

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2003-SC-0838-WC

DATE 9-16-04 EIA Growth, DC.
APPELLANT

MALCOLM MOORE

V. APPEAL FROM COURT OF APPEALS
2003-CA-542-WC
WORKERS' COMPENSATION BOARD NO. 01-WC-76669

MARTIN COUNTY COAL
CORPORATION; HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from an opinion of the Court of Appeals which upheld the Workers' Compensation Board in affirming the decision of the Administrative Law Judge to dismiss the claim as filed.

The questions presented are whether prior injuries that are noncompensable because they are time barred are considered to be not work related; whether a claimant who has sustained both compensable and noncompensable disability is entitled to receive income benefits to the full extent of which compensable, work-related harmful change caused a complete inability to work; and, whether the work relatedness of all applicable injuries is supported by adequate lay and medical testimony.

Moore, 57, began working for the Martin Coal Company in 1973 as a heavy equipment operator. He was injured on August 21, 2001, while driving a bulldozer for

the company when he backed over a large rock, jarring the bulldozer and resulting in injury to his back, neck, stomach and arms. Moore had been treated over the past ten years by Dr. Lon Lafferty on multiple occasions for low back and neck complaints, including a work injury to his back in 1996 for which a claim was never filed. Both the claimant and the employer presented medical evidence which was in direct conflict. After considering the medical evidence and testimony, the ALJ determined that Moore's most recent injury resulted in no compensable disability. The Board, in a unanimous opinion, concluded that it was within the province of the ALJ to rely on the medical witnesses and it was within the authority of the ALJ to decide which evidence was more reliable. The Court of Appeals, in a 2 to 1 opinion, reasoned that Moore had failed to establish that the acceptance by the ALJ of the evidence presented by the company was unreasonable or incredible. This appeal followed.

Moore testified both by deposition and at the formal hearing before the ALJ. The claimant stated that he was seen by Dr. Lon Lafferty the morning after his injury and that Dr. Lafferty has treated him since that time. He also indicated that he was referred to Mountain Comprehensive Care for problems with his nerves and with depression and had been receiving treatment on a monthly basis. Moore testified that he has constant pain in the neck, arms and legs and occasional pain in his lower back and stomach, headaches and difficulty sleeping due to the pain.

The claimant introduced into evidence the deposition of Dr. Lon Lafferty who concluded that Moore had a whole-body impairment of 33%. He attributed half of that impairment to the August 2001 injury and half to preexisting degenerative changes that were asymptomatic until the 2001 injury. Dr. Lafferty believed that Moore was unable to return to work as a heavy machine operator. He also treated Moore for major

depression and assessed 100% impairment as to Moore's psychological ability to return to work.

Moore also presented medical evidence from Dr. David Forester regarding his psychiatric condition. Dr. Forester diagnosed a major progressive episode which he believed was caused by the 2001 injury and he assessed a 40% impairment rating.

Martin Coal Company introduced medical evidence from Dr. Timothy Wagner regarding Moore's physical condition and Dr. Wagner concluded that Moore had no permanent impairment from the 2001 injury. The employer also presented medical evidence from Dr. David Shraberg concerning the psychiatric condition. Dr. Shraberg diagnosed Moore with a passive-dependent personality and concluded that Moore had no psychological impairment.

Other medical records indicate that Moore was seen in 1992, 1993, 1996 and 1997 for back, neck and shoulder pain by Dr. Lafferty. Moore was seen by Dr. Lafferty on May 29, 1996, after a back injury at work had occurred when he operated heavy equipment and ran over a rock. This injury was never filed as a workers' compensation claim.

Moore's reliance on the decision in Scott v. Fruit of the Loom, 2002 W.L. 253814, Ky.App., 3-22-2002, is flawed because it is a "Not to be Published" case, and cannot be cited as authority pursuant to CR 76.28(4)(c). It is also without merit. In that case, the claimant was awarded a permanent partial disability from his most recent injury. In the present case, the ALJ found the employer's proof more convincing and determined that the August 21, 2001 injury did not result in an occupational impairment. Thus, any reliance on Scott was unwarranted.

Moore argues that a prior work-related injury may be considered in the determination of total disability even if that prior injury did not result in compensation. See Kern's Bakery v. Tackett, Ky. App., 964 S.W.2d 815 (1998). He also cites Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503 (2001), which held that a worker who has sustained both compensable and noncompensable disability is entitled to receive benefits to the full extent of which the most recent event caused his inability to work. Here, the ALJ determined that the most recent injury did not result in any disability. The ALJ had the right to rely on that part of the medical evidence establishing the absence of impairment and for that reason, there was never any duty on her part to analyze the impact of the prior work injury.

It is well settled that the ALJ, as the finder of fact, has the sole authority to determine the weight, credibility, substance and inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe as well as what part of the testimony to accept. Pruitt v. Bugg Bros., Ky., 547 S.W.2d 123 (1977).

Moore also contends that it was error for the ALJ to dismiss the claim because the applicable injuries are supported by adequate lay and medical testimony as to their work relationship. We must disagree.

The decision of the ALJ is conclusive and binding as to all matters of fact. KRS 342.285. The question on appeal is whether the evidence upon which Moore relies is so compelling as to require a different result. It is of no consequence to demonstrate that there was some evidence of substance that could have justified a finding in favor of the claimant. The employee must demonstrate that the evidence was of such value that the finding against it was unreasonable. Special Fund v. Francis, Ky., 708 S.W.2d

641 (1986). Although the medical testimony was conflicting, Moore has not established that the acceptance of the evidence presented by the employer was unreasonable and a reviewing authority may not substitute its judgment for that of the ALJ in matters involving the weight to be given to the evidence in questions of fact. Here, there was substantial evidence upon which the ALJ could rely, and thus the Board and the Court of Appeals were without authority to overrule her. The question on appeal was whether the evidence compels a different result. Compelling evidence is generally defined as that which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. That is not the case here. As long as any evidence of substance supports the opinion of the ALJ, it cannot be said that the evidence compels a different result. Francis, supra.

The decision of the Court of Appeals is affirmed.

All concur except Graves, J., who dissents without opinion.

COUNSEL FOR APPELLANT:

Billy J. Moseley
Lawrence R. Webster
P.O. Drawer 712
Pikeville, KY 41502

COUNSEL FOR APPELLEES:

Jeffrey D. Damron
Baird, Baird, Baird & Jones P.S.C.
P.O. Box 351
Pikeville, KY 41502