

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001147-WC

LEONARD SIMONS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-08-75681

WAL-MART STORES, INC.; HON. JOHN B.  
COLEMAN, ADMINISTRATIVE LAW JUDGE;  
AND THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Leonard Simons, appeals the May 14, 2010, decision of the Workers' Compensation Board affirming the November 10, 2009, Opinion, Award, and Order of Administrative Law Judge (ALJ) John B. Coleman on the sole issue of whether Simons' low back claim was properly dismissed. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

Simons, a 53-year-old high school graduate, filed a workers' compensation claim alleging that he sustained permanent injuries to his left knee, hip, and lower back as the result of a work-related injury which he asserts occurred on September 20, 2008, during the course of his work as a floor maintenance person at Wal-Mart. Prior to working for Wal-Mart, Simons sustained a work-related injury at Tubular Threading, a company which manufactured large pipes. Simons testified that while working for that company, his upper body was crushed by four 20-inch pipes, causing injuries to his jaw, cervical spine, and a loss of hearing.<sup>1</sup> According to Simons, he was out of work following this injury for about three years, during which time he was attending rehabilitation. Upon finishing rehabilitation, Simons attempted to return to work but could not do so and settled his workers' compensation claim against Tubular Threading for approximately \$25,000.00.

After holding a number of other jobs, Simons relocated to Radcliff, Kentucky, in June 2006, at which time he was hired by the Elizabethtown Wal-Mart. He worked there for approximately one year before being transferred to the Radcliff store where he worked in floor maintenance. That job required being on his feet, bending, twisting, stooping, lifting, and operating a floor buffer. On September 20, 2008, Simons was in the process of performing his normal floor cleaning activities and was running a buffer down an aisle when he felt the buffer accelerate and jerk him forward to the left. Simons stated that he did not think

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<sup>1</sup> The report of Dr. David Changaris, who was selected by Simons to conduct an Independent Medical Examination (IME), reflects that Dr. Changaris received a history of no major injuries.

anything of it immediately after the accident and did not immediately feel any symptoms. Simons testified that it was only after he returned home and showered that he noticed symptoms in his left knee and low back.

The next day, Simons advised his store manager of the accident when he reported for his next shift and was advised to go to Care First Urgent Treatment Center. Following that visit, at which he underwent x-rays of the left knee, he was given a knee brace and advised not to work. Simons subsequently came under the care of Dr. William King at Work Well who sent him for an MRI which showed degenerative changes and possible tears of both the medial and lateral menisci. Simons was then referred to Dr. William Bonnarens, an orthopedic surgeon. Dr. Bonnarens recommended surgery for the left knee which was performed in November of 2008. Simons testified that the surgery initially helped his left knee condition, although he still has some slight popping in his knee as well as tenderness in the medial joint line.

As of January 14, 2009, Dr. Bonnarens noted that Simons was still using crutches but for his back and not his knee. The range of motion in his knee was found to be “actually quite good,” and it was noted that Simons’ gait was improved. Thereafter, on February 5, 2009, Simons reported that his knee was doing very well, and Dr. Bonnarens found Simons’ clinical exam to be normal. He was released to return to work full duty. Nevertheless Simons did not return to work, and returned to Dr. Bonnarens in April of 2009, reporting increased knee pain. Dr. Bonnarens diagnosed a strain of the medial hamstrings, but did not

restrict Simons from work. On April 30, 2009, Simons reported that he had fallen and twisted his knee at home and was having increased knee pain. Dr. Bonnarens ordered an MRI, after which he opined that any further testing or treatment needed was a direct result of the fall at home and not the alleged work accident. Dr. Bonnarens placed Simons at maximum medical improvement on April 22, 2009, assessed a 4% functional impairment rating for the work accident, and imposed no permanent restrictions. Dr. Bonnarens opined that Simons was capable of returning to work at his regular job as a floor maintenance worker.

Dr. David Changaris conducted an IME in this matter at Simons' request on June 4, 2009. As previously noted, Dr. Changaris reported a history that Simons had not been in any prior accidents which required extensive medical intervention.<sup>2</sup> Dr. Changaris reported that Simons was having headaches as well as pain in his bilateral knees, lumbar spine, left elbow, and cervical spine. Upon physical examination, Dr. Changaris found that Simons had good strength within his hamstrings, quadriceps, and gastrocnemius, and that his deep tendon reflexes were normal. Dr. Changaris found some decreased range of motion but did not specifically perform an examination of Simons' left knee. Dr. Changaris ultimately assessed a 30% functional impairment rating for gait disturbance.

