

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000494-WC

W.T. YOUNG STORAGE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-12-000352

JOHN MORRISON; HON. WILLIAM RUDLOFF,  
ADMINISTRATIVE LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: W.T. Young appeals from an opinion of the Workers' Compensation Board affirming in part, vacating in part, and remanding an opinion and order of the Administrative Law Judge (ALJ). W.T. Young argues the ALJ's finding that John Morrison is permanently totally disabled as a result of a work-

related injury sustained on April 24, 2011, is not supported by substantial evidence.

We conclude otherwise and affirm.

Morrison worked for W.T. Young for fifteen years as a fork lift operator. He filed this workers' compensation claim alleging he incurred a work-related injury on April 24, 2011, when he bent over at work and suffered an immediate onset of back pain.

At the benefit review conference, W.T. Young stipulated Morrison sustained a work-related injury on April 24, 2011. On October 25, 2011, W.T. Young issued a termination of employment notice stating Morrison was terminated because of restrictions placed on him by his treating physician and there was no work to accommodate his restrictions.

During his testimony, Morrison acknowledged that in 1985, while a truck driver in the Army, he injured his lower back in a driving accident and, consequently, in 1987, underwent a L4-5 discectomy. He was awarded a service-connected disability from the Veterans' Administration. He also testified he sustained a work injury to his lower back in 1995, was treated by Dr. Tutt and had surgery that same year. As a result, he filed a workers' compensation claim and was determined to have a 28% permanent partial occupational disability. Morrison testified he sustained a lower back injury in 2009 and was treated by Dr. Harry Lockstadt and Dr. William J. Lester. In addition to acknowledging his prior back injuries, Morrison testified he had surgery on his shoulders and right knee.

Morrison testified he worked for W.T. Young from 1996 to 2011. He has not returned to work since April 24, 2011, and continues to experience pain in his lower back. He does not believe he can return to his regular and customary duties at W.T. Young.

W.T. Young submitted exhibits, including operative notes from the surgery performed by Dr. Tutt in 1995 reflecting Morrison was diagnosed with lumbar spinal stenosis at L5-S1 and lumbar disc protrusion at L5-S1. Also introduced were the following: Dr. Mortara's May 24, 1988, surgical note reflecting Morrison had a herniated disc, L5-S1 left; Good Samaritan Hospital's records relating to Morrison's 1988 injury; medical records dated April 25, 1991, and October 27, 1992, relating to Morrison's low back symptoms; a November 22, 2010, St Joseph Hospital emergency department note indicating Morrison reported to the emergency room complaining of low back pain; Dr. Lester's March 25, 2011, note reflecting Morrison was seen on that date and complained of increased back pain; and Dr. Mary Floyd Ireland's July 4, 2011, note indicating Morrison tripped and injured his shoulder.

Dr. Lyon, an orthopedic surgeon, concluded Morrison's radicular pain complaints preexisted his April 2011 work injury and were unrelated. He opined Morrison had gradual development of L4-5 disc disease as a result of his surgical procedures at L5-S1. He noted if Morrison had been assessed an impairment rating prior to his alleged injury, he would have been categorized as a DRE Category III according to the American Medical Association's Guides to

Permanent Functional Impairment (AMA Guides). Dr. Lyon opined Morrison's impairment was unchanged as a result of his alleged April 2011 work injury.

Dr. Dirk Franzen, Dr. Lockstadt's partner, saw Morrison on July 6, 2011. He noted in his report Morrison had a prior injury in 2009 and was treated by Dr. Lockstadt but was able to return to employment. He concluded Morrison now suffers from chronic back pain, which he believed was a "flare-up of his chronic problem, but with a new injury."

Dr. Lockstadt resumed his care of Morrison on October 13, 2011. On January 16, 2011, Dr. Lockstadt's office notes reflect he compared Morrison's MRI in 2011 with that performed in 2009. He opined Morrison's condition had deteriorated since 2009, which he attributed to a new injury. He opined Morrison has a herniated disc at the L4-5 level of his spine with an additional permanent impairment and stated "this is clearly a new injury." He further opined Morrison is unable to perform his usual and customary job duties.

