

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-002238-WC

CITY OF HENDERSON FIRE DEPARTMENT

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 01-WC-69403

NATHAN E. STONE; HON. KEVIN KING,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE, BARBER AND DYCHE, JUDGES.

DYCHE, JUDGE: The city of Henderson Fire Department appeals from a decision of the Workers' Compensation Board that affirmed an opinion of an administrative law judge. The ALJ awarded permanent partial disability benefits to Nathan E. Stone for a low-back injury, but refused to carve out a portion of Stone's disability as pre-existing active impairment. We affirm.

Stone is employed as a firefighter for the Henderson Fire Department. On October 28, 2001, Stone injured his lower

back while lifting a corpse onto a backboard. During this event, Stone felt a twinge in his back and, by the time his shift ended the next morning, he could barely walk. Stone also felt severe back pain that radiated into his left leg. Stone underwent surgery after an MRI revealed a large, herniated disc. After surgery, Stone returned to work with no restrictions.

The major issue litigated by the parties herein was whether Stone possessed a pre-existing active impairment. The Henderson Fire Department submitted evidence that Stone had back problems prior to the October 28, 2001 incident. First, Stone's supervisor, Lt. Jeffery Strader, testified that he worked with Stone on the day of the alleged injury. Lt. Strader indicated that Stone appeared to be fine during the shift, but Stone did mention that his back hurt. Lt. Strader also testified that, prior to October 28, 2001, Stone regularly complained of back pain. Further, Lt. Strader noted that Stone failed to mention that he felt the twinge in his back after lifting the corpse. Lt. Strader did not know of Stone's injury until the next day.

The employer also relied on the medical report of Dr. Bart Goldman. In his medical records, Dr. Goldman noted that Stone reported stiffness in his lower back one year prior to the lifting incident. Dr. Goldman also indicated that the stiffness was treated and appeared to have subsided until October 28, 2001. With the surgery, Dr. Goldman believed that Stone had a

lumbar DRE Category 3 impairment with objective signs of radiculopathy. Dr. Goldman assigned a 10% whole person impairment, but noted that Stone would have received a 5% whole person impairment based on non-verifiable radicular complaints had he been evaluated then. Thus, Stone's impairment rating for the October 28, 2001 injury was actually 5%.

Dr. Bryant Bloss also treated Stone for lower back pain in December 2000. Dr. Bloss diagnosed lumbar facet syndrome and degenerative disc disease and interpreted x-rays as showing minor spondylosis present at the L4/L5 and LD/S1 levels, with most of the charges being at L4/L5. Dr. Bloss' medical records indicate periods of improvement and exacerbation of Stone's condition during his treatment. Dr. Bloss treated Stone 28 times, but Stone complained of pain radiation in the lower extremities only five times. Two notes in January 2001 refer to lower back pain radiating in both posterior thighs, and notes from February 2001 indicate pain in the left hamstring area. The final six entries do not mention any radicular complaints.

During his testimony, Stone acknowledged having lower back problems from December 2000 to March 2001. Stone denied missing work during this period because of these back problems. In fact, on October 27, 2001, Stone lifted a five-year old and a seven-year old at the same time with no problem.

Dr. Harold C. Cannon was Stone's treating physician for this injury. Dr. Cannon's medical records noted that Stone complained of severe left leg pain that began after lifting a patient onto a gurney. Dr. Cannon diagnosed Stone with left L5/S1 herniation and recommended surgery, which was successfully performed on November 27, 2001. In a letter dated November 27, 2001, Dr. Cannon stated that Stone's condition apparently started with a lifting incident regarding a patient. On December 10, 2001, Dr. Cannon found that Stone's leg pain had improved and released Stone to return to work with no lifting over 20 pounds. Dr. Cannon, on January 22, 2002, released Stone to return to his duties with no restrictions.

Dr. Tinsely Stewart also examined Stone. Dr. Stewart's examination revealed decreased left ankle reflex, positive straight leg raising on the left, no spasm, minimal tenderness and decreased range of motion. Dr. Stewart assigned a 13% impairment rating to Stone.

After considering the evidence found within the record, the ALJ found that Stone proved that his back condition was related to the October 28, 2001 incident. In support of this conclusion, the ALJ stated that the record indicated that Stone did not have any serious lower back problems prior to the work-related injury. However, Stone's testimony, Dr. Cannon's medical records and Dr. Goldman's assessment of a 10% disability

demonstrated that Stone did suffer from lower back problems after October 28, 2001. While accepting Dr. Goldman's impairment rating as credible, the ALJ rejected Dr. Goldman's diagnosis of a 5% pre-existing condition. The ALJ ruled that Dr. Goldman's assessment of a pre-existing condition was not credible because:

[I]n order to qualify for a DRE Category 2 impairment, a patient must have findings "compatible with a specific injury." There is no indication in any of the medical records or in Stone's testimony that the problems Stone had in the winter of 2001 were the result of a specific injury. In fact, the records indicate that Stone's symptoms at that time appeared gradually and were not the result of a specific injury. Furthermore, the Administrative Law Judge notes that, on page 379, the Guides state that the ROM method is to be used when a[n] impairment is not caused by an injury. Therefore, Dr. Goldman [sic] use of the DRE to determine a pre-existing impairment is inappropriate. Finally, under the whole man doctrine, the Administrative Law Judge finds that the entirety of Stone's current impairment and related disability is related to the injury of October 28, 2001.

