

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-000737-WC

WESLEY TYREE

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-04-00367

YELLOW TRANSPORTATION/YELLOW  
FREIGHT SYSTEMS AND  
HON. J. LANDON OVERFIELD,  
ADMINISTRATIVE LAW JUDGE;  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KNOPF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.<sup>1</sup>

ROSENBLUM, SENIOR JUDGE: Wesley Tyree appeals from an opinion of the Workers' Compensation Board dismissing his claim for permanent disability benefits and future medical expense against the Yellow Transportation/Yellow Freight Systems. He contends that the Board erred when it held that objective medical evidence could be disregarded as a result of the Administrative

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

Law Judge's conclusion that Tyree's testimony and information provided to the medical experts was unreliable. Because it is within the ALJ's discretion as the fact-finder to determine the credibility of a witness, including the claimant, we affirm.

The parties stipulated that on July 25, 2003, during the scope of his employment with Yellow Transportation, Tyree suffered a work related injury and that Yellow Transportation received due and timely notice of the injury. It was further stipulated that Tyree is capable of returning to his former work and did return to work on October 8, 2003, at a wage equal to that earned prior to his injury. Tyree's date of birth is April 3, 1960, and he has obtained a G.E.D. and commercial drivers' license.

On the date of his injury, Tyree was delivering two connected trailers, referred to as "pups", to a Louisville customer. While attempting to set a dolly to the first emptied pup, his foot slipped and he immediately experienced low back pain. Tyree notified his dispatcher, Jerry McKinley of the injury and the Yellow Transportation terminal manager, Bill Shaw, arrived at the location and transported Tyree to the Concentra Medical Center where he was examined by Dr. David Miller.

On July 28, 2003, Tyree was fired from his employment at Yellow Transportation for allegedly falsifying his workers'

compensation claim. This suspicion arose from an alleged statement by Tyree to McKinley that if required to deliver the trailers, he would injure himself. Tyree, a member of the Teamsters Union, was reinstated following a grievance hearing and returned to work on October 8, 2003. Tyree testified that while off work, he was treated by Dr. George Estill who treated him with pain and anti-inflammatory medications and referred him to an orthopedic surgeon, Dr. William Sligar. Tyree described his symptoms as pain in the lower back and with a constant ache aggravated by twisting movements. At the hearing in August 2004, Tyree stated that he continued to have low back pain and sitting for prolonged periods increased his symptoms. He complained of difficulty sleeping and takes 200 mg. of Advil once or twice daily.

The medical testimony consisted of reports, records, and/or depositions from Dr. Miller, Dr. Estill, Dr. Sligar, Harrison County Hospital, Dr. Tinsely Stewart, and Dr. Robert Baker. Lay testimony included the testimony of Jerry McKinley.

A progress note from Dr. Miller states that he found no external trauma, no point tenderness, no palpable spasm, no spinal tenderness, and symmetric reflexes. He noted that Tyree had full range of motion. Dr. Miller diagnosed a lumbar strain and released Tyree to return to work the following day, July 26, 2003.

Dr. Estill first saw Tyree on July 28, 2003, and diagnosed lumbar spasm. He noted that there was no pain with straight leg raising to 90 degrees. He released Tyree to return to work on October 8, 2003.

Tyree first saw Dr. Sligar on September 17, 2003, and on physical examination, found a normal back with full range of motion and negative straight leg raising. X-rays revealed no abnormalities; an MRI scan, however, showed a bulging disc at L5-S1. He diagnosed a disc disruption and indicated that Tyree would have long-term back problems but released him to return to work on October 8, 2003.

The Harrison County Hospital records document that Tyree underwent a lumbar MRI scan on August 23, 2003, that demonstrated a minimal diffuse bulging of the L5-S1 annulus, but did not indicate disc herniation.

Two independent medical evaluations were conducted. The first was by Dr. Stewart who saw Tyree on March 9, 2004, and found Tyree to be at maximum medical improvement. He testified that because of Tyree's continued pain, under the AMA Guides to the Evaluation of Permanent Impairment, he had an 8% impairment to the body as a whole. Based on the history given, he stated that within reasonable medical probability, the work-related injury of July 25, 2003, caused Tyree's condition.

