

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-001437-MR

FAIRBANKS COAL COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
CLAIM NO. WC-90-47122

RUDELL G. COLLINS;  
BONNIE C. KITTINGER,  
Administrative Law Judge; and  
WORKERS' COMPENSATION BOARD

APPELLEES

### OPINION

### AFFIRMING

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BEFORE: GUIDUGLI, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: Fairbanks Coal Company, Inc. appeals from a Workers' Compensation Board decision which affirmed an Administrative Law Judge's opinion and award in favor of Rudell G. Collins. The ALJ determined that Collins has a 25% functional impairment as the result of a work-related injury sustained in July of 2000. Our function upon review is to correct the Board only when we perceive that 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.®  
Because we believe the Board has committed no such error in this  
case, we adopt as our own its opinion, set forth below:

Lovan, Chairman. Fairbanks believes the ALJ failed to  
make sufficient findings to support her conclusion,  
believes the credible evidence does not establish an  
injury as that is presently defined, believes the ALJ  
erred in picking from parts of various witnesses  
testimony believes the ALJ substituted her medical  
judg[.]ment for that of the expert witnesses, and  
generally believes the ALJ picked the wrong witnesses to  
rely upon.

On July 24, 2000, Collins was operating a dozer  
for Fairbanks when he apparently uprooted a tree,  
throwing the dozer off balance, pitching him up in the  
air and back down against the seat. It was such a great  
force that bolts on the back of the dozer seat were  
broken according to his testimony. He injured his back  
and neck and allegedly developed psychological problems  
as a result of this event and its bringing to light an  
occurrence of approximately five years previously in  
which a friend of his was killed and he allegedly  
witnessed the incident. According to Collins'[s]  
testimony, immediately after the incident he saw a  
chiropractor and then his family physician, Dr. [Van S.]

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<sup>1</sup> Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685,  
687-688 (1992).

Breeding. He continues to complain of neck and back pain as well as flashbacks to the incident, fear of operating a dozer, anxiety and generally believes he could not engage in any working activities. He continues to be seen and treated both physiologically and psychologically.

The medical evidence comes from Drs. Van Breeding, Ashok Jain, William Brooks, Christa Muckenhausen, David Shraberg and Thomas Menke.

Since the ALJ provided a sufficient summarization of the medical testimony as it relates to the instant action, we adopt it herein by reference as follows:

3. Immediately after the claimed injury, [Collins] saw his family physician, Dr. Van S. Breeding. Dr. [B]reeding referred plaintiff to Dr. Ashok Jain, because of flashbacks, which plaintiff described as relating back to an injury in 1996 when a relative and co-worker was injured on a dozer near him and later died from the injuries. According to Dr. Breeding's August 2, 2000, notes, {Collins} stated that he was working on a dozer which almost flipped over, injuring his neck. Plaintiff was now having post traumatic stress, lots of crying, anxiety, depression[] and neck pain. In October of 2000, Dr.

Breeding also referred [Collins] to Dr. William Brooks, a neurosurgeon, because of persistent neck pain and headaches. Dr. Breeding continued to see [Collins] for the persistent neck and back pain, headaches, anxiety and depression.

4. As [Fairbanks] has pointed out, Dr. Breeding's treatment of [Collins] for neck and back pain, and anxiety, did not begin with this injury. As early as May 13, 1989, Dr. Breeding's notes indicate that [Collins] complained of lower, middle and upper back pain and popping of his neck on flexion and extension. On September 21, 1998, Dr. Breeding states that [Collins]'s lower back pain resolved after seeking [sic] a chiropractor. On March 3, 1999, [Collins] saw Dr. Breeding following a motor vehicle accident the date before. Dr. Breeding noted diffuse musculoskeletal pain, back strain[] and mild concussion. He referred [Collins] to a chiropractor and on March 10, 1999, reported that the pain in [Collins]'s neck was much improved. On April 16, 1999, Dr. Breeding's physician assistant noted [Collins]'s left hip pain and stated that he was seeing a chiropractor with no improvement. On May 3,

1999, Dr. Breeding saw [Collins] for lower back pain and neck pain secondary to the motor vehicle accident, and the pain was worse. Visits on 6/1/99, 7/19/99, 7/27/99, 8/16/99, 10/11/99[] and 11/17/99 all describe persistent neck or back pain. On January 12, 2000, Dr. Breeding's notes describe myofascial pain and state that [Collins] has returned to work. [Collins]'s affidavit filed on August 22, 2001, states that by this [time Collins] had returned to work with [Fairbanks]. On April 5, 2000, [Collins] saw Dr. Breeding for shortness of breath, a tight chest[] and night sweats. On April 19, 2000, Dr. Breeding noted back pain and on May 3, 2000, [Collins] had shortness of breath, wheezing, asthma[] and an anxiety attack. On May 31, 2000, Dr. Breeding noted chronic lower back pain, insomnia [] and anxiety disorder with panic attacks. This visit was approximately two months before the July 24, 2000, injury.

