

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001611-WC

TRACTOR SUPPLY COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-09-83425

GAIL CASHION (ADMINISTRATOR OF  
THE ESTATE OF DAVID CASHION;  
HON. CHRIS DAVIS, ADMINISTRATIVE  
LAW JUDGE; AND THE WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, CLAYTON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Tractor Supply Company ("Tractor Supply") petitions for review of the August 3, 2011, opinion of the Workers' Compensation Board ("Board") which affirmed the January 10, 2011, opinion and award of Administrative Law Judge ("ALJ") Chris Davis, in David Cashion's claim for

workers' compensation benefits. Because we find no error with the Board's opinion, we affirm.

Cashion was employed by Tractor Supply as a management team leader from September 2008 until June 30, 2009. His duties primarily consisted of assisting with sales and supervising employees; he was also required to lift items weighing approximately 50 pounds. On June 27, 2009, Cashion sustained a low back injury while performing a task at Tractor Supply. A few days later, Cashion visited BaptistWorx, an occupational health clinic, where he was diagnosed with acute right lumbar strain, moderate-severe with right leg symptoms. Cashion did not return to his employment with Tractor Supply after sustaining this injury.

In June 2010, Cashion filed an application for resolution of injury claim with the department of workers' claims. The ALJ conducted a hearing and found that Cashion had sustained a work-related injury and assigned an 8% impairment rating. Cashion was awarded permanent partial disability benefits in the amount of \$17.22 per week for 425 weeks and temporary total disability benefits in the amount of \$253.17 per week from July 2, 2009 through May 19, 2010. Cashion was also awarded medical expenses.

Both parties filed petitions for reconsideration. Cashion requested clarification of the compensability of certain medical expenses, and Tractor Supply requested that the ALJ correct patent errors in the judgment. In particular, Tractor Supply asked that the ALJ alter its findings and determine that Cashion had acted fraudulent with regard to his representation of pre-existing medical conditions.

The motions for reconsideration were denied and both parties appealed the ALJ's judgment. The Board affirmed the judgment and Tractor Supply filed a petition for review with this court.

As an initial matter, an ALJ's decision is "conclusive and binding as to all questions of fact" and the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact[.]" KRS<sup>1</sup> 342.285.

When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did.

*Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). We review the Board's decision "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." *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Tractor Supply argues that the ALJ erred as a matter of law by failing to attribute any of Cashion's occupational disability to a pre-existing active condition. "It is well-established that the work-related arousal of a pre-existing dormant condition into disabling reality is compensable." *Finley v. DBM Techs.*, 217 S.W.3d 261, 265 (Ky.App. 2007) (citation omitted). The existence of a pre-existing active condition requires that a percentage of the claimant's occupational disability be assigned to the previous condition when it affects the claimant's

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<sup>1</sup> Kentucky Revised Statutes.

ability to work. *See, e.g., Yocom v. Stone*, 597 S.W.2d 866, 867 (Ky.App. 1980).

“[T]he test for determining whether a claimant suffers from an active disability is how much, if any, occupational disability he evidenced immediately before the subsequent injury.” *Newberg v. Davis*, 841 S.W.2d 164, 166 (Ky. 1992).

The employer, in this case Tractor Supply, bears the burden of proving the existence of a pre-existing condition. *Finley*, 217 S.W.3d at 265 (citation omitted).

In support of its finding that Cashion had suffered a work-related injury on June 27, 2009, the ALJ relied on the medical reports and findings of Dr. Gary Reasor, who first examined Cashion on June 29, 2010. Dr. Reasor submitted two reports, from June and September 2010, in which he diagnosed Cashion with sacroilitis, lumbar degenerative disk disease, and lumbago. Dr. Reasor attributed Cashion’s injuries to the June 27, 2009, incident, and assigned him an 8% impairment rating from DRE Category II, with an additional 3% for pain. The additional 3% was not adopted by the ALJ. Instead, the ALJ adopted only an 8% impairment rating based on Dr. Reasor’s assignment and the 8% impairment ratings assigned by Drs. Robert Jacob and Ellen Ballard.

In support of its argument that Cashion suffered from a pre-existing condition, Tractor Supply offered evidence in the form of medical-related testimony and records. Cashion admitted that he suffered from some prior low back pain and that he had discussed the pain with several physicians prior to the June 2009, incident. Cashion further testified that he had been treated by Dr. Greg Nazar for low back pain prior to the incident and had undergone a cervical fusion

with Dr. Nazar. Dr. Jacob diagnosed Cashion with longstanding multi-degenerative disk disease, facet arthropathy, congenital and developmental spinal stenosis, foraminal narrowing, and chronic back pain. Dr. Jacob opined that Cashion's diagnosis was a pre-existing condition and that no work-related injury existed. Dr. Ballard diagnosed Cashion with a history of acute back pain from the June 2009, incident, a history of cardiac disease, and multilevel degenerative disc disease. Her 8% impairment rating, however, pre-existed the work injury.

As fact-finder, the ALJ has the sole discretion to determine the quality, credibility, substance and inferences to be drawn from the evidence. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). "The fact-finder has the sole authority to judge the weight to be afforded the testimony of a particular witness." *Id.* Furthermore, 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 adversary party's total proof." *Id.*

In support of its finding that the ALJ did not err by determining that Cashion's injury was not pre-existing and active, the Board stated:

While this Board acknowledges the existence of medical testimony in the record which would support a finding of a preexisting condition, there is also testimony in the record which supports a finding Cashion's impairment rating is wholly attributable to the June 27, 2009, injury.

We agree. "Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal." *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999)

(citation omitted). Instead, the party opposing the ALJ's conclusion must show that no substantial evidence supported that conclusion. *Id.* at 481. "Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Id.* at 481-82 (citation omitted). Given the evidence presented by Dr. Reasor, and the ALJ's authority to determine the weight and credibility of that evidence, we conclude that Tractor Supply has failed to show a lack of substantial evidence that would support the ALJ's award.

Tractor Supply also argued that Cashion had fraudulently represented the presence of a pre-existing condition and offered a private investigator's video surveillance of Cashion as evidence. The video portrayed Cashion performing various physical activities in contrast to his alleged limited abilities. Cashion could be seen bending, stooping, walking, pulling a lawn tractor wagon, and changing car tires. In response to the video, the ALJ stated:

the undersigned does not find at any point that the Plaintiff was adamant that he could not ever, under any circumstances, perform the listed activities. Rather, the Administrative Law Judge accepts his explanation that he undertook the activities while taking pain medicine and that, following the changing of the tires at least, he was in great pain. There is no fraud herein.

Again, the ALJ has the sole discretion to determine the credibility of any particular witness. *Magic Coal Co.*, 19 S.W.3d at 96. Tractor Supply has failed to show that the ALJ abused that discretion, and has consequently failed to show that the Board committed reversible error in affirming the ALJ's judgment.

For the foregoing reasons, the August 3, 2011, opinion of the  
Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott C. Wilhoit  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stephanie L. Kinney  
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