

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-002193-WC

GILVENS-HOUCHIN, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-68339

EDWIN R. PATTERSON;
WORKERS' COMPENSATION BOARD;
AND HON. RONALD E. JOHNSON,
ADMINISTRATIVE LAW JUDGE

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Gilvens-Houchin, Inc. ("GH"), petitions for a review of a decision of the Workers' Compensation Board which affirmed an order of an Administrative Law Judge ("ALJ"). The ALJ found Edwin R. Patterson ("Patterson") to be totally and permanently disabled and awarded benefits. GH asserts that the ALJ misinterpreted a stipulation entered into between the parties concerning Patterson's ability to work. Further, GH argues that the ALJ's erroneous reading of the stipulation

caused him to ignore actual medical evidence concerning Patterson's physical condition. Having thoroughly reviewed the record, the arguments presented herein, and the applicable law, we believe that the ALJ's determination was correct. We affirm.

Patterson was employed by GH as a truck driver. On September 11, 2000, Patterson sustained a work-related injury to his back and right hand. This injury occurred while Patterson, standing on top of a load of logs on the back of his truck, attempted to adjust some straps during a rainstorm. Patterson slipped off of the logs, fell approximately twelve feet and struck the truck bed before landing on the ground. Despite suffering these injuries, Patterson did not initially seek medical treatment. Rather, Patterson delivered the logs to Edinburg, Indiana, and sought medical attention two days later.

Patterson first sought medical treatment from Dr. Frederick Huffnagle on September 13, 2000. At that time, Patterson complained of lower back pain radiating into the right leg, pain between his shoulders, and pain in his right hand. Dr. Huffnagle discovered muscle spasms in Patterson's low back, as well as swelling in his right hand. X-rays of Patterson's hand and back revealed evidence of two compound fractures. Dr. Huffnagle diagnosed Patterson with acute back strain/sprain, prescribed pain medication, ordered physical therapy, and excused Patterson from work.

Patterson returned to Dr. Huffnagle on September 22, 2000. An MRI was conducted, revealing evidence of a bulging disc at the L4-5 level. As a result of this discovery, Dr. Huffnagle recommended surgery in the form of a percutaneous discectomy. This surgery was performed in January 2001.

Dr. Huffnagle's last treatment note, dated April 2, 2001, indicated that Patterson continued to exhibit stiffness of the lumbar spine, tightness of the hamstrings and was moving slowly. Dr. Huffnagle further stated that if Patterson returned to truck driving, he should engage in no lifting and no sitting for longer than four hours at a time. Dr. Huffnagle cleared Patterson to return to light work, but warned that the longer Patterson remained inactive, the lesser the probability that he could return to truck driving.

On July 27, 2001, Dr. David Changaris performed an independent medical examination on Patterson. During this evaluation, Patterson complained of constant pain in his low back, right leg, and right hand. Patterson also complained of a burning sensation in these areas, with weakness in his right hand and right leg, with periods of numbness and tingling occurring in both legs. Further, Patterson advised Dr. Changaris that his pain decreased initially after surgery, but had increased over time.

Dr. Changaris reviewed x-ray results that showed degenerative changes at C5-6, a compression fracture at T10 with mild scoliosis, a mild compression fracture and evidence of herniation at L4-5. Dr. Changaris also noted that Patterson had obtained treatment from Kleinert, Kutz and Associates for post-traumatic tenosynovitis of the right index finger and MP joint. Based upon his evaluation, Dr. Changaris diagnosed Patterson as suffering from post-laminectomy syndrome in the lumbar region, lumbar radiculopathy, right index finger pain with decreased range of motion and loss of strength, and mild depression. Dr. Changaris assigned Patterson a whole person impairment of between 29% and 31%. Of this impairment, Dr. Changaris assigned 10% to 13% to the lumbar injury, 5% to the hand injury, 12% to the loss of grip strength, and 5% to mild depression. Dr. Changaris attributed the entire impairment rating solely to Patterson's work-related accident. Dr. Changaris recommended Patterson not lift anything in excess of fifteen pounds, perform no repetitive bending, stooping, crawling, twisting or climbing, perform no repetitive use of his right hand, and not sit, stand or lie down for more than one to two hours at a time. Despite these limitations, Dr. Changaris opined that Patterson could return to work if his employment was tailored to light duty or sedentary work within these specific restrictions.

Dr. Martyn Goldman examined Patterson on April 23, 2000. During this evaluation, Dr. Goldman found some flattening of the lumbar spine and evidence of motion in the lower back. Patterson's lower extremities revealed bilateral "pes planus deformity." Regarding Patterson's right hand, Dr. Goldman confirmed a thickening of the MP joint of the index finger with limitation of flexion at that joint. A neurological examination uncovered tenderness of the hamstrings. Based upon this examination, Dr. Goldman diagnosed Patterson as suffering from post percutaneous discetomy at L4-5 and post status sprain of the MP joint of the right index finger with restricted residual flexion. Dr. Goldman assessed Patterson as suffering from a 10% permanent partial impairment and suggested a home exercise program. Dr. Goldman believed Patterson could return to work with restrictions of no lifting over twenty pounds and no bending forward with the knee straight.

Dr. Tsu-Men Tsai of Kleinert, Kutz and Associates treated Patterson for pain in his right hand. Dr. Tsai discovered swelling and tenderness of the MP joint of the right index finger. Consequently, Dr. Tsai diagnosed Patterson as suffering from tenosynovitis of the MP joint of the right index finger. Dr. Tsai indicated that Patterson could return to light duty work, but ordered no lifting in excess of twenty pounds, no frequent lifting or carrying in excess of ten pounds and avoid

constant repetitive pushing, pulling, pinching or gripping with his right hand.