Dr. Baker performed an independent medical evaluation on August 5, 2004, and received the history of the injury and medical history. He noted that Tyree continued to complain of low back pain but the only significant finding on physical examination was Tyree's limited range of motion in the lumbar spine. The changes, seen on the MRI, Dr. Baker stated, are common for a 44-year-old heavy laborer. Based on the AMA Guides, he assessed Tyree's impairment rating at 5%. He imposed no restrictions on Tyree's physical activities.

Jerry McKinley testified that on the morning of the injury, Tyree told him that he did not want to deliver the trailers and, if he did, the gravel parking lot where he was to make the delivery "would be a good place for him to have a work injury." Later that morning, McKinley called Tyree at the delivery site and Tyree reported that he had injured himself. When asked how the injury occurred and if he needed medical assistance, Tyree responded "I don't know" and was unable to tell McKinley any of the details surrounding his injury.

Both Dr. Baker and Dr. Stewart found that Tyree has a limited range of motion and were the only experts asked to make an assessment based on the AMA Guides. To the extent that there are no other medical opinions as to Tyree's functional impairment, their opinions are uncontradicted; the ALJ, however, found that the physicians' findings are subjective and can not

support an award under the Workers' Compensation Act.

Furthermore, the ALJ found Tyree to be less than credible when describing his symptoms to the physicians. Based on the record and personal observations of Tyree, the ALJ's stated impression was that Tyree "would say whatever he deemed necessary to obtain an award." Therefore, the ALJ found Tyree "failed to sustain the burden of proving to the satisfaction of the trier of fact that the symptoms of which he complains, including those symptoms related to the medical experts, were in fact present."

Tyree filed a petition for review arguing that the ALJ erroneously concluded that a medical finding that a claimant suffers a limited range of motion is a subjective finding and that there is no evidence to support the ALJ's conclusion that he was malingering. As to the first issue, the Board agreed that the ALJ erroneously held that range of motion studies are always subjective and, as a matter of law, under KRS 342.0011(1), can not rise to the level of objective findings for the purpose of proving a work-related injury.

The term, "objective medical findings", is defined in KRS 342.0011(33) as "information gained through direct observation and testing of the patient applying objective or standardized methods." Our Supreme Court has explained that a diagnosis based solely on complaints of symptoms, is not an objective medical finding as used in the Act, but indicated that

a harmful change could be established, indirectly, through observations and testing applying objective or standardized methods. Gibbs v. Premier Scale Co., 50 S.W.3d 754 (Ky. 2001). Applying Gibbs, the Board reasoned that range of motion studies are generally considered objective medical findings:

[T]he AMA Guides unequivocally recognize ROM test results to be objective findings where testing is properly conducted. Asymmetric ROM measurements are plainly criteria under the DRE model of the AMA Guides for determining the validity of symptoms, and may be used solely on "muscle guarding" by a patient. Moreover, the AMA Guides, Fifth Edition, in certain instances, mandate use of the ROM model as the only viable alternative to the DRE method in verifying and measuring harmful changes to the human organism. While the AMA Guides speak in terms of "objective findings," rather than "objective medical findings," the results of the ROM testing nevertheless qualify as information gained through direct observation and/or testing by a physician applying objective or standardized methods.

Although the Board held that the results of the limited range of motion studies were objective findings that could support a finding of a work-related injury under KRS 342.0011(1), the Board nevertheless affirmed the ALJ's finding that Tyree had not been candid during the tests and in his testimony. The ALJ's finding, the Board held, was controlling and affirmed the denial of the claim for permanent disability benefits and future medical expenses.

Yellow Transportation did not file a cross-appeal challenging the Board's ruling that range of motion studies are generally considered objective medical findings and we find the result reach by the Board to be well reasoned. The issue, therefore, is whether the ALJ had the authority to reject the findings of the two independent evaluators on the basis of his conclusion that Tyree was not truthful during the testing procedure. We find that he did and affirm.