5. Except for Dr. Breeding's two office notes regarding anxiety and a panic attack, there is no indication that [Collins] received any psychiatric treatment prior to the injury of July 24, 2000. Dr. Jain first saw [Collins] on July 25, 2000, and diagnosed post traumatic

stress disorder, and major depressive disorder, which was severe and recurrent. Dr. Jain saw [Collins] at least a dozen more times over the next year, and, most of the time, noted some improvement in [Collins]'s mood and sleep pattern, however, at least three visits describe [Collins] as being nervous, jittery, shaky, depressed[] or crying. In a letter to the Disability Determination Services, as part of [Collins]'s social security disability claim, Dr. Jain stated that [Collins] is permanently disabled to hold any significant job. Dr. Jain does not state that [Collins]'s current condition is all related to the July 24, 2000, work injury.

6. Dr. William Brooks, who saw [Collins] on referral from Dr. Breeding, stated that [Collins] did not have radicular symptoms as of October 30, 2000, and that his symptoms were progressive over a five year period with exacerbation on July 24, 2000. Dr. Brooks also noted palpable popping in [Collins]'s neck, curtailment of flexion, extension, lateral rotation[] and lateral bending of the cervical spine without muscular spasm. Dr. Brooks interpreted an MRI and bone scan on November 17, 2000, as being normal.

7. In addition to medical reports and records from [Collins]'s treating physicians, reports have been submitted from four doctors who examined [Collins] in connection with this claim. Dr. Christa Muckenhausen examined [Collins] on June 11, 2001, and diagnosed status post head and neck injuries on July 24, 2000, with subsequent severe depression and anxiety, post traumatic stress disorder, neck pain with cervical radiculopathy, headaches[] and neck strain. Dr. Muckenhausen assessed a 10% impairment of the whole person broken down to 8% impairment of the cervical spine and 13% impairment to the lumbar spine. She stated he did not have an active impairment prior to the injury of July 24, 2000, and imposed lifting restrictions and other restrictions that would preclude [Collins] from returning to his past type of work. Although Dr. Muchenhausen described various symptoms of depression, including [Collins] crying, she stated that there was no symptom magnification.

8. Dr. David Shraberg examined [Collins] on August 20, 2001, and noted that [Collins] reported significant anxiety and depression. Dr. Shraberg mistakenly thought that [Collins] stopped working five years ago after the

accident which resulted in the death of his relative and co-worker. Dr. Shraberg stated that [Collins] is likely to be pre-occupied with worries about his health, that he is insecure and anxious, and these worries are likely to have restricted his activities of daily living. He also reported symptom magnification. Although Dr. Shraberg stated that [Collins] has some elements of post traumatic stress disorder, he noted that this diagnosis had been true for over five years. Dr. Shraberg assessed an impairment rating of approximately 5% based on a non-physical, psychological injury of 5 years ago rather than the most recent injury of July 24, 2000.

9. The final report from an examining physician for this compensation claim is the report of Dr. Thomas Menke, an orthopedic surgeon who examined [Collins] on January 18, 2001. Dr. Menke reviewed the MRI of November 17, 2000, which Dr. Brooks obtained, and saw a small midline bulge at C7-T1, but stated that the MRI was essentially normal for [Collins]'s age. Dr. Menke opined that [Collins] was at maximum medical improvement but should have lifting restrictions for approximately six weeks to allow his body to be reconditioned.

Dr. Menke did not believe [Collins] would have a permanent impairment and stated that with regard to [Collins]'s neck and low back, he could return to work.

10. The only other medical report filed on behalf of [Fairbanks] is an emergency room report dated March 2, 1999, showing that [Collins] complained of lower back pain, neck pain[] and left flank pain following a motor vehicle accident.

. . . We would initially acknowledge that in order to have an injury as it is now defined in [Kentucky Revised Statutes [KRS]] 342.0011(1), that injury must be evidenced by objective medical findings. Although Fairbanks rests much of its argument on Gibbs v. Premiere Scale Company,<sup>[2]</sup> simultaneously with the issuance of that opinion the Supreme Court also issued a decision in Staples v. Diana Konvelski.<sup>[3]</sup> When reading those cases together, it is not, as argued by Fairbanks, a requirement that some specialized test, such as an MRI, establish the existence of an injury. Nor is it necessary for the impairment rating itself to be based upon objective medical findings. Rather, the impairment rating is based upon the AMA Guides while the existence

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<sup>2</sup> Ky., 50 S.W.3d 754 (2001).

