

RENDERED: APRIL 22, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001927-WC

JAMES NICHOLSON

APPELLANT

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
v. ACTION NOS. WC-03-01289 AND WC-03-01297

AMERICAN GREETING CARDS; HON. J.  
LANDON OVERFIELD, ADMINISTRATIVE LAW  
JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

### OPINION AFFIRMING

\*\* \*\* \* \* \*

BEFORE: HENRY AND VANMETER JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

HENRY, JUDGE: The Appellant, James Nicholson, appeals from the opinion of the Workers' Compensation Board affirming an Administrative Law Judge's dismissal of his claims.

---

<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

Nicholson is a 55 year old man with a twelfth grade education, who was formerly an employee of American Greeting Cards. He worked at American Greeting Cards from 1973 until November 16, 2001, when the Corbin, Kentucky plant shut down. In July of 2003, Nicholson filed an application for Workers' Compensation benefits for injuries alleged to have occurred in November of 2001 and July of 2001. Nicholson claimed a work related knee injury for July 12, 2001, and a cumulative trauma injury to the majority of his body manifesting on November 15, 2001. Nicholson admitted to sustaining a back injury in March of 1997 when he slipped in an icy parking lot.

Nicholson was examined separately by three physicians in 2003; Drs. Christa Muckenhausen, Kenneth Graulich and David Muffly. Dr. Muckenhausen, a neurologist, performed an examination of Nicholson in which she found several work related medical conditions. She gave Nicholson a functional impairment rating of 57% and restricted him to lifting no more than 10 pounds.

Another neurologist, Dr. Graulich, examined Nicholson and found right knee pain, low back pain, neck pain, multiple joint pain complaints and possible carpal tunnel syndrome, all of which he attributed to age related arthritis. Dr. Graulich gave Nicholson a 0% impairment rating.

Finally, an orthopedic specialist, Dr. Muffly, examined Nicholson. He diagnosed the existence of lumbar degenerative disc disease and right knee osteoarthritis. He further diagnosed no cumulative injury and found 0% impairment. He restricted Nicholson to lifting not more than 50 pounds.

In 2004, an Administrative Law Judge determined that Nicholson had failed to establish a work related injury under KRS<sup>2</sup> chapter 342, and had also failed to give timely notice of the claim. The Workers' Compensation Board affirmed the determination in August of 2004. Nicholson has appealed the prior decision of dismissal, arguing that the ALJ erred in its factual evaluation of his injuries.

To succeed on appeal Nicholson must demonstrate that the evidence compels a finding in his favor, and if there is substantial evidence to support the opinion and order of the Board, this court must affirm. Special Fund v. Francis, 708 S.W.2d 641, 643-44 (Ky. 1986). The ALJ has been described by the Kentucky Supreme Court as having sole discretion to judge the weight to be properly accorded evidence presented to it. Miller v. East Kentucky Beverage/Pepsico, Inc. 951 S.W.2d 329, 331 (Ky. 1997); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985); Pruit v. Bugg Brothers, 547 S.W.2d 123, 124 (Ky. 1977).

---

<sup>2</sup> Kentucky Revised Statutes.

Nicholson has argued that the ALJ erred in not accepting the medical opinions of Dr. Muckenhausen concerning work related impairment in this case. Nicholson fails to address the existence of the two other physicians who made contrary assessments. The ALJ could have chosen to follow the opinion of Dr. Muckenhausen, but instead found the reports of Drs. Graulich and Muffly more persuasive.

As noted above, this Court does not have the authority to substitute its assessment of the facts for that of the ALJ, unless there exists a lack of substantial evidence. The medical reports of Drs. Graulich and Muffly constitute substantial evidence. The fact that contrary evidence from Dr. Muckenhausen exists as well is largely irrelevant. This Court's deferential role towards the fact finding of the ALJ does not change simply because of the existence of contrary medical evidence. In McCloud v. Beth-Elkhorn Corporation, 514 S.W.2d 46, (Ky.App. 1974), this Court reviewed a similar case involving the opinions of nine physicians. The ALJ accepted the opinions of three physicians and chose not to follow the contradictory opinions of the other six. Id. This Court found that the issue was not whether the opinions of the three should have been more persuasive than those of the six that were not accepted. Id. at 47. The only issue was whether the opinions of the three

doctors provided a "firm basis" for the conclusions of the finder of fact. Id.

Whether or not this Court would have reviewed the evidence in the same way as the ALJ is irrelevant. As noted in Three Point Coal Co. v. Moser, 298 Ky. 868, 875; 184 S.W.2d 242, 245 (Ky. 1944), even if a reviewing court disagrees with the findings of an ALJ, it cannot overturn its opinion unless the evidence used is not substantial. The Court wrote:

We must admit that the proof upon which the Board made its finding... is not of the most satisfactory character, yet we are bound by our well recognized rule, to the effect that if there is any evidence of a substantial probative nature tending to support the Board's conclusion, this court is without authority to substitute its findings of fact for that of the Board. Id.

The evidence relied upon by the ALJ was substantial in this case. The decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Monica Rice Smith  
Hyden, Kentucky

BRIEF FOR APPELLEE:

W. Barry Lewis  
Hazard, Kentucky