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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MAY 19, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 6-9-05 ELIA GRANT, D.C.

2004-SC-0403-WC

TERRY HARRINGTON — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-2053-WC
WORKERS' COMPENSATION BOARD NO. 02-WC-82353

TFE GROUP; HON. LAWRENCE F. SMITH, 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 for workers' compensation benefits by Harrington. The dismissal was based on the failure of the claimant to prove causation sufficient to establish a work-related injury.

Harrington was employed as a material handler at the warehouse of TFE Group. The majority of his work involved moving items throughout the warehouse with a power jack. A power jack is similar to a forklift; however, the prongs are in the back. To operate a power jack, a left-handed employee such as Harrington, must stand on the

right side of the power jack deck with his back to the forks and operate the controls with his left hand and hold on with his right hand. The fork that is used moves stacks of product on a skid from the receiving area to the storage area inside the warehouse.

Harrington testified by deposition and at the hearing that he suffered a work-related injury on June 5, 2002 when he was stepping off his power jack to go to the break room. He felt as though he was going to twist his ankle. He jerked to the left to counter balance his awkward step, and as he did so, he felt pain in his lower back. He went on break, but as he sat in the break room his discomfort increased. After returning to work, he began to experience numbness in his lower back extending to his right leg. He later notified his supervisor and an accident report was completed. Harrington was taken to the St. Elizabeth Business Health Center immediately after he reported his injury where he was treated by Dr. Agatep. When his condition failed to improve, the physician scheduled an MRI which indicated the presence of a disk herniation at L3-4. Based on the MRI report, Dr. Agatep discontinued physical therapy and referred Harrington to Dr. Duplechan, board certified in physical medicines, rehabilitation and electrodiagnostic medicine, who first saw him on July 2, 2002.

In this appeal, Harrington contends that the order of the ALJ dismissing the claim was based on conjecture and must be reversed. He also asserts that the opinion and order is not supported by compelling evidence.

Initially, after the alleged injury, Harrington received temporary total disability benefits and medical benefits from June 6, 2002 through July 10, 2002. Following an investigation by the company, TFE terminated the benefits asserting that the injury did not arise out of or in the course of his employment. Harrington filed a motion for

interlocutory relief which was later expanded into a claim for benefits. Subsequently, the claim was bifurcated on the issue of work-related causation.

The human resources manager of TFE testified by deposition that he investigated the alleged incident and confirmed that Harrington had called in sick on June 3 and 4, 2002 because of sunburn. Upon a return to work, Harrington was questioned about the sick leave, and the human resources manager stated that he did not see any signs of tan, sunburn, redness or peeling. It is unclear as to exactly when this interview took place. The manager also testified that there were approximately 53 cameras operating within the plant at any given time and that these cameras take a series of rapid pictures but do not record streaming or a continuous video. He testified that he was unable to locate or identify any incident that he believed would have caused the injury. The pictures were not clear enough to actually make out the faces of any employee, and there was no specific picture of Harrington at the exact moment he stepped from the power jack.

The immediate supervisor testified by deposition that Harrington reported the incident to her and that she was directed to have Harrington go to the hospital. She stated that when he returned he appeared to be in pain and was limping.

An investigator with CNA Insurance testified by deposition that he had reviewed the videotapes taken by the plant camera and he did not see anything that indicated to him that there was any injury. He also testified that he investigated the weather in the Covington area on the Saturday before the alleged injury and obtained information that it was apparently overcast and hazy and had rained that morning and afternoon. Harrington lives in Covington and the weather information is for the airport which is in

Boone County, a distance of approximately twelve miles. An actual weather report was introduced into evidence and recorded .10 inches of rain at noon at the airport.

Dr. Graulich, board certified in neurology and psychiatry, conducted an independent medical examination at the request of the employer on January 29, 2003.

