

IMPORTANT NOTICE
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RENDERED: September 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-0979-WC

DATE 10-13-05 E. J. A. Grawitt, DC

PLASTIC PRODUCTS COMPANY, INC.,
AS INSURED BY UNDERWRITERS'
SAFETY AND CLAIMS

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2003-CA-2704-WC
WORKERS' COMPENSATION BOARD NO. 00-71250

JEFF HOOTS; HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant was disabled due to work-related injuries to his cervical and lumbar spine that occurred on July 27, 2000. Although the employer asserted that there was no substantial evidence the claimant sustained a work-related back injury on July 27, 2000, or gave due and timely notice of such an injury, the Workers' Compensation Board and the Court of Appeals affirmed. We affirm.

The claimant was born in 1970. When his claim was heard, he had a high school education, three semesters of college, and vocational training in electrical work. From 1991 to mid-1994 he worked primarily in the fast food industry. He testified that he injured his back in 1993, while working and that he saw a chiropractor about three times. In October, 1994, he began working for the defendant-employer, first as a press

operator and later as a material handler. Over the years, he sustained several work-related injuries and one non-work-related injury.

In about 1995, he slipped in some oil while bending over to pick up parts, causing him to fall and pull a muscle. He testified that he experienced some back pain at the time and saw Dr. Steeves, the company doctor who later became his family physician as well. Treatment consisted of several physical therapy sessions. He missed little if any work and did not file a claim.

On September 26, 1998, the claimant received a static shock while working. He lost his balance, fell backward from a height of about five feet, and landed on his back. At the emergency room, he was diagnosed with a head contusion, severe whiplash, and lower back strain. After a brief period of light duty, Dr. Steeves returned him to full duty on October 6, 1998. About three weeks later, when he remained on pain medication, the back of the chair in which he was sitting broke, causing him to "re-injure everything." It is unclear whether he missed any work.

On December 1, 1998, the claimant sustained a hernia while using a floor jack. Dr. Steeves referred him to Dr. Dorrah for surgery, which was performed in February, 1999. The claimant returned to work, and that injury is no longer at issue.

On March 3, 1999, the claimant received a whiplash injury in a non-work-related motor vehicle accident. Dr. Steeves treated him with Ibuprofen and Flexeril, placed him on light duty for two weeks, and released him to full duty on March 26, 1999. From March through August, 1999, he received chiropractic treatment.

On June 20, 2000, the claimant was struck in the head with a hopper lid. He experienced headaches, dizziness, neck pain, and numbness in the right arm and

reported the incident to his supervisor. After taking a scheduled two-week vacation, he continued to perform his usual work.

The claimant testified that the final work-related injury occurred on July 27, 2000, when he began to experience back pain, chest pain, and numbness in his right arm while using a floor jack. The symptoms worsened as the day progressed, and he notified the employer's Human Resources Administrator. He stated that although she wanted to call an ambulance, he had his wife take him to the emergency room where he was diagnosed with a muscle strain.

The medical evidence was extensive. Dr. Steeves first saw the claimant for complaints of pain in the right lower back, buttock, and leg on July 17, 1996. A lumbar x-ray revealed no abnormalities. Dr. Steeves did not think there was any likelihood of a disc herniation and recommended a weight reduction diet. On August 26, 1996, he diagnosed a slowly resolving chronic lumbar strain. In September, 1998, he treated the claimant for a hematoma to the head and muscular injuries to the neck and upper back, noting that he received a shock, fell, and landed on his upper back, neck, and head.

Dr. Steeves saw the claimant several times in March, 1999, following a non-work-related motor vehicle accident and noted that the claimant was tender from the cervical area to the sacrum due to the accident. He diagnosed back pain secondary to a muscular strain, noting that there was no numbness or tingling. On March 26, 1999, the claimant had an unrestricted range of motion and was released to full-duty work.

