

RENDERED: FEBRUARY 15, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2018-CA-001057-WC

ARTHUR MONKS

APPELLANT

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-16-72763

V.

JACK COOPER TRANSPORT;  
HON. MONICA RICE-SMITH, ALJ; AND  
KENTUCKY WORKERS' COMPENSATION BOARD

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

GOODWINE, JUDGE: Arthur Monks (Monks) appeals from an opinion of the Worker's Compensation Board affirming the decision of the Administrative Law Judge (ALJ) denying he suffered any permanent work-related injuries. After careful review, we affirm.

## **BACKGROUND**

Monks is a 73-year-old high school graduate with two years of college. In 2006, he had a commercial drivers' license. Monks served in the Army Reserve from 1966 to 1972, and worked through and was a member of Union Local Teamsters 89. Monks retired from the Teamsters and Yellow Freight and did not work from 2001 through 2016. He currently receives his Teamsters' retirement and Social Security benefits.

On August 12, 2016, Monks returned to the active workforce and was employed by Jack Cooper Transport moving Ford F-250 trucks. He picked the trucks up from a big lot at the assembly plant and drove them to different locations. On August 14, 2016, as Monks approached a truck he was going to move, another Ford truck driver ran over his left foot, causing Monks to fall to the ground. The driver continued backing up and ran over Monks' hips. Monks was transported by ambulance to the University of Louisville ER's trauma center where they x-rayed his foot, took a CT scan of his hips, gave him some crutches, and sent him home.

Monks followed up with Dr. Andrew DeGruccio. He chose Dr. DeGruccio because his daughter works for him. When Monks saw Dr. DeGruccio, he could not walk or stand. Dr. DeGruccio put him in a boot and recommended physical therapy. While doing physical therapy, Monks progressed quite well. He

wanted to continue for another month, but Dr. DeGruccio released him to return to work without restrictions; however, Monks failed to return to work.

Monks received temporary total disability benefits in the amount of \$16,734.73, from August 15, 2016 through February 8, 2017. In August 2017, Monks again visited Dr. DeGruccio complaining that his right hip caused pain. Monks acknowledged that the hip x-ray Dr. DeGruccio ordered was normal and Dr. DeGruccio did not refer Monks to another physician for treatment. After Dr. DeGruccio released him, Monks tried to get a second opinion with Dr. Patel but workers' compensation would not pay for it.

Monks testified that prior to the injury on August 12, 2016, he had no problems with his left foot/ankle or either hip, and had never been diagnosed with traumatic degenerative osteoarthritis of the left ankle, right hip trochanteric bursitis, stasis dermatitis, edema, or marked varicosities of the lower extremity.

Monk testified that after the injury he had the following limitations:

1) no feeling in the right side of his left ankle; 2) pain in his foot where it was broken; 3) inability to walk like he did before; 4) inability to lay on his right side; 5) severe right hip pain; and 6) difficulty sleeping.

He further testified that he has limited range of motion and has swelling in his left leg; that his left hip is worse than his right; and that he has trouble getting out of a car. He said he must take his leg and put it in and out of

the car. Based on these limitations, Monks testified he cannot return to the work he was doing at the time of the injury because most of the trucks do not have steps. Monks admitted he was able to wash his vehicles and walk around them to dry and vacuum; however, he believes he is totally disabled.

Monks filed an application for resolution of claim with the Department of Workers' Claims. His claim was assigned to an ALJ. Following discovery, a benefits review conference, and final hearing, the ALJ entered an opinion, order and award. The ALJ made a finding that Monks did not satisfy his burden of proving he sustained a permanent work-related injury. The ALJ took great care to explain the reservations she had with Monks' credibility. The ALJ outlined Monks' inconsistencies as follows:

Monks testified in his deposition that he has no pain in his left hip, however at the hearing Monks indicates he has pain in both hips, worse in the night. He testified at the hearing Dr. DeGruccio did not know anything about his hips, however he was adamant in his deposition that he reported his hip pain to Dr. DeGruccio at every visit. In the hearing, he initially testified Dr. DeGruccio did not treat his hips, however after questioning admitted Dr. DeGruccio x-rayed and examined the right hips. Monks also testified that he has difficulty getting in and out of a car, specifically testifying that he has to put his leg in and out of the car. The surveillance video shows Monks getting in and out of a car on numerous occasions. There was never any instance of Monks having to place his leg in and out of a car. The video shows him, although doing so slowly, simply getting in and out of the car normally. Monks does not seem to have any difficulty walking

around the car numerous times to dry it, nor does he seem to have any difficulty bending to wipe it dry.

ALJ Op., 14-15, February 2, 2018. The ALJ determined that Dr. DeGruccio used reasonable medical evidence to support his conclusions.

Monks filed a motion to reconsider, which the ALJ denied, finding no patent error. Monks appealed the ALJ's order to the Board arguing that the ALJ erroneously abused her fact-finding discretion in dismissing his claim for permanent disability. The Board affirmed the ALJ's order. This appeal followed.