Dr. Gregory Gleis performed an IME in this matter on April 22, 2009, and gave a deposition on August 27, 2009. Dr. Gleis testified that in his opinion,

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<sup>2</sup> This is despite Simons' testimony that in March of 1990, he was nearly crushed to death by four 20-inch pipes, after which time he underwent three years of rehabilitation. Simons testified that he has temporal mandibular joint disfunction (TMJ), migraine headaches, and two herniated discs in his cervical spine as a result of this accident.

neither the low back nor the knee injuries were caused by Simons' work accident of September 20, 2008. Dr. Gleis based that opinion on the fact that Simons' symptoms did not start for at least twelve hours after the accident, when he was no longer at work. Dr. Gleis believed that Simons was engaging in symptom magnification. In that regard, Dr. Gleis noted that Simons presented for the examination using two crutches but was nevertheless able to move freely about the room and put weight on both lower extremities. Dr. Gleis found this contrary to Simons' contention that his left knee was weak and giving out on him. Dr. Gleis assessed a 4% rating for Simons' left knee based on the medial and lateral meniscectomies which were performed by Dr. Bonnarens and a 0% rating for Simons' low back. In making the latter determination, Dr. Gleis found that Simons had none of the criteria necessary to qualify for a DRE<sup>3</sup> Category II rating of between 5-8%. Dr. Gleis found a 0% rating to be appropriate and found no restrictions applicable to the alleged lower back condition.

In addition to assigning his own IME rating, Dr. Gleis reviewed and commented upon the IME rating assigned by Simons' IME physician, Dr. David Changaris. Dr. Gleis testified that when there is a specific method or DRE categorization to assess a functional impairment, assessment of a functional impairment using gait disturbance, as Dr. Changaris did, was incorrect. Dr. Gleis also noted that Dr. Changaris, in calculating his impairment rating, had used the gait derangement tables in the *Fifth Edition of the AMA Guides* for a person who

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<sup>3</sup> Diagnosis-related estimate

has either a peripheral or central nervous system disorder. As Simons' gait alteration was due to an orthopedic problem, Dr. Gleis found the 30% rating assigned by Dr. Changaris to be inappropriate.

Simons was also referred to Dr. Tindall, a chiropractor in Elizabethtown, Kentucky, for treatment of his low back pain. Dr. Tindall began treating Simons for his low back pain on November 19, 2008. Dr. Tindall administered chiropractic manipulations at least two times per week from the time of the initial visit through March of 2009. Dr. Tindall opined that Simons had swelling and edema of the lumbar spine as well as an altered gait. Simons was ultimately treated for multiple diagnoses, including lumbar joint dysfunction L1-L5, sacroiliac joint dysfunction, subluxation, dislocation, displacement, lumbar strains/sprains, sciatica, neuralgia, myalgia, and myositis. Dr. Tindall placed Simons at maximum medical improvement on or about April 21, 2009. At that time, Dr. Tindall assessed an 8% functional impairment rating and advised that Simons should only lift 50 pounds occasionally, but could repetitively lift 35 pounds. Dr. Tindall would limit Simons to pushing and pulling 75 pounds, standing for only 30 minutes at a time, walking no more than two city blocks continuously, no bending or stooping over 30 minutes, and no repetitive pushing or pulling.

As noted, the ALJ issued an opinion, order, and award in this matter on November 10, 2009. Therein, the ALJ found that a work accident did in fact occur on September 20, 2008, but resulted only in a compensable left knee injury.

The ALJ was not persuaded that Simons had sustained a compensable injury for his low back and right knee claims based on the medical evidence of record.

Simons was awarded permanent partial disability (PPD) benefits for the left knee on the basis of the 4% impairment rating assigned by Dr. Gleis.

