

RENDERED: FEBRUARY 1, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-001763-WC

REED & DAMRON TRUCKING CO., INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-04-80079

ROGER D. MAY; HON. JOHN B.  
COLEMAN, ADMINISTRATIVE LAW  
JUDGE; AND WORKERS' COMPENSATION  
BOARD

APPELLEES

### OPINION AFFIRMING

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BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Reed & Damron Trucking Co., Inc. (R&D) petitions for the review of a Workers' Compensation Board's (Board's) opinion affirming an Administrative Law Judge's (ALJ's) opinion awarding Roger May \$108.04 per week in permanent partial disability benefits for a period not to exceed 425 weeks. For the following reasons, we affirm.

For almost two weeks in June and July 2004, May was employed by R&D as a coal truck driver. On July 2, 2004, May developed pain in his hip and leg and could barely walk. He did not return to work after that day.

May filed an application for resolution of injury claim, alleging that he was unable to work because of “[r]epetitive and cumulative trauma to the back over a long period of time.” Some four months later, he filed a second application for resolution of injury claim, alleging that on July 2, 2004, he injured his back and left leg while

driving a coal truck, which had a new clutch in it that kept sticking and was very stiff. [He] had to apply significant pressure to the clutch to engage it. While doing so [he] felt severe pain in [his] back and left leg.

Upon May's motion, the ALJ consolidated these two claims.

The parties introduced medical evidence from several sources, which the Board summarized in its opinion as follows:<sup>1</sup>

The records from Pikeville Medical Center were introduced into the record. They indicate May was seen on July 3, 2004 for complaints of pain going down his left leg. The record indicates the pain was not associated with any numbness, tingling, injury or heavy lifting. It was further noted May did not have a prior history of back injury. The physician noted May drove a truck locally. He was diagnosed with sciatica and given pain shots. The records indicate May underwent an MRI scan of his lumbar spine on July 13, 2004 which was interpreted as showing a mild herniated disk on the left at L1-2 and a large herniated disk on the left at L5-S1.

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<sup>1</sup> The parties also introduced evidence from several lay witnesses regarding whether May gave timely notice of his injury, and whether he actually injured himself while working at home. As the ALJ found in May's favor on these issues, and R&D has not challenged those findings on appeal, we omit the ALJ's summary of this evidence.

The medical records of Dr. Naveed Ahmed indicate May was seen on July 13, 2004 at the request of Dr. Valera. Dr. Ahmed received a history from May that he had back pain “forever” but that he had pain on the outer aspect of his left lower leg for approximately 12 days. Dr. Ahmed diagnosed possible acute herniated nucleus pulposus in the lumbar spine, lumbosacral radiculopathy, and degenerative joint disease of the lumbar spine. He scheduled May for an MRI and prescribed Vioxx, Robaxin, and hydrocodone.

The medical records of Akers Family Chiropractic indicate May was first seen on July 19, 2004 for complaints of back and leg pain. May reported he had injured his back on July 2, 2004 while pushing a clutch when driving a coal truck at work. Dr. Akers told May he would continue to treat him but he needed to file a workers' compensation claim.

May relied on a medical report from Dr. James Templin who evaluated him on May 5, 2005. Dr. Templin noted a history of chronic low back pain with radiation of pain into the left hip and leg. Dr. Templin gave a detailed history of the work injury occurring on July 2, 2004 while driving a coal truck with a recently installed clutch. May told Dr. Templin that while driving the truck, he began to experience left leg pain. Dr. Templin reviewed May's medical treatment following the injury. Dr. Templin performed a physical examination and reviewed diagnostic test results. Dr. Templin diagnosed lumbar disk herniation at L5-S1, left leg radicular symptoms, and degenerative lumbar disk disease. Dr. Templin assessed an 8% impairment and he indicated May's injury was causing his complaints. Dr. Templin cautioned, however, he had no way knowing how much force was needed to be exerted on the clutch of the truck May was driving. Dr. Templin noted that while use of force could cause a preexisting injured disk to herniate, it was more likely the activity would result in sciatica or left sided lumbosacral musculoligamentous strain. Dr. Templin stated he had no reason to doubt May and the fact that the medical records and May's history indicated consistently that he did not report to any of his physicians his pain was related to work was worrisome. Dr. Templin stated, however, accepting May's history as provided by him as accurate and

complete, the 8% impairment rating would be applicable. This was based on a DRE lumbar Category II impairment for a person with a clinical history and examination findings compatible with a specific injury together with asymmetrical loss of range of motion and non verifiable radicular complaints. Dr. Templin stated if an EMB/NCV study verified the radiculopathy, May would qualify for a 13% impairment for a Category III. Dr. Templin indicated May did not have an active impairment prior to the injury. He placed stringent restrictions on May's activity and indicated he did not retain the physical capacity to return to the type of work performed at the time of injury.

