

RENDERED: JULY 25, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002114-WC

ROGER AEBERSOLD

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-12-01076

RYAN TRANSPORTATION, INC.;
HON. JONATHON R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Roger Aebersold petitions this Court to review a November 20, 2013, Opinion of the Workers' Compensation Board (Board) affirming the Administrative Law Judge's (ALJ) dismissal of Aebersold's claim for workers' compensation benefits. We affirm.

Aebersold was employed by Ryan Transportation, Inc. when he allegedly suffered a work-related injury to his shoulder on February 28, 2012. According to Aebersold, he experienced an electrical shock while working on an electrical plug. Aebersold stated that the electrical shock caused his body and arm to jerk violently, thereby causing a rotator cuff tear in his right shoulder.

Aebersold filed a petition for workers' compensation benefits and alleged that the electrical shock caused a permanent injury to his right shoulder. Ryan Transportation introduced evidence that Aebersold was involved in a road rage incident in November 2011 and suffered injury to his right arm after punching a vehicle's side window. Both Ryan Transportation and Aebersold introduced contradictory medical evidence concerning causation and extent of the shoulder injury.

By Opinion and Order entered June 14, 2013, the ALJ found Ryan Transportation's medical expert, Dr. Robert Jacob, credible and adopted his opinion that Aebersold suffered from "an underlying pre-existing condition that was symptomatic and impairment ratable . . . immediately prior to the occurrence of the work-related injury." Opinion and Order at 11. Hence, the ALJ found that Aebersold's shoulder injury was active prior to the alleged work-related injury and thus, non-compensable. The ALJ also noted Dr. Jacob's opinion that the electrical shock could not have caused Aebersold's right shoulder rotator cuff tear. Accordingly, the ALJ dismissed Aebersold's claim.

Being dissatisfied with the ALJ's dismissal, Aebersold sought review with the Board. By Opinion entered November 20, 2013, the Board affirmed the ALJ's dismissal of Aebersold's claim. Our review follows.

To begin, our review in a workers' compensation case is limited. We are limited to reverse the Board's opinion only where "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). In reviewing the Board's opinion, we necessarily look to the ALJ's opinion. The ALJ's findings of fact may only be set aside if not supported by substantial evidence. Moreover, the ALJ, as fact-finder, has the sole authority to determine the weight of evidence and to draw reasonable inferences therefrom. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

Aebersold contends that the ALJ erred by finding that his right shoulder injury constituted an active preexisting condition. Aebersold argued that no evidence was introduced demonstrating that his right shoulder condition was "symptomatic, or ratable prior to the subject work injury." Aebersold's Brief at 10. Aebersold also alleges that Dr. Jacob's opinion Aebersold suffered a preexisting active condition lacked medical evidentiary support and did not comply with *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. 2007).

During the hearing before the ALJ, Ryan Transportation called Larry Brison, general manager, and he testified, in relevant part, as follows:

Q Is that what Mr. Aebersold did when he was demonstrating to you and Mr. Ledford what had happened to him after the road rage incident?

A Yes, sir. It is.

Q Okay. After he made the first report of the road rage incident, did Mr. Aebersold continue to demonstrate from time to time any complaint with his right shoulder, as far as moving it around or trying to show what problem he had with that shoulder?

A It was ongoing. You know, some of the work that he could do continued to diminish over the course of the next couple of months, because he would complain of pain in the shoulder.

Q Right shoulder or left shoulder?

A In the right shoulder. And, you know, it got to a point where if he was working on something that required him to have his arms above his head, such as scraping decals off of trailers, he was unable to perform those tasks any longer, because he couldn't work with his arms in an extended position above his head.

Q Right arm?

A Right arm.

Transcription of Workers' Compensation hearing at 44. Additionally, Dr. Jacob opined that "I do not believe that it is within a degree of reasonable medical probability that even if he had sustained an electric shock that this shock would result in a rotator cuff tear." Dr. Jacob's Medical Report at 7. Considering the whole of the evidence, we believe substantial evidence supported the ALJ's finding that the right shoulder injury was a preexisting active condition under the

precepts of *Finley*, 217 S.W.3d 261. The testimony of Brison and Dr. Jacob aptly support a finding that Aebersold's right shoulder injury was both symptomatic and ratable prior to the alleged electrical shock. *See id.*

Aebersold also asserts that the ALJ failed to make findings of fact upon the issues of whether the work-related injury occurred, whether notice of the injury was timely given, whether a period of TTD was associated with the injury, and whether Aebersold is entitled to medical benefits.¹ We agree with the Board that these issues are rendered moot:

Because the ALJ determined the alleged work incidence did not cause the rotator cuff injury, the additional findings requested by Aebersold are unnecessary. Aebersold continued to work following the alleged injury, and there is no indication he was temporarily totally disabled prior to his shoulder surgery. Again, Dr. Jacob opined the need for the surgery was not related to the alleged work injury and Aebersold did not need any further medical treatment. . . .

Opinion at 9.

In sum, we cannot say that the Board erred by affirming the ALJ's dismissal of Aebersold's claim for workers' compensation benefits.

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

ALL CONCUR.

¹ Roger Aebersold also claims that the Administrative Law Judge failed to make findings of fact as to whether he suffered a separate injury (neurobehavioral changes) due to the alleged electrical shock. However, in his petition for rehearing, Aebersold does not request any finding of fact upon this separate injury. Consequently, the issue is waived.

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