

RENDERED: OCTOBER 8, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000551-WC

JAMES BAILEY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-73615

NORTHPOINT SENIOR SERVICES;
HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: FORMTEXT TAYLOR, CHIEF JUDGE; COMBS AND NICKELL,
JUDGES.

TAYLOR, CHIEF JUDGE: James Bailey petitions this Court to review an opinion
of the Workers' Compensation Board (Board) entered February 18, 2010,

affirming the Administrative Law Judge's (ALJ) decision dismissing Bailey's claim for workers' compensation benefits. We affirm.

Bailey allegedly sustained a work-related injury on September 13, 2006, while employed as a Licensed Practical Nurse by Northpoint Senior Services (Northpoint). He filed a workers' compensation claim and specifically claimed to have suffered a shoulder injury while lifting a patient. The claim went before an ALJ. By opinion and order, the ALJ dismissed Bailey's claim in its entirety. In so doing, the ALJ specifically found that Bailey "failed to prove that the condition in his shoulder was caused by any work related event." Bailey then sought review with the Board. The Board eventually affirmed the ALJ's opinion, thus precipitating our review.

As an appellate court, we will only reverse the Board's opinion when it has overlooked or misconstrued the law or flagrantly erred in evaluating evidence so as to cause gross injustice. *W. Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992). To do so, we must necessarily review the ALJ's opinion. *Abbott Laboratories v. Smith*, 205 S.W.3d 249 (Ky. App. 2006). As fact finder, it is within the sole province of the ALJ to weigh the credibility and determine the substance of the evidence. *Id.* As Bailey carried the burden of proof before the ALJ, Bailey must demonstrate that the record compels a finding in his favor. This Court then reviews issues of law *de novo*. *Com., ex rel Stumbo v. Ky. Pub. Serv. Comm'n*, 243 S.W.3d 374 (Ky. App. 2007).

Bailey contends the ALJ erred by dismissing his claim. Specifically, he argues that the ALJ erroneously confused the legal concepts of work-related injury and pre-existing active disability. In dismissing his claim, Bailey maintains that the ALJ utilized medical evidence ostensibly demonstrating a pre-existing active disability to Bailey's shoulder but failed to make any findings of fact relating to a pre-existing active disability.

Under Kentucky Revised Statutes (KRS) 342.0011(1), an injury is defined as a "work-related traumatic event . . . arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical evidence." The above phrase "in the course . . . employment," refers to the time, place, and circumstances of the accident, and the words, "arising out of . . . employment" relate to the cause of source of the accident. *Masonic Widows & Orphans Homes v. Lewis*, 330 S.W.2d 103, 104 (Ky. 1959). The injury must also be the "proximate cause" of the "harmful change." KRS 342.0011(1). As such, the injury must have taken place in the course of and arising out of employment, and such injury must proximately cause the harmful condition.

In the opinion and order, the ALJ relied upon medical evidence to reach his decision that Bailey did not suffer a work-related injury:

The ALJ has carefully compared the office records of Dr. Micek on the dates of August 24, 2006[,] and September 28, 2006. Of course, the significance of these dates is that the August notes are approximately 20 days prior to the alleged work[-]related incident and the

September notes are 15 days after the alleged incident. A comparison of these medical records reveals that [Bailey] voiced the same complaints on both occasions. Dr. Micek's notes further reflect the same or nearly the same, physical findings were made on clinical examinations on those two dates. Of great significance, the notes do not reflect that [Bailey] reported the alleged work[-]related incident to Dr. Micek during the visit of September 28, 2006. The notes of Dr. Micek do not reflect any mention of any work[-]related incident having occurred. In testimony given by Dr. Micek during his deposition on February 5, 2009, he confirmed that his notes did not reflect any mention of a work[-]related injury. He first saw Mr. Bailey on June 13, 2006[,] for a complaint of ankle pain. He first treated Mr. Bailey for the left shoulder complaint on August 24, 2006. [Bailey] described the pain as moderate in severity on August 24, 2006. Dr. Micek performed an examination of the shoulder on that date and made an initial diagnosis. Dr. Micek next saw Mr. Bailey on September 28, 2006. Records on that date indicated [Bailey] was "having worsening pain" and that on that date Dr. Micek's assessment was "worsening subacromial bursitis and possible rotator cuff tear". [sic] Dr. Micek's records did not reflect any mention by [Bailey] of a work[-]related incident having occurred at any time between the dates of August 24, 2006[,] and September 13, 2006. When asked whether he thought that any traumatic injury had occurred to the shoulder between the two examinations, Dr. Micek answered "I'd say no". [sic] . . .

. . . However, a close analysis of the information given by the claimant throughout this case reveal[s] some troubling inconsistencies, oversights and failures to provide information, and an inconsistent pattern of memory, sometimes saying it has been too long to remember, while at other times appearing to have perfect recall of events which occurred during the same time period.

. . . It is also significant that [Bailey] did not on any of the incident reports or similar reports which he

completed and submitted to the employer make any mention of the absence of a Hoyer lift, even though he claims that he requested a Hoyer lift immediately prior to lifting the patient which resulted in his injury.

Upon review of the ALJ's decision, it is clear that the ALJ utilized the medical evidence to conclude that Bailey did not sustain a work-related injury. Indeed, the ALJ placed great weight on the fact that Bailey did not report a work-related injury to his doctor, Dr. Timothy Micek, during his exams on August 24, 2006, or September 28, 2006. Also, the ALJ pointed out that Dr. Micek did not believe that an injury had occurred between his examination of Bailey on August 24, 2006, (before the alleged injury) and his examination on September 28, 2006 (after the alleged injury). The ALJ highlighted the fact that Bailey's incident reports made no mention that a "Hoyer lift" was unavailable even though he claimed to have requested such a lift prior to lifting the patient. Moreover, the ALJ found that Bailey's testimony "reveal[ed] some troubling inconstancies, oversights and . . . inconsistent pattern of memory."

While the evidence may have demonstrated that Bailey suffered from a pre-existing active disability to his shoulder, the evidence also could be and was relied upon by the ALJ to find that Bailey did not suffer a work-related injury. As such, we do not believe the ALJ erred by finding that no work-related injury occurred.

We view Bailey's remaining argument as moot.

For the foregoing reasons, the opinion of the Worker's Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marcus A. Roland
Lexington, Kentucky

BRIEF FOR APPELLEE:

Stephanie D. Ross
Florence, Kentucky