Thereafter, Dr. Templin's deposition was taken by R&D. Dr. Templin was questioned concerning the lack of history of an injury given by May to medical care providers following his claim of injury. Dr. Templin acknowledged this was worrisome. He also felt the statement from May to Dr. Ahmed concerning chronic back pain indicated a prior active condition. He testified, however, he would need to see documentation of treatment or medication records prior to July 2, 2004 before making a finding May was suffering from an active condition on the date of injury. Dr. Templin testified he would not attribute the degenerative disk disease of May's lumbar spine to a short period of work with R&D. He felt, however, assuming the history of the malfunctioning clutch to be correct, there would be enough stress to the hip, low back, and sciatic areas to result in May's current condition, which would either be a soft tissue musculoligamentous strain or arousal of preexisting dormant degenerative changes.

R&D relied on a medical report from Dr. David Jenkinson who evaluated May on August 26, 2005. He received a history of development of sciatica and left leg pain while driving a truck with a new clutch in July 2004. Dr. Jenkinson performed physical examination and reviewed medical records. He noted May showed signs consistent with a left side L5-S1 disk herniation. He stated regarding causation, it was difficult to relate the disk herniation to the situation where May was using a stiff clutch on a new truck for about two weeks. Dr. Jenkinson stated May had a 13%

impairment for a DRE lumbar Category III. He did not believe the impairment to be work-related. He also did not believe May could return to work as a truck driver.

R&D also relied on a report from Dr. Russell Travis who conducted a medical record review. Dr. Travis opined May did not suffer significant injury at R&D. He noted May's long history of low back pain and noted the majority of disk herniations are not associated with an acute injury that are classified as idiopathic. He stated May clearly fit the category of most disk herniations which were preceded by degenerative changes and some history of low back pain. Dr. Travis assessed either a 10 or 13% impairment under the DRE method, but cautioned that the range of motion method was probably more proper because there was no distinct injury. He stated no percentage of the impairment was attributable to May's work at R&D.

From this evidence, the ALJ concluded that “all of the medical evidence agrees that [May's] injury is not the result of a cumulative trauma or repetitive trauma type injury” and dismissed May's original action. The ALJ also held that May had a longstanding herniation in his low back, which was not caused by his work at R&D. However, the ALJ held that May “developed a musculoligamentous strain and sciatica of the left lower extremity while operating a very stiff clutch on the truck he was assigned for [R&D] for the week leading up to July 2, 2004.” He adopted Dr. Templin's assessment that May had an 8% impairment for this work-related injury, and awarded May benefits accordingly. The Board affirmed the ALJ's opinion, and this petition for review followed.

R&D argues that because the ALJ held that May's herniation in his low back (a Category III impairment under the AMA Guides) was not work related, the ALJ

erred by finding that the “lesser included” musculoligamentous strain (Category II) was work related. We disagree.

It is well settled that a workers’ compensation claimant has the burden of proving every element of his claim. *Jefferson County Pub. Sch./Jefferson County Bd. of Educ. v. Stephens*, 208 S.W.3d 862, 866 (Ky. 2006). Because May met his burden below, the issue on appeal is whether the ALJ's decision was supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

An ALJ has the sole authority to judge the weight, credibility, and inferences to be drawn from the evidence. *Miller v. East Ky. Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). He also has the sole discretion to determine the quality, character, and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). And he is free to reject any testimony, and to believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). Here, the ALJ chose to accept Dr. Templin's assessment that May's sciatica and lumbosacral musculoligamentous strain resulted in an 8% impairment. As Dr. Templin's assessment constitutes substantial evidence, the Board did not err by affirming the ALJ's decision.

Further, an ALJ is not authorized to interpret the AMA Guides. *George Humfleet Mobile Homes v. Christman*, 125 S.W.3d 288, 294 (Ky. 2004). Rather, the proper interpretation of the AMA Guides and any assessment of an impairment rating in accordance with those Guides are medical questions which must be supported by medical testimony. *Ky. River Enters., Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003). Again, as Dr. Templin's medical testimony supported his assessment under the AMA Guides, the ALJ did not err by relying upon that testimony.

The Workers' Compensation Board's opinion is affirmed.

ALL CONCUR.

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