerative changes in the cervical spine due to the natural aging process. Dr. Sheridan stated that he would not place any restrictions on

Caudill related to the February 19, 2004, accident and that Caudill did not require any future medical treatment or medications for that injury. Dr. Sheridan assessed a 5% whole person impairment rating for a DRE Cervical Category II based on nonverifiable radicular complaints in the left upper extremity. In a supplemental report of September 2, 2004, Dr. Sheridan indicated that Caudill had 0% impairment based on objective medical findings.

Clinton also submitted the report of Dr. Russell Travis, a Board-certified neurosurgeon, who performed a comprehensive medical records review and interpreted the two MRI scans before and after the February 19, 2004, injury. The report, dated January 23, 2005, stated that a comparison of the two MRIs showed no changes that would indicate acute injury, no evidence of a soft herniated disc, and nothing more than a consistent progression of the natural aging process. Dr. Travis noted that the medical records of Dr. Williams, a chiropractor, indicated that Caudill had been treating for neck and shoulder pain with numbness from August 2, 2001, to February 12, 2004. Dr. Travis further noted that the medical records of Dr. Wicker indicated that Caudill was treated for neck pain on February 6, 2004, just 13 days prior to accident date. Dr. Travis diagnosed Caudill with cervical spondylosis superimposed on a pre-existing congenitally narrowed spinal canal. Dr. Travis assessed a 5%

functional impairment rating due to this condition, but stated that this impairment was entirely pre-existing active prior to the work injury of February 19, 2004.

The ALJ awarded benefits. The pertinent portion of the ALJ's opinion is as follows:

(2) The primary issue in dispute is causation and prior active impairment. While Dr. Tibbs has opined a high level of impairment for a work-related condition, his conclusion is solely based on the history taken from the Plaintiff and does not reflect the more extensive medical evidence relied upon by Dr. Templin, Dr. Sheridan, and Dr. Travis. "When a medical opinion is based solely upon history, the trier of fact is not constricted to a myopic view focusing only on the physicians' testimony The recitation of a history by a physician does not render it unassailable." Osbourne v. Pepsi-Cola, Ky., 816 S.W.2d 643, 647 (1991).

Mr. Caudill had significant prior treatment for neck and left shoulder pain prior to February 19, 2002, including only a few weeks prior to injury date. Since even his own evaluating physician, Dr. Templin found 5% preexisting active impairment, the undersigned finds the medical reports of Dr. Templin, Dr. Sheridan, and Dr. Travis are more credible than the history-based conclusion of Dr. Tibbs in regard to the issue of preexisting active impairment to the neck and shoulder.

(3) The next issues are the related questions of injury as defined by the ACT and permanent impairment. While post-injury MRI findings do indicate the presence of a small disc herniation, Dr. Travis has opined that this is simply the natural progression of an age-related degenerative condition and

is similar to the pre-injury MRI results. The Plaintiff did attempt to rebut the report of Dr. Sheridan by the later examination by Dr. Templin who did, in fact, opine a 5% preexisting active impairment.

However, Dr. Sheridan opined that the only work-related injury was an acute cervical strain that had largely resolved at the time of his examination other than subjective complaints of pain. Dr. Travis found no evidence of any acute injury and opined that all the Plaintiff's complaints were preexisting and any changes were the result of natural aging.

While the undersigned has disagreed with the causation opinion of Dr. Tibbs, the undersigned does find that the impairment rating of Dr. Tibbs, an experienced neurosurgeon, more accurately reflects the actual whole body impairment rating of Mr. Caudill. No impairment was given by Dr. Tibbs to the Plaintiff's right shoulder and no credible medical evidence has been identified showing any objective medical findings of a permanent, work-related injury to the left shoulder.

The undersigned also notes that the Plaintiff's primary remaining complaint is neck pain, and that any problem with the left shoulder related to the cervical condition. The undersigned finds that the reports of Dr. Sheridan and Dr. Travis are more credible as to causation and impairment for any left shoulder injury, and the undersigned finds that there is no permanent impairment to the left shoulder as a result of the February 19, 2004 injury.

Although there was somewhat of a delay in getting an MRI, the undersigned finds that credible objective medical evidence exists of a cervical injury that was caused both by preexisting active conditions and the six-foot fall of the bulldozer, after

which Mr. Caudill has not returned to work. The Plaintiff had preexisting neck complaints and a preexisting MRI showing objective medical findings of an existing, degenerative condition to the neck.

The issue of impairment traceable to the February 19, 2004, injury is less clear. The undersigned notes credible evidence of a significant fall while driving a bulldozer. While Dr. Travis spent a lot of time in reviewing medical records, he did not examine Mr. Caudill or follow up with him when clearly some issues were present regarding the accuracy of the February 19, 2004, medical note that referenced the lifting of grass seed. No evidence has been presented, other than this medical note, to dispute the Plaintiff's credible testimony that he was injured when the bulldozer fell six feet.

The undersigned finds that the report of Dr. Templin of 5% preexisting active impairment is more credible than the report of Dr. Travis who opined that the entire condition is preexisting. The undersigned also finds that since Dr. Tibbs was not presented with the prior medical records, his impairment rating should be reduced by the 5% preexisting impairment found by Dr. Templin, for a remaining total whole body impairment of 11% as a result of the work-related injury.

