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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000042-WC

CHARLES SHOEMAKER — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-90031

IRVING MATERIALS, INC.,
HON. IRENE STEEN, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

HENRY, JUDGE: Charles Shoemaker appeals from an opinion of the Workers' Compensation Board affirming the decision of the Administrative Law Judge (ALJ), which awarded Shoemaker benefits but denied any award resulting from injuries to his cervical spine, which he claims resulted from the same accident. We affirm.

On May 28, 2001, Shoemaker was driving a concrete truck for Irving Materials, Inc., (IMI), when a front tire blew,

causing Shoemaker to lose control. The truck left the roadway and turned onto its side. Shoemaker sustained injuries including fractured ribs and compression fractures of some thoracic vertebrae. Shoemaker was able to return to work at IMI on August 27, 2001.

In February 2002 Shoemaker went to Dr. Paul Rice complaining of headaches, neck pain and shoulder pain. Dr. Rice referred Shoemaker to Dr. John Harpring. After further testing Dr. Harpring diagnosed cervical spondylosis[1] and cervical stenosis[2]. On January 24, 2003, Dr. Harpring and Dr. Mitchell Campbell performed an anterior cervical discectomy[3] and fusion of Shoemaker's C5-6 and C6-7 vertebrae. Shoemaker returned to full-time work at IMI on May 1, 2003. In July, 2003, Shoemaker resigned his job at IMI and moved to Tennessee. Dr. Harpring released Shoemaker from his care without work restrictions on July 30, 2003.

The ALJ thoroughly reviewed the medical and lay evidence and awarded Shoemaker benefits based on the 8% impairment rating assessed by Dr. Gleis. Neither Dr. Gleis nor Dr. Schiller (another reviewing physician) were persuaded that

[1]Any of various degenerative diseases of the spine.

[2]Narrowing of the diameter of an opening or orifice; in this case narrowing of the opening of the cervical vertebrae.

[3]Surgical removal of the intervertebral disc, a tough elastic structure between the vertebrae.

Shoemaker's neck problems resulted from the May 28, 2001 accident. Both believed that the damage to Shoemaker's cervical spine most likely resulted from the effect of the natural aging process on Shoemaker's degenerative cervical disc disease. The Worker's Compensation Board affirmed the decision of the ALJ, and this appeal followed.

On appeal Shoemaker urges us to reverse the decision of the Board because he claims that the medical opinions of Dr. Gleis and Dr. Schiller, upon which the ALJ relied, are "fatally flawed and therefore not credible". He also claims that the ALJ inappropriately drew medical conclusions beyond the scope of the evidence, and therefore erred as a matter of law in determining the medical cause of Shoemaker's cervical condition.

"The function of further review of the [Workers' Compensation Board] in the Court of Appeals is to correct the Board only where the 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". Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992). In reviewing decisions of the Board in which the claimant was unsuccessful, "the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor". Wolf Creek Collieries v. Crum, 673

S.W.2d 735, 736 (Ky.App. 1984). Not only does the ALJ have sole authority to determine the quality, character and substance of the evidence, Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993, citing Paramount Foods, Inc., v. Burkhardt, 695 S.W.2d 418 (Ky. 1985), but also to judge the weight and inferences to be taken therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 331 (Ky. 1997). The ALJ may reject any testimony, and may believe or disbelieve various parts of the evidence. Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000), citing Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). The same is true of medical evidence, including conflicting testimony by physicians. Pruitt v. Bugg Bros., 547 S.W.2d 123, 125 (Ky. 1977). Having reviewed the record and the decisions of the ALJ and the Board, we find no flagrant error in assessing the evidence, but rather a choice between conflicting evidence by the ALJ, which we have no authority to disturb. See Square D. Co. v Tipton, at 309.

The basis of Shoemaker's argument that the ALJ drew medical conclusions beyond the scope of the evidence, and therefore erred in the determination of medical causation of Shoemaker's medical condition, is found in the following statement from the ALJ's findings of fact:

> It was noted that Petitioner had been brought to the hospital in a soft cervical

> collar, however, that appears to be pretty well standard MO after a traumatic event.

This sentence occurs in the middle of a paragraph in which the ALJ thoroughly discusses Shoemaker's medical findings which were reported shortly after his accident. The gist of this argument seems to be that the statement referred to above indicates that the ALJ wrongfully disregarded evidence of Shoemaker's neck injury. Regarding the cervical spine complaint, the ALJ found that although Shoemaker was brought to the hospital in a soft cervical collar, the contemporaneous medical records do not indicate that he complained of neck pain or of an injury to his neck, nor do they contain a medical diagnosis of a cervical spine injury resulting from the accident. When read in their entirety the findings of fact reflect a careful weighing of the available medical evidence. The comment complained of is much more in the nature of a passing remark than a "medical conclusion". Weighing the evidence, and deciding which inferences to take therefrom, is the job of the ALJ. Miller v. East Kentucky Beverage/Pepsico, at 331; Magic Coal Co. v. Fox, at 96. The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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