On appeal, the Board affirmed the ALJ's decision. This petition for review 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 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.

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 Powell 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 is 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. Hall's 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 ALJ's decision, it must be shown that no substantial evidence supports that decision. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Guided by these legal principles, we turn to this employer's assertions of error.

First, the Henderson Fire Department argues that the Board erred in affirming the ALJ's finding that Stone did not have a pre-existing impairment. Further, this employer asserts that the medical evidence from Dr. Goldman indicates that Stone had a 5% pre-existing impairment. We disagree.

The medical evidence presented to the ALJ simply does not compel a finding of a pre-existing impairment. Medical records from Dr. Bloss show that Stone had lumbar facet syndrome and degenerative lumbar disc disease, especially at L4/L5, in December 2000. Stone received treatment for back pain from December 2000 until March 2001. The ALJ further noted that Stone endured both periods of improvement and exacerbation of his symptoms during this treatment. There is, however, no medical evidence in the record establishing that Stone had complaints concerning his lower back from March 2001 until October 28, 2001. While there is conflicting lay testimony concerning whether Stone possessed continuing lower back

complaints after March 2001, the ALJ was free to choose which evidence was more convincing concerning this issue. Here, the ALJ gave more weight to Stone's testimony and found that Stone did not have a serious condition until the October injury.

The ALJ also considered a number of factors when he determined that Dr. Goldman's assessment was not credible. First, the ALJ was not persuaded that Stone continued to have radicular complaints following February 2001. Substantial medical evidence supported a finding that that the condition in October 2001 was a specific injury that had not previously caused Stone to complain of pain. Also, the testimony from Stone and his supervisors demonstrates that Stone had not missed work as a result of any back condition and had not received medical treatment for any extended period of time prior to October 28, 2001. Moreover, Dr. Goldman's opinion expresses mere speculation as to what impairment Stone might have received had he been rated in February 2001. Dr. Goldman's rating only indicated that radicular complaints could have existed eight months prior to the work injury. Moreover, no evidence exists supporting the presence of radicular complaints immediately prior to October 2001. From this evidence, we believe the ALJ could reasonably find Dr. Goldman's opinion lacks credibility. Thus, the Board correctly found that the evidence does not compel a finding of any prior disability.

The Henderson Fire Department also argues that the ALJ improperly conducted an independent analysis of the AMA Guides in assessing weight and credibility to be accorded to Dr. Goldman's assessment of a pre-existing impairment. We disagree.

In Kentucky, the process of determining permanent partial disability benefits begins with an impairment rating under the AMA Guides. KRS 342.730(1)(b). The assignment of an impairment rating under the AMA Guides is a medical finding. Generally, ALJs are prohibited from determining whether a physician's calculation of impairment is valid upon an independent review of the AMA Guides. See Newberg v. Garrett, 858 S.W.2d 181 (1993); Wright v. Hopgood Mining, Ky., 832 S.W.2d 884 (1992); Watkins v. Ampak Mining Co., Ky. App. 834 S.W.2d 699 (1992). Accordingly, the ALJ cannot independently calculate an impairment rating or recalculate the rating of a particular physician in order to arrive at a new disability rating.

Here, the ALJ did not recalculate any disability rating Dr. Goldman assigned to Stone. Rather, the ALJ accepted Dr. Goldman's whole body assessment rating and conducted his own review of the AMA Guides to determine only if Dr. Goldman's assessment of a 5% pre-existing active disability corresponded with the accepted methods of determining a worker's impairment rating. This review by the ALJ is proper since the evidence herein provided no indication of any prior, specific injuries to

Stone's back. In fact, Dr. Goldman's assessment rating was subject to further scrutiny after the ALJ found that Stone's prior back condition appeared gradually and was not caused by a specific injury. At this point, the ALJ reviewed the AMA Guides and determined that Dr. Goldman used the DRE method instead of the preferred range of motion method to determine Stone's pre-existing impairment rating. No court in this Commonwealth has ruled that an ALJ is denied this much authority. Simply because the application of the AMA Guides is medical in nature does not prevent an ALJ from reviewing the AMA Guides to ensure that a physician used the correct method to assess a worker's disability rating. To rule otherwise not only defies common sense, but strips the ALJ of his authority to determine the weight and credibility to be accorded to any physician's testimony concerning a disability impairment rating. Thus, we believe the ALJ properly rejected Dr. Goldman's assessment of Stone's pre-existing active impairment.

The judgment of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John C. Morton
Rebecca L. Briggs
MORTON & BACH
Henderson, Kentucky

BRIEF FOR APPELLEE:

Robert M. Lindsay
SEGAL, STEWART, CUTLER, LINDSAY,
JANES & BERRY
Louisville, Kentucky