<sup>3</sup> Ky., 56 S.W.3d 412 (2001).

or nonexistence of an injury must rest upon objective medical findings. Several of the physicians who saw Collins found evidence of muscle spasm, tightness, radiculopathy, loss of range of motion and based upon their clinical examinations were of the opinion he had sustained an injury. While the MRIs may have been interpreted as within normal limits, these other observations by physicians, particularly Dr. Breeding and Dr. Muckenhausen, constitute objective medical findings.<sup>[4]</sup> Once an injury is established, then it is incumbent upon the physician in assessing an impairment rating to rely on the AMA Guides.

On the physiological portion of this claim, the ALJ relied upon Dr. Muckenhausen. The ALJ also relied in part upon Dr. Breeding, who saw Collins both before and after the accident at issue herein. It is true that Dr. Breeding's records reflect a lengthy period of treatment and complaints for cervical and lumbar spine problems dating to a 1998 vehicular accident. However, Dr. Breeding in a letter introduced into evidence affirmatively stated the present problems being experienced by Collins were related to the work incident. Although the evidence from Dr. Muchenhausen would be subject to impeachment as to whether or not she had a full history from Collins, that is nothing more than an issue of weight and credibility and there is no mandate

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<sup>4</sup>

Id.

her opinion be disregarded.<sup>[5]</sup> Of course, the question of weight and credibility is for the ALJ and not [the] Board [or this Court].<sup>[6]</sup>

As to the psychiatric impairment, Fairbanks challenges the ALJ's assessment of causation as relating to Collins' most recent injury. All of the physicians involved who discussed this condition acknowledged there was an element of the post-traumatic stress disorder that relates back to an event in 1997. However, again Dr. Breeding and Dr. Muckenhausen, and to an extent Dr. Jain, believed the most recent occurrence brought this to a point that it impacted Collins occupationally. That there may have been a pre-existing event that set the individual up for further problems does not prohibit a finding of work causation.<sup>[7]</sup>

Fairbanks also is of the opinion this [Court] should no longer allow ALJs to cherry pick from the evidence. Presumably Fairbanks is discussing the concept that it is within the authority of an ALJ/factfinder to pick and choose from the evidence, including believing a part of a witness's testimony while disregarding other parts. Unfortunately for Fairbanks, this principle is

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<sup>5</sup> Osborne v. Pepsi Cola, Ky., 816 S.W.2d 643 (1991).

<sup>6</sup> Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971).

<sup>7</sup> See Lexington-Fayette Urban County Government v. West, Ky., 42 S.W.3d 564 (2001).

[firmly established by the] courts.<sup>8</sup> As it related to the issue of causation on the psychological disorder, the ALJ relied upon Drs. Breeding, Muckenhausen and Jain, and, while in assessing impairment, relied upon the impairment rating assessed by Dr. Shraberg. That was her right in accordance with Republic Steel Corp. v. Justice and Magic Coal Co. v. Fox. Whether we would have reached the same conclusion is irrelevant. However, the concept of picking portions of the evidence is not as fallacious as Fairbanks would want us to believe. The determination of causation involves a multitude of factors, even in the realm of medical causation. On the other hand, the assessment of an impairment rating, as was done by Dr. Shraberg, is merely a function of a medical provider analyzing the AMA Guides and fitting the diagnosis within those Guides. Therefore, it was not, in our opinion, totally unreasonable for the ALJ to rely upon the causation testimony of Drs. Breeding, Muckenhausen and Jain, while at the same time rely[ing] upon the impairment rating assessed by Dr. Shraberg.

Ultimately, Fairbanks is simply disenchanted with the decision reached. It points to numerous discrepancies from Collins'[s] testimony and significant medical testimony from Drs. Menke, Brooks and Shraberg which, if relied upon by the ALJ, would have resulted in

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<sup>8</sup> See Republic Steel Corp. v. Justice, Ky., 464 S.W.2d 267 (1971), and Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000).

a decision in its favor. Fairbanks directs our attention to medical evidence of ongoing treatment as late as May of 2000 demonstrating chronic low back pain, anxiety and depression. It points to evidence from Dr. Breeding, who for the first time mentioned the alleged occurrence in August of 2000. Certainly there were discrepancies in the evidence. However, there was also evidence which, if believed by an ALJ, and it was, supports the ultimate conclusion. Dr. Muckenhausen found causation to be medically attributable to the dozer incident. So did Dr. Breeding. While the evidence would have certainly supported a contrary conclusion, the standard on appeal is not whether there was evidence that could have been believed by another but rather whether there was evidence of substantive and probative value that would support the ALJ.[<sup>9</sup>]

The Board's opinion is affirmed.

ALL CONCUR.

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<sup>9</sup> McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).