The undersigned notes that while the Plaintiff had preexisting active symptoms to both his neck and shoulder, he was able to perform his job as a heavy equipment operator until the injury of February 19, 2004. The undersigned would have preferred that the parties provide additional evidence from Dr. Tibbs, particularly after the lengthy records review conducted by Dr. Travis, and the 5% preexisting active finding from Dr. Templin. The treating neurosurgeon might have bolstered his own

opinion of complete work-related causation or have conceded, as found by Dr. Travis, that the impairment was all preexisting. Yet, in the absence of such additional testimony, the undersigned finds that impairment rating of the treating neurosurgeon, as modified by the 5% preexisting active impairment found by Dr. Templin, is more credible.

Clinton appealed to the Board, arguing that, under Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), the ALJ improperly credited the opinions of physicians who had a false and incomplete history regarding Caudill's injury. The Board affirmed the ALJ, determining that Cepero did not apply in this case:

We find no error in the ALJ's reliance on the opinion of Dr. Tibbs in finding an overall 16% impairment rating. The ALJ clearly rejected, in part, Dr. Tibbs' opinion as to causation based upon the inaccurate history. However, history is irrelevant to the overall impairment rating. The ALJ was convinced that the most accurate impairment rating for all causes related to the cervical condition was the 16% assessed by Dr. Tibbs. The ALJ was well within his role as fact finder in doing so.

. . .

We believe Dr. Templin's opinion that Caudill had a 5% pre-existing active impairment is substantial evidence upon which the ALJ could rely. Although Dr. Templin did not receive a complete and accurate history from Caudill, it is apparent from his report that he reviewed various medical records and was aware of the February treatment received shortly prior to the alleged work injury. He was also aware

of chiropractic treatment approximately one and a half years prior to the February work injury. He was well aware that there were discrepancies between the medical records and the history provided by Caudill. Dr. Templin clearly did not base his opinion on causation solely on the history provided by Caudill. Had he done so, he could not have found a pre-existing active impairment. Dr. Templin did not rely solely on the history provided by Caudill.

The holding in Cepero did not require that the ALJ ignore Dr. Templin's opinion. Instead, this is merely an instance where the ALJ had the authority to weigh the evidence and determine the weight and credibility to be applied to Dr. Templin's opinion. The ALJ did so. Further, the ALJ stated he did not find Dr. Travis credible regarding pre-existing impairment, and noted there was no evidence presented to dispute Caudill's credible testimony that he was injured when the bulldozer fell six feet. This was an instance where the ALJ was faced with conflicting evidence, weighed the evidence, and found it more persuasive that Caudill suffered some impairment as a result of the work injury. There being substantial evidence to support such a conclusion, we are without authority to find otherwise.

Clinton argues that the holding in Cepero does apply in the present case and prevents the ALJ from accepting the opinion of Dr. Tibbs as to impairment when the ALJ had already determined that the history given to Dr. Tibbs was inaccurate and materially incomplete for purposes of determining causation. In Cepero, the claimant did not mention a knee injury which occurred some years before while practicing martial arts, but instead attributed his knee injury solely to the work-related

accident. Despite the inaccurate and incomplete history given to these doctors, the ALJ accepted the testimony of those doctors as to causation and awarded benefits. The Board reversed, determining that the ALJ's conclusion as to causation was not supported by substantial evidence. The Supreme Court affirmed the Board, holding:

In cases such as this, where it is irrefutable that a physician's history regarding work-related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician on the issue of causation cannot constitute substantial evidence.

Cepero, 132 S.W.3d at 842.

As the finder of fact, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). When the evidence is conflicting, it is for the ALJ to choose whom and what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). A finding that favors the party with the burden of proof must be upheld if it is supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as evidence having the fitness to

induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). "The function of further review of the [Workers' Compensation Board] 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." Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

The question before us is when an ALJ rejects an opinion of a physician on causation under Cepero because of an inaccurate or incomplete history, is it error for the ALJ to thereafter accept the opinion (or part of the opinion) of that physician on level of impairment? From our reading of Cepero, it is clear that its holding is limited to opinions of physicians "on the issue of causation." Cepero, 132 S.W.3d at 842. We are aware of no decision that extends the holding in Cepero to assessments of impairment ratings. In the present case, although the ALJ rejected the causation opinion of Dr. Tibbs, the ALJ felt that the impairment rating of Dr. Tibbs, an experienced neurosurgeon, more accurately reflected the actual whole body impairment rating of Mr. Caudill. Taking into account the incomplete history given to Dr. Tibbs, the ALJ then reduced this impairment rating by the preexisting impairment

found by Dr. Templin. We believe this was a proper exercise of the ALJ's discretion to pick and choose what evidence to accept. Accordingly, there was no error in the ALJ's determination of Caudill's impairment rating.

Clinton also argues that under Cepero the ALJ should have not credited Dr. Templin's opinion regarding causation because he also had an incomplete and inaccurate history. Although Caudill may not have given a complete history to Dr. Templin, Dr. Templin nevertheless received an adequate history from his review of Caudill's pre-injury medical records. Dr. Templin in his report even acknowledged the discrepancy in Caudill's history between what was relayed to him by Caudill and what was contained in his prior medical records. Unlike the two physicians in Cepero, Dr. Templin was aware of Caudill's prior injury, his prior treatment for his neck and shoulder pain, and the fact that he had received treatment as recently as February 6 and 9, 2004. Accordingly, Dr. Templin had a sufficiently accurate and complete history to give a credible opinion on causation, and the ALJ did not err in accepting this opinion.

For the reasons stated above, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEE:

Phillip Lewis
Hyden, Kentucky