Morrison was evaluated by independent medical evaluator, Dr. Frank Burke. In his report, Dr. Burke recited Morrison's history of a back injury in 2009 and medical treatment by Dr. Lockstadt. He also noted back injuries in 1988 and 1995. He performed a physical examination and concluded Morrison had activated a preexisting degenerative condition. Dr. Burke stated that based on the AMA Guides, Morrison sustained a 37% whole person permanent impairment. Dr. Burke apportioned 50% of Morrison's functional impairment to his 2009 injury. He opined Morrison should be restricted from climbing, crawling, being around

any moving machinery, and avoid prolonged standing or sitting. Dr. Burke further stated Morrison was able to return to work after his 2009 injury, but after his 2011 injury Morrison is not able to work.

The ALJ relied on the opinions offered by Dr. Lockstadt and Dr. Burke and Morrison's testimony. He determined Morrison sustained a work-related injury on April 24, 2011, and is permanently and totally disabled. However, because of his prior award of benefits based on a 28% occupational impairment, the ALJ reduced Morrison's disability award to 72% and awarded permanent partial disability for 520 weeks from April 24, 2011.

W.T. Young's and Morrison's petitions for reconsideration were denied. W.T. Young appealed to the Board. The Board concluded the ALJ's finding that Morrison sustained a work-related injury on April 24, 2011, resulting in permanent total disability was supported by substantial evidence and affirmed. It vacated the award of permanent partial disability benefits and remanded the matter to the ALJ for entry of an award of permanent total disability benefits. The sole issue presented in this appeal is whether there is substantial evidence to support the ALJ's finding Morrison is permanently totally disabled as a result of a work-related injury sustained on April 24, 2011.

KRS 342.285(2) specifically prohibits the Board from reweighing the evidence or substituting its judgment for that of the ALJ with regard to a question of fact. It is the ALJ's function, as sole fact-finder, to translate the lay and medical evidence into a finding of occupational disability. *Ira A. Watson Dep't Store v.*

*Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). Consequently, our standard of review is limited:

Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. 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. The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.

*Id.* (citations omitted).

The ALJ considered Morrison's testimony and the medical evidence. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. *Hush v. Abrams*, 584 S.W.2d 48, 51 (Ky. 1979). Although there was conflicting testimony regarding the degree of his medical impairment, it was for the ALJ to determine which evidence to believe. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999).

Despite the well recognized discretion afforded an ALJ, W.T. Young argues the ALJ erroneously relied upon the testimony and opinions of Dr. Burke, Dr. Lockstadt, and Morrison. W.T. Young points out Dr. Burke and Dr. Lockstadt did not obtain all Morrison's prior medical records prior to rendering their expert opinions, and Morrison did not precisely disclose every medical appointment and

injury. Further, it asserts Dr. Burke and Dr. Lockstadt did not specifically identify the injury date or state Morrison's current condition was caused by an injury incurred on April 24, 2011.

Morrison had a history of prior back problems and Dr. Burke and Dr. Lockstadt did not review the entirety of his medical history. Nevertheless, as noted by the Board after its close examination of the record, both physicians had a sufficient history of Morrison's injuries and medical treatment to assess his functional impairment and the cause of his impairment. Both physicians were aware Morrison had undergone two surgeries prior to April 24, 2011, at the L5-S1 level and both opined he had an additional impairment at L4-5. As noted by the Board, the fact Dr. Burke and Dr. Lockstadt did not review certain medical records goes to the weight to be afforded their opinion and testimony, which is a question solely determined by the ALJ.

The Board also rejected W.T. Young's assertion the ALJ could not rely on the opinions of Dr. Burke and Dr. Lockstadt because neither specifically referenced the April 24, 2011 injury. A reasonable interpretation of both physicians' reports and notes is they were aware Morrison sustained an injury in 2011 that caused an additional impairment.

Although Morrison's testimony regarding his prior medical history was not completely accurate, it was not so inaccurate that his testimony should have been disregarded by the ALJ. There is no dispute that prior to April 24, 2011, he worked for W.T. Young and was capable of performing his work-related duties.

Because the ALJ's finding that Morrison sustained a work-related injury on April 24, 2011, resulting in total and permanent disability is supported by substantial evidence, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Walter A. Ward  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Timothy J. Wilson  
Lexington, Kentucky