Although not argued as a basis for reversal, it has not gone unnoticed that Yellow Transportation stipulated that Tyree suffered a work-related injury and that the ALJ held Yellow Transportation bound by that stipulation for the purpose of awarding temporary disability benefits and medical expenses incurred as of the date of his return to work. While that holding may appear inconsistent with the denial of permanent partial disability benefits on the basis that Tyree failed to prove a "compensable injury", based on the current interpretation of the Workers' Compensation Act, the two holdings are easily reconciled.

Since the 1996 amendments to KRS 342.0011(1), the term "injury" has been interpreted to refer to the event that involves physical trauma and does not include the physical change itself. Coleman v. Emily Enterprises, Inc., 58 S.W.3d 459 (Ky. 2001). As noted by the ALJ, "there are many instances

where the injury, or the traumatic event, does not produce an injury evidenced by objective medical findings that would support an award for permanent partial disability." Yellow Transportation stipulated only that a work-related traumatic event occurred leaving the ALJ to determine whether Tyree suffered a permanent harmful change in the human organism evidenced by objective medical findings. Specifically reserved for the ALJ's determination was whether Tyree suffered an injury as defined in the Workers' Compensation Act.

The burden of persuasion is on the claimant to prove every element of a workers' compensation claim. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984). When the claimant has been unsuccessful before the Board, our standard of review is whether the evidence is so compelling as to require a finding in the claimant's favor. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). The ALJ, in its role as fact-finder, is free to judge the credibility of the testimony and may believe parts of the evidence and disbelieve other parts even though from that same witness or the same party's proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). The ALJ is not denied the discretion to determine the credibility of witnesses and weigh the evidence merely because the evidence is uncontradicted. If such evidence is rejected, however, a reasonable explanation for the rejection of such evidence is

required. Commonwealth v. Workers' Compensation Board, 697 S.W.2d 540 (Ky.App. 1985).

Tyree contends that the ALJ was required to find that he suffered a permanent impairment based on the uncontradicted findings of the two independent medical examiners that he suffers a functional disability pursuant to the AMA Guides. In Mengel v. Hawaiian-Tropic Northwest & Central, 618 S.W.2d 184, 186-187 (Ky.App. 1981), the court held that when the question is one properly within the province of medical experts the Board is not justified in disregarding the medical evidence; the ALJ, however, is not always deprived of the discretion to determine the weight to be given uncontradicted testimony. The medical testimony is conclusive only if the witness is disinterested, not discredited by other evidence, and the testimony is to a fact not improbable or in conflict with other evidence, and within the knowledge of the witness. Osborne v. Pepsi-Cola, 816 S.W.2d 643, 646 (Ky.1991). In Osborne, the court held that when a medical opinion is based solely on the patient's history, the "trier of fact is not constricted to a myopic view focusing only on the physicians' testimony. Other testimony bearing on the accuracy of the history may be considered". Id. at 647.

The ALJ did not, as Tyree suggests, disregard the medical experts' opinions relating to the functional impairment rating assigned Tyree under the AMA Guides. Under the

circumstances it was within the discretion of the ALJ and not within the province of the medical experts to determine Tyree's credibility. We agree with the Board that, although the results of range of motion tests are considered objective medical findings, the actual testing is a subjective procedure and requires the truthfulness and cooperation of the claimant. Tyree's credibility was brought into question through the testimony of Jerry McKinley and strongly suggested that Tyree had been less than credible concerning his injury. Additionally, Tyree's treating physicians found no limited range of motion. Most persuasive in upholding the ALJ's finding is his observation of Tyree from which he concluded that Tyree was not being truthful. We agree with the Board's ultimate conclusion that:

Unquestionably, in the case sub judice, after personally observing the petitioner's demeanor at (sic) hearing and closely scrutinizing the other evidence of record, the ALJ found Tyree's propensity for truthfulness to be wholly lacking in reliability. What is more, in this rare instance, loss of ROM constituted the lone physical dynamic supporting a harmful change to the human organism according to those expert witnesses who addressed the issue. Under these circumstances, absent any other objective medical finding to the contrary, we believe the overall veracity of the employee as gauged by the ALJ in his capacity as fact-finder, to be not only relevant, but controlling.

The opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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