### **STANDARD OF REVIEW**

“On appeal, our standard of review of a decision of the Workers’ Compensation Board ‘is 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.’” *Pike Cty. Bd. of Educ. v. Mills*, 260 S.W.3d 366, 368 (Ky. App. 2008) (citation omitted). The burden of persuasion is on the claimant to prove every element of a workers’ compensation claim. *Id.* (internal citation omitted).

The ALJ is the sole fact finder in all worker’s compensation claims. KRS<sup>1</sup> 342.285(1). In fact, “KRS 342.285 designates the ALJ as finder of fact, and has been construed to mean that the factfinder has the sole discretion to determine

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

the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence.” *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009). “In short, appellate courts may not second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion.” *Id.* (citation omitted). An ALJ abuses discretion when the decision is “arbitrary, unreasonable, unfair or unsupported by sound legal principles.” *Id.*

### ANALYSIS

Monks contends the Board erred in affirming the ALJ’s decision that he did not suffer permanent work-related injuries. Monks argues that Dr. DeGruccio’s opinions were not medically sound and not genuine. He posits the same arguments alleged in his appeal to the Board, albeit in greater detail. In sum, Dr. Degruccio states in his October 2017 report that Monks has a zero percent impairment rating according to the AMA Guidelines,<sup>2</sup> because “he has no loss of range of motion at either the foot, ankle, knee, hip, or the elbow area from these injuries.”

Dr. DeGruccio addressed Monks’ complaints about his hip, stating “[h]e did continue to complain of some non-verifiable hip and low back pain, but it

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<sup>2</sup> AMERICAN MEDICAL ASSOCIATION GUIDES TO EVALUATION OF PERMANENT IMPAIRMENT, 5th ed.

was my opinion that this was resolving, and that based on the original x-rays that were taken in the ER, there was little concern for long-term disability and progression.” He concluded there was no evidentiary link between the right hip pain to the actual work-related injury.

Dr. DeGruccio filed a report in October of 2017 stating that Monks “was very well known to have left lower extremity venostasis and venous insufficiency with varicosities” before the accident, which was documented in the first office visit note. He assessed a four percent impairment rating for pre-existing venous insufficiency and varicosities. The Board’s opinion affirming the ALJ explained:

[Dr. Degruccio] also stated a CT scan performed on the day of the accident demonstrated a significant amount of degenerative changes throughout the spine with multiple osteophytes, moderate degenerative changes in both hips, and significant lumbar spinal stenosis. It did not show evidence of acute changes. Dr. DeGruccio opined Monk had a pre-existing, active impairment for the lumbar spinal stenosis of 8%.

Dr. DeGruccio emphasized a right hip x-ray was read as normal at the August 31, 2017 office visit, and there was no tenderness around the hip on examination. He also found no signs of greater trochanteric burstitis or range of motion loss at the hip. Dr. DeGruccio stated Monk indicated he felt pain deep in the greater sciatic notch consistent with sciatica. Therefore, he concluded Monk demonstrated signs of sciatica or lumbar spinal stenosis symptoms which he could not relate to the work injury since it is not in relation to the initial area of bruising

around the hip, and is possibly related to the pre-existing elements seen on the CT scan.

Board's Op., 9-10, June 15, 2018.

To challenge these findings, Monks relies on the August 27, 2017 report of Dr. Jules Barefoot, who maintains that he has a twenty-five percent whole person permanent partial impairment based upon range of movement, diminished sensation and swelling in his left ankle and bursitis of his right hip. Dr. Barefoot apportioned three percent of the rating to the right hip impairment and the remaining twenty-three percent to Monks' left ankle. Dr. Barefoot opined that as a direct result of his work-related injuries, Monks would not be able to return to his prior work position. Dr. Barefoot goes so far as to say he does not understand how Dr. DeGruccio examined the same patient because their opinions were vastly different.

By offering Dr. Barefoot's opinion, which contradicted Dr. DeGruccio's opinion, the ALJ had to weigh the credibility and arguments of both doctors and weigh that evidence with Monks' testimony. Monks does not offer a reasonable analysis as to why Dr. DeGruccio's conclusions are unsound, other than they are disputed in Dr. Barefoot's report.

Monks contends that it is obvious that Dr. DeGruccio's opinion is in "direct contradiction to reality as everyone knows that back injuries are not always accompanied with superficial bruising." Dr. DeGruccio was convinced that the CT

scan showed degenerative changes in the back, not acute changes. The ALJ had the right to find that one opinion was persuasive and the other one was not.

This case has been thoroughly analyzed by the ALJ and the Board in two detailed, reasoned opinions. This Court has no authority to disturb the fact finding of the ALJ, absent abuse of discretion. *Bowerman* at 866. We are unable to conclude that the ALJ's opinion and the Board's order affirming that opinion, was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

### **CONCLUSION**

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Nicholas Murphy  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Robert J. Nemes  
Louisville, Kentucky