On February 28, 2003, Dr. Graulich amended his opinion expressed in the earlier examination. After viewing the tape a multitude of times and reviewing the work file, he stated:

> The patient's injury and his activities directly afterward as he told them to me on the first page of my IME could still be compatible with this videotape. But having reviewed the entire file I would like to make the following points.
>
> It takes some stretch of the imagination to consider this a work related injury under KRS 342.0011. The patient does give a history of injury. But the injury is trivial and certainly cannot be considered the main proximate cause of the patient's HIVD, only an exacerbating or immediately inciting factor. Disks do not herniate due to such a trivial incident unless they are severely diseased beforehand. Thus even if it should be determined that the condition is work related the vast majority, at least 90-95%, should be considered due to age-related degenerative arthritis in my opinion.
>
> The patient's history that he missed two days of work preceding the incident due to a severe sunburn is suspicious at best. It would be more likely to conclude he missed work because he was having back pain – a common occurrence in his age group with such severe underlying degenerative arthritis.

The ALJ determined that the claimant lived ten to twelve miles northeast of the airport and a short distance from the downtown area where the climatology records are kept. The ALJ was persuaded that the evidence was not sufficient to support the claim that Harrington had severe sunburn which required two days off. The ALJ concluded that from the medical reports, deposition testimony and his observation of the demeanor of the witness at the formal hearing, he was not convinced that the back injury was a result of the injury described at the workplace on June 5, 2002. Rather, the ALJ agreed with Dr. Graulich that it would be more likely to conclude that the claimant missed work

because he was having back pain, a common occurrence in his age group with severe underlying degenerative arthritis. Harrington was approximately 50 years of age at the time of the injury.

The ALJ, in rendering his decision, indicated that there were glaring inconsistencies in the statement presented by the claimant. The ALJ was concerned that the claimant neither sought nor received any medical care for the sunburn.

The burden of proof and risk of nonpersuasion are on the claimant relative to each and every essential element of the claim. Snawder v. Stice, 576 S.W.2d 276 (Ky.App. 1979). See also Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). As a finder of fact, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). In addition, the ALJ has the sole authority to judge the weight and inferences to be taken from the evidence. Miller v. East Ky. Beverage/PepsiCo, Inc., 951 S.W.2d 329 (Ky. 1997). As the fact finder, the ALJ may reject any testimony and believe or disbelieve various parts of the evidence. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

In order to reverse a decision of the ALJ, it must be demonstrated that there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). There is no doubt that the evidence regarding the actual occurrence of a work-related injury is conflicting. The Board observed that there was certainly sufficient evidence to support both an award of benefits as well as the dismissal issued by the ALJ. The Board also stated that it is only by the barest of margins can it be said that the conclusions of the ALJ are totally without merit. The

Board also indulged in dicta that another finder of fact might have interpreted the evidence differently, although that kind of speculation is of no benefit to the claimant.

In this instance, Harrington was unsuccessful in his burden of proof before the ALJ. The question on appeal is whether the evidence was so overwhelming, upon consideration of the entire record, as to compel a finding in his favor. See Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984). Compelling evidence is evidence that is so overwhelming that no reasonable person could arrive at the same conclusion reached by the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky.App. 1985). As long as there is any evidence of substance which supports the decision of the ALJ, the Board or Court cannot reverse on appeal. Special Fund v. Francis, supra.

The Board may not substitute its judgment on appeal for that of the ALJ in matters involving the weight to be given to the evidence in questions of fact. KRS 342.285(2).

A careful review of the record in this case indicates that the ALJ considered all the lay and medical testimony in the record in very great detail. The Board, in a unanimous opinion, determined that it was within the province of the ALJ to rely on the evidence presented to him. The Board correctly determined that it did not have the authority to overrule the ALJ or substitute its judgment for his in matters involving the weight to be given to the evidence in questions of fact. Both the Board and the Court of Appeals were sympathetic to the claimant, but as a matter of law, could not reach his complaints. The Court of Appeals correctly stated that the evidence here was not so overwhelming as to require it to supersede the findings of the Board or the ALJ. See Western Baptist Hosp. v. Kelly, 827 S.W.2d 685 (Ky. 1992)

The opinion of the Court of Appeals is affirmed.

All concur.

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