

RENDERED: JULY 13, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002320-WC

ROBERT P. LEDFORD

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-02227

DANA CORPORATION; HON. W. BRUCE COWDEN,
ADMINISTRATIVE LAW JUDGE; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,¹ SENIOR
JUDGE.

BUCKINGHAM, SENIOR JUDGE: Robert P. Ledford petitions for the review of an
opinion of the Workers' Compensation Board (Board) that affirmed the decision of an

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

administrative law judge (ALJ) dismissing Ledford's workers' compensation claim against Dana Corporation. Ledford argues that the Board erred in affirming the ALJ's decision because his injury was supported by objective medical findings and a 12% impairment rating. Finding no error in the Board's decision, we affirm.

Ledford, who was born on February 26, 1957, began working as a product technician for Dana Corporation in 1999. He alleges that on January 11, 2002, he sustained a closed head injury as a result of being struck on the head while at work. He was treated at Dana Corporation's first aid station with an ice pack and returned to work and continued working without incident until April 11, 2002. On that day, Ledford was allegedly behaving strangely at work and was evaluated by Dana Corporation's physician's assistant. Ledford was referred to his family physician, who in turn referred him to Dr. Noel Reloj, a neurologist. Dr. Reloj diagnosed Ledford with post concussion syndrome, most likely caused by the alleged closed head injury. Further medical tests conducted on Ledford in the summer of 2002 showed he suffered no significant brain or vision abnormalities.²

In August 2002, Ledford saw Dr. James Burke, a psychologist, complaining of memory loss. Dr. Burke diagnosed Ledford as having work-related adjustment disorder with mixed anxiety and depressed mood. At a follow-up testing with Dr. Burke, Ledford scored in the above average range of intellectual functioning and had a memory

² Ledford alleges that Dr. Reloj opined that he suffered a work-related injury, ascribing a 12% functional impairment rating. However, Ledford does not cite in the record, nor do we find, where such evidence was admitted at the hearing before the ALJ. Dana Corporation contends that it received a record of the 12% functional impairment rating from its insurance carrier, but that Ledford did not file this record with his Application for Resolution of Injury Claim.

quotient on the Weschler Memory Scale was 100. Ledford was also tested and shown to be negative for the presence of brain dysfunction. At another follow-up examination, Ledford was diagnosed with significant work-related depression.

In July 2005, Dr. Kenneth Graulich evaluated Ledford at Dana Corporation's request for an independent medical examination. Dr. Graulich stated that Ledford showed no overt signs of head injury, suffered no significant anterograde or retrograde amnesia, and had an essentially normal neuropsychological examination. Dr. Graulich stated that Ledford's memory loss and worsening memory over time were not explainable in the context of the injury. Because of this, Dr. Graulich concluded that there was a significant psychological overlay to Ledford's continuing symptomatology.

Based on these findings, Dr. Graulich opined that Ledford would not warrant an impairment rating and could return to the type of work he previously performed. Dr. Graulich also felt that no future medical treatment was required for the work injury, but treatment might be required for the underlying psychopathology unrelated to the injury.

In December 2004, Ledford filed an "Application for Resolution of Injury Claim" seeking workers' compensation benefits for the injury. Dana Corporation ultimately denied Ledford's claim, claiming it did not receive proper notice of it until May 2005. After a hearing, the ALJ entered an order dismissing Ledford's claim for benefits, finding that Ledford's injury was not supported by objective medical evidence.

The Board affirmed the decision of the ALJ, although it did so for a different reason. First, the Board disagreed with the ALJ regarding whether Ledford had

introduced some evidence of objective medical findings to support his claim that he had suffered an injury. *See* Kentucky Revised Statute (KRS) 342.0011(33). However, the Board affirmed the ALJ's order dismissing Ledford's claim because Ledford had failed to introduce evidence of an impairment rating. *Citing Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000), the Board noted that absent an impairment rating there can be no award of benefits. This petition for review by Ledford followed.

Ledford argues that the Board erred in affirming the ALJ's decision because his neurologist assigned him a 12% impairment rating and Dana Corporation admitted that fact in the proceedings before the ALJ. We reject that argument for the reasons set forth below.

Ledford contends that on two occasions, “once by memorandum submitted to the [ALJ] and then in a brief submitted to the [Board], the Appellee herein, Dana Corporation, makes reference to the fact that . . . Dr. Relej” gave him a 12% impairment rating. Ledford argues that this amounted to a judicial admission on the part of Dana Corporation that should have been considered by the Board in making its decision. Ledford did not offer any evidence of his own to either the ALJ or the Board showing an impairment rating.

In Dana Corporation's brief to the ALJ, it stated that “Dr. Relej feels plaintiff has suffered a work-related injury and that he suffers from memory loss, confusion, and disorientation. He ascribed a 12% impairment rating.” Similarly, in Dana Corporation's brief to the Board, it stated, “[Ledford] did file Dr. Relej's report in which Dr. Relej expressed an opinion that [Ledford] had suffered a work-related injury and that

he suffered from memory loss, confusion, and disorientation, ascribing a 12% functional impairment rating.” Ledford does not cite, nor do we find, medical records from Dr. Reloj actually entered into evidence stating that Ledford suffered any impairment rating. Apparently, Dana Corporation erroneously believed that Ledford had filed such a medical report; however, in fact, he failed to do so.

The record on appeal does not include medical reports by Dr. Reloj that indicate an impairment rating. Our review is confined to matters properly made a part of the record below. *Baker v. Jones*, 199 S.W.3d 749, 753 (Ky.App. 2006)(citing *Fortney v. Elliott's Adm'r*, 273 S.W.2d 51, 52 (Ky. 1954)). As Ledford failed to properly make the 12% impairment rating issue a part of the record, we are unable to consider it.

Nevertheless, Ledford's argument that Dana's actions amount to a judicial admission still fails. Dana Corporation's statements in its briefs to the ALJ and Board regarding the alleged 12% impairment rating do not constitute a judicial admission. “A judicial admission is a formal act by a party in the course of a judicial proceeding which has the effect of waiving or dispensing with the necessity of producing evidence by the opponent and bars a party from disputing a proposition in question.” *Nolin Production Credit Association v. Canmer Deposit Bank*, 726 S.W.2d 693, 710 (Ky.App. 1986). Neither Dana Corporation's brief before the ALJ nor its brief before the Board can be regarded a formal act having the effect of waiving or dispensing with the necessity of producing evidence. Such evidence is Ledford's burden of producing in proving causation and that his injury was work-related. *See Armco Steel v. Lyons*, 561 S.W.2d

676 (Ky.App. 1978); KRS 342.0011(1). Therefore, Ledford failed to meet his burden, and the Board correctly affirmed the dismissal of his claim.

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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