

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001504-WC

GARY CLARK

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NOS. WC-03-77867 & WC-03-02236

ELMO GREER & SONS;  
HON. JOHN W. THACKER,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

HUDDLESTON, SENIOR JUDGE: Gary Clark seeks review by this Court of an opinion of the Workers' Compensation Board that affirmed an Administrative Law Judge's denial of his claim for temporary total disability (TTD) benefits for a neck and shoulder injury and for permanent partial disability (PPD) benefits, or in the alternative, medical benefits, for a lower back injury.

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

Clark is 56 years old, has at least a seventh-grade education, and has not obtained a GED. In 1967, Clark entered the Job Corps where he received training as a heavy equipment operator. Clark has engaged in such employment for most of his adult life. He sustained a work-related injury in 1985 when he jumped off a bulldozer and fractured a vertebra in his back. As a result, Clark received benefits for a 40% occupational disability.

Clark began working for Elmo Greer & Sons in 2000. Clark was on a job site on July 21, 2003, when he was struck from behind by a truck driven by a co-worker. Clark complained of back, shoulder, neck and chest pain. He was treated at a local emergency room and followed up with an orthopedic surgeon, Dr. Anbu Nadar. Clark's treatment with Dr. Nadar consisted of medication and physical therapy. Clark was also evaluated by a neurologist and diagnosed with a sprain injury of the neck, shoulder and low back. None of Clark's physicians recommended surgical intervention. In March 2004, Dr. Nadar assessed Clark's impairment at 5% back, 5% neck and 3% shoulder. Dr. Nadar also found Clark had work restrictions and would not be able to return to construction work.

Elmo Greer & Sons retained an orthopedic surgeon, Dr. Timothy R. Wagner, to evaluate Clark's impairment. Dr. Wagner found that Clark had 0% impairment and could return to work

without restrictions. He also opined that the low back injury was pre-existing.

Clark filed an Application for Resolution of Injury Claim with the Department of Workers' Claims on November 12, 2003. Both parties submitted extensive medical records for the ALJ's consideration. The two main issues on appeal concern the ALJ's determination that Clark was ineligible for TTD benefits relating to the neck and shoulder injury and ineligible for any benefits relating to his back injury.

We first address Clark's claim arising from his neck and shoulder injury. Clark argues he is entitled to TTD benefits from the day after the accident until he received an impairment rating from Dr. Nadar in March 2004. The ALJ found that Clark had failed to present any affirmative proof as to when he reached maximum medical improvement (MMI), thereby foreclosing TTD benefits. Consequently, the ALJ determined that Clark reached MMI on the day after the accident, and PPD benefits were payable from that date forward.

The AMA Guides define MMI as "[a] condition or state that is well stabilized and unlikely to change substantially in the next year with or without medical treatment. Over time there may be some change, however, further recovery or

deterioration is not anticipated.”<sup>2</sup>

The ALJ enjoys great discretion in determining what weight is to be given to evidence and in assessing the credibility of witnesses.<sup>3</sup> Furthermore, the Board will uphold the ALJ’s decision unless the evidence is so overwhelmingly in the claimant’s favor that no reasonable person could agree with the ALJ.<sup>4</sup> This Court gives deference to the Board’s decision and only intervenes when the Board commits a flagrant error resulting in gross injustice.<sup>5</sup>

In this case, the ALJ was free to weigh the evidence and to find that Clark was at MMI and unlikely to change with further treatment, thereby entitling Clark to immediate PPD benefits and no interim TTD benefits. Accordingly, we find no error in the ALJ’s or the Board’s reasoning.

Clark’s second claim relates to the denial of benefits for his back injury. The ALJ relied on the medical report of Dr. Wagner, which found no impairment to Clark’s back and related negative MRI findings to a pre-existing lower back injury. We agree with the Board’s findings affirming the ALJ.

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<sup>2</sup> *AMA Guides to the Evaluation of Permanent Impairment* 601 (Linda Cocchiarella & Gunnar B.J. Andersson, eds., 5th Ed. 2001).

<sup>3</sup> *Magic Coal Company v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

<sup>4</sup> *REO Mechanical v. Barnes*, 691 S.W.2d 224, 226 (Ky. App. 1985), *overruled on other grounds, Haddock v. Hopkinsville Coating Corp.*, 62 S.W.3d 387 (Ky. 2001).

<sup>5</sup> *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

Clark relies on *Derr Construction Co. v. Bennett*,<sup>6</sup> in which the Supreme Court said, “[l]iability for medical expenses requires only that an injury was caused by work and that medical treatment was necessitated by the injury.”<sup>7</sup> Clark’s reliance on this case is misplaced as there was no finding of injury to his back.

As the Board observed,

KRS 342.0011(1) defines ‘injury’ as a ‘work-related traumatic event . . . which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.’ The claimant must first prove the occurrence of an ‘injury’ before he may receive an award of income or medical benefits. Thus unless the evidence compels a finding that Clark sustained a harmful change to his lumbar spine as a proximate result of the work-related traumatic event at issue, the ALJ’s determination may not be disturbed.

Clark points to medical evidence as proof that his back injury is a result of the July 2003 accident. However, evidence merely supporting an alternate conclusion is not sufficient to justify reversal.<sup>8</sup>

We agree with the Board that the evidence supports the ALJ’s finding that Clark did not sustain an “injury” within the meaning of the statute. Accordingly, since there is no

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<sup>6</sup> 873 S.W.2d 824 (Ky. 1994).

<sup>7</sup> *Id.* at 827.

<sup>8</sup> *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000).

"injury," Clark is not entitled to medical benefits. There is no error in the Board's decision as a matter of law.

For the reasons stated herein, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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