The claimant saw Dr. Steeves on July 20, 2000, complaining of diffuse neck pain and stiffness, posterior headaches, occasional numbness in the left arm, and chronic low back pain that radiated to the upper legs. He reported that his symptoms were aggravated by chronic strain and lifting at work. Dr. Steeves diagnosed chronic muscle

and ligament strain, noting that the claimant had experienced chronic neck and back problems since a prior work-related accident and motor vehicle accident. He also noted that an EKG revealed no serious cardiac abnormalities. The next note, dated August 2, 2000, indicates that the claimant complained of a headache and blurred vision that he attributed to a June 20, 2000, head injury at work. On August 5, 2000, Dr. Steeves noted that a CT scan was negative but also noted the claimant's report that he was developing a head tremor. Dr. Steeves referred him to a neurologist and took him off work. The neurologist found no abnormalities, noted that the tremor stopped when the claimant was distracted, and concluded that it might be stress-related. Dr. Steeves then released the claimant to return to work on September 8, 2000.

The record indicates that a cervical MRI performed on September 12, 2000, revealed a small disc protrusion at C3-4, mild secondary neural foraminal narrowing, and evidence of early degenerative changes at C3-4 and C4-5. The claimant testified that Dr. Aaron became his family physician in November, 2000. The record indicates that a lumbar MRI performed on November 30, 2000, revealed "[m]oderate central and right lateral herniation at L5-S1 with central disc herniation and moderate bilateral disc bulging at L4-5."

Dr. Shields first saw the claimant on January 3, 2001, and noted that he sustained a work-related low back injury in 1998, when he was shocked and thrown onto his back. Dr. Shields thought that the L5-S1 herniation was the likely cause of the claimant's pain but did not recommend surgery at the time due to his obesity. He did recommend that the claimant retrain for less strenuous work. Dr. Shields eventually performed lumbar surgery in July, 2002.

Dr. Patrick examined the claimant on March 23, 2002, regarding his neck and back conditions. Dr. Patrick noted that the claimant “was injured on four occasions from 1998 until July 27, 2000.” His report included a history of the four work-related injuries from 1998 through 2000 but did not mention the 1999 motor vehicle accident. He diagnosed an asymptomatic cervical disc protrusion and a lumbar disc protrusion with persistent pain and nerve involvement. He attributed the lumbar symptoms and findings to the July 27, 2000, injury; assigned a 12% AMA impairment, attributing an 8% impairment to the lumbar condition and a 4% impairment to the cervical condition; and indicated that the claimant had no active impairment before the injury. He also assigned numerous work restrictions.

Dr. Patrick examined the claimant again on October 19, 2002, after Dr. Shields performed lumbar surgery. At that time, the claimant complained of continuous back pain that occasionally radiated down his leg. Dr. Patrick continued to attribute the claimant’s conditions to the July 27, 2000, injury and to assign a 12% impairment. He assigned the same work restrictions as before and stated that the claimant lacked the physical capacity to return to the type of work he performed at the time of the injury.

Dr. Wood evaluated the claimant on May 21, 2002, and reviewed his medical records. He assigned a 5% impairment to the claimant’s cervical complaints and attributed them to the September 24, 1998, injury. Although he assigned a 5% impairment to the lumbar condition, he found no objective evidence that the L5/S1 disc herniation caused any of the claimant’s symptoms and no objective evidence of a causal relationship between the back and right leg symptoms and any of the accidents. Noting the lack of medical evidence of back pain between July 27, 2000, and November, 2000, he concluded that the lumbar impairment was due to pre-existing

active lumbar spondylosis that was aggravated by the motor vehicle accident and the aging process.

Dr. Gleis examined the claimant on February 3, 2003, and reviewed the medical records. He assigned a 13% AMA impairment. Noting that there was no documented injury on July 27, 2000, he attributed the claimant's condition entirely to the natural aging process or the motor vehicle accident. In his opinion, the claimant did not retain the physical capacity to return to the type of work he performed previously due to his obesity and lack of conditioning.

The employer argued that the claimant failed to prove that he suffered an injury on July 27, 2000, and that he failed to give due and timely notice of such an injury. Based on the testimonies of Drs. Wood and Gleis, the employer maintained that he failed to prove that his low back condition was work-related. It asserted that the most credible evidence was that "the present low back condition [was] due to a combination of pre-existing conditions, his automobile accident, and the natural aging process."