Those benefits were further increased by a 3.2 factor, pursuant to KRS 342.730(1)(c)(1) and (3), as ALJ Coleman was persuaded by the medical evidence that Simons did not retain the physical capacity to return to his former employment as a result of the knee injury. Following the issuance of the ALJ's decision, Simons' attorneys withdrew. Simons, then representing himself pro se, failed to file a petition for reconsideration and instead appealed directly to the Board. The Board affirmed the opinion and award of the ALJ on May 14, 2010. Simons, now again represented by counsel, appeals from the order of the Board to this Court.

On appeal, Simons essentially makes one argument; namely, that the ALJ's decision to dismiss his claim for a low back injury was not supported by substantial evidence of record. In making that argument, Simons seems to place much emphasis upon the fact that the ALJ relied primarily upon the opinions and findings of Dr. Gleis, who was an evaluating physician, as opposed to the findings made by other treating physicians.

In response, Wal-Mart argues first that Simons' appeal should be dismissed because he did not file a petition for reconsideration with the ALJ and, alternatively, that the Board should be affirmed because the opinion of the ALJ was supported by substantial evidence of record.

In reviewing these arguments, we note that our Kentucky Supreme Court has long recognized that the function of the Court of Appeals in reviewing the decisions of the Board is to correct the Board only where the Court perceives that 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).

Having reviewed the evidence of record, we are compelled to agree with the Board that the decision of the ALJ to dismiss Simons' claim for a low back injury was supported by substantial evidence of record and thus cannot be disturbed on appeal. Pursuant to KRS 342.0011, Simons had the burden to establish a harmful change to the human organism evidenced by objective medical findings. In reliance upon the testimony and report of Dr. Gregory Gleis who found no objective medical findings to support the existence of a low back injury, the ALJ concluded that Simons failed to meet his burden of proving injury under KRS 342.0011(1).

While Simons seems to argue that the ALJ and the Board relied too much upon the opinions of Dr. Gleis in rendering their respective rulings because he was an IME physician and not a treating physician, this is an argument unsupported by our law. *See Wells v. Morris*, 698 S.W.2d 321, 322 (Ky. App. 1985). The ALJ has been granted the discretion to choose the evidence upon which he will rely. *See Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). While there was certainly medical evidence which conflicted with the



opinions of Dr. Gleis, it is well established that where there is conflicting medical testimony, the fact-finder has the right to believe part of the evidence and disbelieve other parts of the evidence and to deem which evidence he finds most credible. *See Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979).

In so finding, we nevertheless find it necessary to briefly address Wal-Mart's argument concerning Simons' failure to file a petition for reconsideration. This very issue has been recently addressed by our Kentucky Supreme Court in *Bullock v. Goodwill Coal Co.*, 214 S.W.3d 890 (Ky. 2007). Therein, the claimant sought to reopen his claim to resolve whether treatment for chronic chest pain received 20 years after the injury was related to the original injury. The ALJ determined that the disputed bills were not compensable and claimant appealed to the Board, which vacated and remanded. This Court subsequently determined that the claimant's failure to file a petition for reconsideration was fatal to his appeal.

The claimant then appealed to the Supreme Court, which reversed, finding that the error asserted by the claimant was one that was not an error patently appearing on the face of the opinion (which the ALJ could have corrected upon receipt of a petition for reconsideration) but was, instead, an alleged error which would have required a reconsideration on the merits, which KRS 342.281 does not permit. Thus, the Supreme Court found that the claimant was not required to file a petition for reconsideration in order to preserve the error.

We believe the facts in the matter *sub judice* to be substantially aligned with those in *Bullock*. In the matter *sub judice*, Simons did not request that the

ALJ correct a clear and patent error on the face of the opinion. To the contrary, he questioned the substantive merits of the opinion, including the evidence upon which the ALJ relied in issuing same. In light of our Supreme Court's recent holding in *Bullock*, we disagree with Wal-Mart's assertion that a petition for reconsideration was required to preserve these alleged errors. Nevertheless, for the reasons previously set forth herein, we believe affirmation on the merits is appropriate in this instance.

Wherefore, for the foregoing reasons, we hereby affirm the May 14, 2010, decision of the Workers' Compensation Board, affirming the November 10, 2009, Opinion, Award, and Order of the Administrative Law Judge.

ALL CONCUR.

BRIEF FOR APPELLANT:

Benjamin J. Humphries  
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BRIEF FOR APPELLEES:

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