Patterson testified by deposition and at the final hearing held before the ALJ on February 8, 2002. During the final hearing, Patterson continued to complain of pain and discomfort in his lower back, lower extremities, and his right hand. Patterson testified that, on a good day, he can lift up to twenty-five pounds. However, on a bad day, he can lift nothing. Further, Patterson testified that he continues to have difficulty sitting for long periods of time. In fact, while driving, Patterson stated that he must stop and exit his vehicle every forty to forty-five miles due to pain. Based upon his physical condition, Patterson testified that he has not been able to work as a truck driver. Further, Patterson asserted that his work-related injuries have "totally disrupted" his life, causing him to believe that he is unable to perform any type of work.

On April 15, 2002, the ALJ entered an order finding Patterson to be totally and permanently occupationally disabled. In making this finding, the ALJ listed that the parties stipulated that Patterson did not retain the physical capacity to work. This stipulation, however, is not entirely accurate. According to the benefit review conference order and memorandum entered November 30, 2001, the parties stipulated that Patterson

does not retain "the physical capacity to return to former work." The ALJ awarded Patterson total disability benefits in the amount of \$189.93 per week until Patterson attains the age of retirement. Following this ruling, GH filed a petition for reconsideration and pointed out the error in the ALJ's listing of the above referenced stipulation. The ALJ denied the petition for reconsideration. The Board affirmed, holding that the record supported the ALJ's determination that Patterson was totally and permanently disabled. This petition followed.

We note that our review of decisions from the Workers' Compensation Board is to be deferential. In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992), the Kentucky Supreme Court outlined this Court's role in the review process as follows:

The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the the [sic] 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.

It is well established that a claimant in a workers' compensation action bears the burden of proving every essential element of his cause of action. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Since Patterson was successful before the ALJ, the question on appeal is whether substantial evidence

supports the ALJ's conclusion. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence has been conclusively defined by Kentucky courts as evidence which, when taken alone or in light of all the evidence, has probative value to induce conviction in the mind of a reasonable person.

Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994), citing Kentucky State Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

As the finder of fact, the ALJ has the sole authority to assess and to evaluate the quality, character, and substance of the evidence. Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993). The 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 adversary party's total proof. Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal.

Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999). In order to reverse the decision of the ALJ, it must be shown that no substantial evidence exists to support his decision. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Guided by these legal principles, we now turn to GH's assertion of error.

GH argues that additional findings of fact are required because the ALJ misinterpreted a stipulation regarding

Patterson's ability to return to employment. In support of this argument, GH submits that the ALJ believed GH stipulated that Patterson could never return to work of any capacity. Thus, according to GH, the ALJ's decision was based on a misinterpretation of the evidence. We disagree.

Under Kentucky's workers' compensation law, awards for permanent, partial disability are a function of the worker's AMA impairment rating, the statutory multiplier for that rating, and whether the worker can return to the pre-injury employment. KRS 342.730(1)(b) and (c). Clearly, the ALJ has very limited discretion when determining the extent of a worker's permanent, partial disability. McNutt Construction v. Scott, Ky., 40 S.W.3d 854, 859 (2001). However, determining whether a particular worker has sustained a partial or total occupational disability as defined by KRS 342.0011(11) requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy. Ira A. Watson Dep't. Store v. Hamilton, Ky., 34 S.W.3d 48, 51 (2000).

In McNutt Construction, the Kentucky Supreme Court provided the analysis that must be used when determining whether a worker's occupational disability is partial or total. Consistent with factors described in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), the Supreme Court stated that an

individualized determination of a worker's ability to work after recovering from injury:

[N]ecessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be dependable and whether his physiological restrictions prohibit him from using the skills which are within his individual vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See Osborne v. Johnson, supra, at 803.

McNutt Construction, 40 S.W.3d at 860.

In this matter currently before us, we agree with the Board that substantial evidence exists supporting the ALJ's determination that Patterson is totally and permanently disabled. The ALJ applied the McNutt Construction principles and found that Patterson's past employment history primarily centered on being a long haul truck driver and a heavy equipment operator. Additionally, given the medical restrictions assigned to Patterson by Dr. Huffnagle, Dr. Changaris, Dr. Goldman, and Dr. Tsai, the ALJ reasonably concluded that Patterson would not find work consistently under normal employment conditions. Finally, since Patterson's vocational capacity is grounded

primarily within the trucking industry, the ALJ reasonably concluded that Patterson has no experience or training to perform any other type of work.

We also note that Patterson's own testimony supports the ALJ's findings. Patterson testified that he is not able to sit and drive a truck for extended periods of time. Patterson also stated that his physical condition prevents him from tightening straps or using tools. Further, Patterson noted that he is unable to squeeze anything with his right hand. While the ALJ must necessarily consider the worker's medical condition when determining the extent of the occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985); Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976). A worker's testimony is competent evidence of his physical condition and of the worker's ability to perform various activities both before and after being injured. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979). Here, after considering Patterson's age, education and experience, as well as the medical and testimonial evidence, the ALJ determined that Patterson could no longer engage in any gainful employment. Drawing this inference from the evidence is well within the

authority of an administrative law judge. Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1979).

Finally, we recognize that the ALJ misstated the parties' stipulation regarding Patterson's physical capacity to return to his "former" work. After reviewing the ALJ's written decision, we agree with the Board that this misstatement constitutes nothing more than harmless error. The ALJ's reliance upon this stipulation was only one factor in his overall determination. The record clearly shows that Patterson has primarily worked as either a truck driver or in the construction industry as a heavy equipment operator. Thus, whether stated as "former work" or simply as "work," the record clearly demonstrates that Patterson is no longer physically able to perform duties related to these jobs. Accordingly, we adjudge no error since the ALJ's decision is supported by substantial evidence.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, EDWIN R.
PATTERSON:

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