Mary Jane Tungate, the employer's Human Resources Administrator, testified that the claimant gave notice of a July 10, 1996, low back strain; of a September 23, 1998, injury; and of a June 20, 2000, head injury. He reported chest pains while working on July 27, 2000, but did not mention any back problems. On February 2, 2001, he completed a First Report of Injury in which he asserted that he had injured his back on July 27, 2000, and had reported the injury to Jimmy Lockett, his supervisor. She stated that at no time before February 2, 2001, did the claimant request the employer to provide medical treatment for the injury.

Jimmy Lockett testified that he did not work on July 26 or 27, 2000, so the claimant could not have reported the injury to him on July 27. Furthermore, he would

have completed an accident report if the claimant had reported an injury subsequently. He stated that workers are instructed to notify the substitute of any accidents that occur in their usual supervisor's absence.

The claimant did not return to work after July 27, 2000. When his claim was heard, he continued to experience constant lower back pain and numbness in the right leg and heel despite ongoing treatment. He had enrolled in college and expected to graduate in May, 2005.

Relying on the claimant's testimony and the evidence from Drs. Steeves, Shields, and Patrick, the ALJ determined that the claimant sustained work-related injuries affecting his neck and back on September 24, 1998; June 20, 2000; and July 27, 2000. Although noting that the claimant had been treated for neck and back symptoms since 1996 and that he injured his neck and back in the motor vehicle accident, the ALJ also noted that Dr. Steeves released him to return to his regular work after each incident. Although acknowledging the contrary testimonies of the employer's witnesses, the ALJ characterized as "credible" the claimant's testimony that he reported a back injury on July 27, 2000, despite his failure to complete a formal report until February, 2001. Relying on the claimant and Dr. Patrick, the ALJ determined that the claimant had no prior, active disability; that he had a period of temporary total disability until he recovered from the lumbar surgery; that he had a 12% neck and back impairment; that his disability was entirely due to the July 27, 2000, injury; and that the injury caused him to lack the physical capacity to return to his prior work. Noting the claimant's inability to perform work for which he had previous training or experience due to the injury, the ALJ ordered a vocational evaluation.

In a petition for reconsideration, the employer asserted that the claimant could not have been temporarily totally disabled from July 27, 2000, to November 2, 2000, because no medical records indicated that he complained of back pain until the latter date. The employer also asserted that the ALJ “ignored uncontradicted evidence of record with regard to the issue of notice and the occurrence of a work injury on July 27, 2000.” After the petition was denied, the employer appealed.

It is the injured worker’s burden to prove every element of a claim for benefits, including causation. Roark v. Alva Coal Corp., 371 S.W.2d 856 (Ky. 1963); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App.1984); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). KRS 342.285 designates the ALJ as the finder of fact, and the courts have construed it to mean that the ALJ has the sole discretion to determine the quality, character, and substance of evidence. See Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). In doing so, an ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party’s total proof. Caudill v. Maloney’s Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). When the evidence is conflicting, it is for the ALJ to choose whom and what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). A finding that favors the party with the burden of proof must be upheld on appeal if it is supported by substantial evidence and, therefore, is reasonable. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as evidence having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Where such evidence supports a decision, the mere existence of evidence that would have

supported a different result is an inadequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Although the claimant related his disabling symptoms to the 1998 injury when seeking treatment from Drs. Aaron and Shields, he was not a medical expert. Medical causation generally must be proved with expert medical evidence; therefore, an ALJ may not disregard uncontradicted medical evidence of causation without stating a reasonable basis for doing so. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). A medical opinion regarding causation that is based on a substantially inaccurate or incomplete medical history and that is completely unsupported by any other credible evidence cannot constitute substantial evidence. Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004).

In Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), the court set forth factors to be considered in determining the extent of a worker's occupational disability. Those factors were later codified in KRS 342.0011(11) and governed awards until the Act was amended extensively in December, 1996. The translation of medical evidence regarding impairment and restrictions into a finding of occupational disability was a matter that was within the discretion of the ALJ. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976).

