

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000790-WC

PAUL CHAMBERLIN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-01946

HISWAY MARKETING COLLECTIBLES/
SCOTTS SAFETY & JANITORIAL SUPPLIES;
HON. MARCEL SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * * * * * * *

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Paul Chamberlin petitions for the review of an opinion of the Workers' Compensation Board (Board), entered March 14, 2007, affirming the decision of an Administrative Law Judge (ALJ) denying medical benefits following a

¹ Senior Judge John W. Graves sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

work-related injury. Chamberlin argues that the ALJ erred in finding that no objective medical evidence supported his claim for benefits. We affirm.

On January 9, 2004, Chamberlin was injured in a motor vehicle accident while working for Hisway Marketing Collectibles/Scotts Safety & Janitorial Supplies (Hisway). As a result of the accident, Chamberlin went to the local emergency room and was given injections for muscle spasms and pain. Later that same month, Chamberlin saw physicians at Summit Orthopedics and began physical therapy and pain medication. Over the next few months, Chamberlin visited several other doctors when his symptoms did not improve. Those doctors included Drs. Gilbert and Lingreen at the Spine and Brain Neurological Center. After reviewing an MRI scan, Dr. Gilbert recommended fusion surgery be performed on Chamberlin's cervical area. Chamberlin sought a second opinion from a Dr. Tibbs who encouraged him to wait at least eighteen months before having surgery. Chamberlin followed Dr. Tibbs advice and decided to wait, although he visited the Harrison Memorial Hospital emergency room in January, February, May, and June of 2004 complaining of neck pain. Chamberlin continued to work for Hisway until June 2005 at which time he went to work for another company.

On March 4, 2006, Lexington neurologist Kenneth Graulich performed an independent medical evaluation of Chamberlin on behalf of Hisway. Dr. Graulich diagnosed Chamberlin with a simple whiplash injury and further found no objective evidence for continuing impairment and placed him in DRE category I for 0% impairment rating. Dr. Graulich did not feel that Chamberlin required any future treatment beyond

home exercise. On May 19, 2006, at the behest of Hisway, Dr. Bart Olash performed a utilization review with respect to Chamberlin's February, May, and June 2004 emergency room visits, as well as various charges for lab work. After review of the medical records, Dr. Olash determined that neither the emergency room visits nor the lab studies were medically necessary or appropriate. Thereafter, Hisway refused further payment of Chamberlin's medical bills, including the disputed emergency room visits and lab work.

Chamberlin's claim against Hisway for benefits included the reports of his several doctors, all of whom described some degree of functional impairment. After reviewing the evidence, the ALJ found Dr. Graulich's testimony the most credible, determining "that there is no objective indication of permanent impairment." Chamberlin filed a Petition for Reconsideration that was denied on October 26, 2006. Following the denial, Chamberlin filed a timely appeal with the Board. On March 14, 2007, the Board affirmed the decision of the ALJ. This appeal followed.

Chamberlin argues that the ALJ erred when she found that there was no objective medical evidence supporting his impairment claim because she relied on the report of Dr. Graulich. We disagree.

Essentially, Chamberlin argues that his claim for benefits should have been granted because Hisway's only evidence concerning the absence of objective medical came from Dr. Graulich. Chamberlin avers that this is in direct opposition to his own treating physicians' assessments of his impairment. The Supreme Court of Kentucky, in *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985), held the fact-

finder, rather than the reviewing court, has sole discretion “to determine the quality, character and substance of the evidence presented” Furthermore, where there is conflicting medical testimony, an ALJ, as the finder of fact, may reject any testimony and believe or disbelieve various parts of the evidence. *See Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). So long as the ALJ's decision is supported by substantial evidence, the fact that contrary evidence in support of an opposite finding was presented is insufficient to reverse on appeal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974). In this case, although substantial evidence existed which could have supported a finding of disability, other substantial evidence clearly supported a finding to the contrary.

Chamberlin also argues that the ALJ erred by determining his emergency room visits were not compensable. Again, we disagree.

KRS² 342.020(1), in pertinent part, provides that “. . . the employer shall pay for the cure and relief from the effects of an injury . . . the medical, surgical, and hospital treatment . . . as may reasonably be required at the time of the injury and thereafter during disability” KRS 342.020(1) allows an injured employee to choose his own physician and to have whatever medical treatment is reasonably necessary for the cure and/or relief of his injury. *See Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). In *Square D Co.*, our Supreme Court discussed the factors under KRS 342.020(1) that an

² Kentucky Revised Statute.

ALJ must consider when determining the compensability of a medical procedure or treatment:

While the injured worker must be given great latitude in selecting the physician and treatment appropriate to her case, the worker's freedom of choice is not unfettered . . . [w]e believe . . . that [KRS 342.020(3)] relieves an employer of the obligation to pay for treatments or procedures that, regardless of the competence of the treating physician, are shown to be unproductive or outside the type of treatment generally accepted by the medical profession as reasonable in the injured worker's particular case. We also believe that such decisions should be made by the ALJs based on the particular facts and circumstances of each case, so long as there is substantial evidence to support the decision.

Id. at 309-10. In this case, we are of the opinion that the ALJ's decision that Chamberlin's emergency room visits were not compensable was based upon substantial evidence.

In its opinion affirming the ALJ's decision, the Board stated

Dr. Graulich's medical report provides substantial evidence to support the ALJ's conclusion. Dr. Graulich diagnosed simple whiplash injury to the cervical and lumbar spine without objective evidence of continuing impairment. . . . Substantial evidence also exists to support the ALJ's determination that [Chamberlin's emergency room visits are not compensable]. . . . In his utilization report, Dr. Olash noted the emergency room visits were not medically necessary or appropriate. Dr. Olash further noted that certainly by the time of the visits, Chamberlin's symptoms were chronic and there were no findings to suggest progression or instability

Based on our review of the record, we believe the ALJ had substantial evidence to conclude that Chamberlin did not suffer a permanent impairment and that his

emergency room visits were not compensable. Accordingly, because there is substantial evidence to support the ALJ's findings, we must affirm the Board's decision.

The March 14, 2007, decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harry E. Budden, Jr.
Paris, Kentucky

BRIEF FOR APPELLEES:

H. Robert Jones
Robert L. Swisher
Lexington, Kentucky