

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001661-WC

PEARL SUE MCINTYRE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
CLAIM NO. WC-03-74409

PERKINS JOB CORP. A/K/A DESI;  
HON. ANDREW F. MANNO, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: The Administrative Law Judge (ALJ) denied Pearl Sue McIntyre's claim for workers' compensation benefits from a neck, back, arm, leg and possibly psychological injury occurring on September 2, 2003, when she tripped and fell on an open desk drawer. The ALJ held that McIntyre sustained a work-related physical injury to her left knee, neck and low back on September 2, 2003, but she did not sustain a physical injury to any other body part or a psychological injury. In addition, the

ALJ held that McIntyre was at maximum medical improvement for her physical injury and was not permanently impaired. And because he concluded that there was no permanent impairment, the ALJ held that there was no basis for an award of future medical treatment.

McIntyre appealed the ALJ's decision to the Workers' Compensation Board (the Board). In a 27-page opinion, after a thorough review of McIntyre's testimony and the medical evidence, the Board affirmed the decision of the ALJ. McIntyre now seeks review by this Court.

In this appeal, McIntyre argues that the evidence compels a finding that her condition is a result of a work-related injury. She contends that future medical benefits were proper under KRS 342.020. Moreover, McIntyre contends that the ALJ and the Board failed to properly consider objective medical evidence in determining the extent and duration of her potential disability. McIntyre points to the results of a diagnostic test (called an NCV/EMG) performed on her by a neurologist, Dr. Gutti, which looks for signs of nerve damage and/or muscle disease. She argues that the results of the test were abnormal with findings consistent with Left L5 radiculopathy and left tibial neuritis.

This Court's function when reviewing the Board's affirmance of a decision of the ALJ is to correct the Board only

where we perceive "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 Hosp. v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992). In this case, McIntyre had the burden of proof. If the ALJ finds against the person with the burden of proof, her burden on appeal is infinitely greater. See Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Because McIntyre had the burden of proof, she must do more than assert that there was some evidence of substance which would have justified a finding in her favor. See id. She must show that the evidence was such that the finding against her was unreasonable on the basis of reliable, probative, and material evidence contained in the whole record. See id.; KRS 342.285(2)(d). A finding that is unreasonable under the evidence presented is clearly erroneous and would compel a different finding. See id.

In the underlying administrative proceedings, the ALJ and the Board provided an extensive recitation of the medical evidence in this case. We will not repeat that evidence in this opinion other than to state that McIntyre relies on Dr. Gutti's report for her argument that the ALJ failed to properly consider the objective medical evidence in determining the extent and duration of McIntyre's potential disability. But the ALJ chose

to rely on the opinions of two other doctors -- Dr. Burgess, an orthopedic surgeon, and Dr. Kiefer, a neurosurgeon -- who found no basis for a permanent impairment rating as a result of her fall. And another doctor who performed an independent medical examination, Dr. Kriss, a neurosurgeon and spine specialist, found no correlation between Dr. Gutti's findings and McIntyre's clinical presentation. The ALJ found the opinions of Drs. Burgess, Kiefer and Kriss to be the most authoritative and the most persuasive.

Having reviewed the evidence and the arguments of the parties, we conclude that there was substantial evidence that McIntyre sustained no permanent disability as a result of the work-related injury and that a different finding was not compelled. Furthermore, in view of the evidence that the work-related incident caused no permanent change in McIntyre's physical condition as she reached maximum medical improvement six to eight weeks after the injury, there was substantial evidence to support the conclusion that no future medical benefits were warranted. See Robertson v. United Parcel Service, 64 S.W.3d 284, 287 (Ky. 2001).

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas W. Moak  
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Mark P. Niemi  
Ferreri & Fogle  
Lexington, Kentucky