As amended effective December 12, 1996, KRS 342.730(1)(b) based the amount of a worker's partial disability on the amount of impairment the underlying injury caused. Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), explained that the 1996 version of KRS 342.730(1)(b) requires pre-existing impairment to be excluded when determining the partial disability caused by an injury. The present case was decided under the Osborne v. Johnson standard, shortly before the Robinson decision, and at no

point was the ALJ asked to consider an argument like that raised in Robinson.

Nonetheless, we are convinced that the decision was proper under either standard.

Appealing findings that the claimant sustained a July 27, 2000, back injury and gave timely notice, the employer notes that Dr. Patrick was the only physician who received a history of the incident and who attributed his condition to it. The employer maintains, however, that Dr. Patrick's opinion of causation was based on a defective history that failed to include the 1999 motor vehicle accident and did not constitute substantial evidence to support the finding in the claimant's favor. Furthermore, uncontradicted evidence from its medical experts established that the claimant's condition was due to the motor vehicle accident or factors other than a July 27, 2000, accident. The employer emphasizes that both Mary Tungate and Jimmy Luckett denied that they received notice of such a back injury.

It is undisputed that the claimant had instances of back pain before July 27, 2000. Dr. Steeves last treated him on March 26, 1999, for the effects of the motor vehicle accident that occurred earlier that month. He next saw the claimant on July 20, 2000, noting that he complained of neck pain, back pain, and various other symptoms and that he associated them with the physical strain of his work. KRS 342.0011(1) defines an injury as being a work-related traumatic event that causes a harmful change in the human organism. The claimant did not describe his July 27, 2000, injury as being what would commonly be thought of as an accident. He testified that he began to experience back pain, chest pain, and numbness in his arm while working with a floor jack, and that his symptoms increased throughout the day. Although he testified that he reported all of his symptoms to Ms. Tungate at the time, she testified that he complained only of chest pains, and Jimmy Luckett testified that he was not informed of a July 27, 2000, injury.

This is not a case such as Cepero v. Fabricated Metals Corp., *supra*, in which the injured worker falsely denied a prior injury to the same part of his body that was injured at work. Cepero did so, not only in his initial testimony, but also in the history that he gave to physicians whose testimony of causation supported his award. Yet, the prior injury was severe enough to require three months' confinement in a wheel chair and to require surgery that had not been performed when he sustained the work-related injury to the same part of his body.

The claimant returned to his usual work about 10 days after the September, 1998, accident. After the 1999 motor vehicle accident, he was placed on light duty for about two weeks and then returned to full duty. He completed chiropractic treatment a few months later. Although his cervical and lumbar conditions were occasionally symptomatic, there was no evidence that they affected his ability to work or required significant medical treatment; no evidence that a physician found herniated discs before July 27, 2000; and no evidence that a physician assigned a cervical or lumbar impairment or permanent restrictions at any time before July 27, 2000. Although the evidence would not have compelled findings that favored the claimant, it was not unreasonable for the ALJ to conclude that, despite its shortcomings, Dr. Patrick's testimony more accurately reflected the cause of the claimant's disability than the testimonies of Drs. Woods and Gleis. Nor was it unreasonable for the ALJ to reject the testimony from the employer's witnesses and to rely on the claimant's testimony that he reported all of his symptoms on that date.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Carl Brashear
Hoskins Law Offices, PLLC
P.O. Box 24564
Lexington, KY 40524-4564

COUNSEL FOR APPELLEE, JEFF HOOTS:

James D. Howes
Howes & Paige, PLLC
Watterson City West, Ste. 1020
1941 Bishop Lane
Louisville, KY 40218

COUNSEL FOR APPELLEE, PLASTIC PRODUCTS COMPANY, INC.,
AS INSURED BY LIBERTY MUTUAL INSURANCE COMPANY:

Jane Ann Pancake
Ferreri & Fogle
203 Speed Building
333 Guthrie Green
Louisville, KY 40202