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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002061-WC

BACK CONSTRUCTION COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-77367

MATTHEW ARCHER; HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON AND NICKELL, JUDGES; SHAKE,¹ SENIOR JUDGE.

NICKELL, JUDGE: Back Construction Company, Inc. (Back) appeals from a
decision of the Workers' Compensation Board (Board) affirming an award of

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

income benefits and payment of medical expenses to Matthew J. Archer (Archer) as the result of a work-related low back injury suffered on September 4, 2008. Back argues the finding of a permanent work injury on that date was not supported by objective medical findings where the employee had prior active back pain for which he was receiving ongoing treatment; the doctor's opinion relied upon by the Administrative Law Judge (ALJ) was later contradicted by the doctor upon his receipt of additional information; and that doctor, as well as a second doctor, had stated Archer's fall on September 4, 2008, resulted in nothing more than a temporary exacerbation of his prior active symptoms. In contrast, as evidence of the permanent impairment he suffered during the September 2008 fall, Archer states he was able to operate a jackhammer weighing between 120 and 150 pounds for much of the day before he fell, performed other heavy exertional construction work without restriction prior to the fall, but now labors under medical restrictions, is in much greater pain and has reduced functional capacity; and now has difficulty climbing a flight of stairs. Upon review of the briefs, the record and the law, we affirm.

FACTS

In 2003, Archer injured his back while attempting to move a heavy mirror while working as a maintenance supervisor for Kohl's Department Store (Kohl's). The incident resulted in a four-month hiatus from work during which Archer received a series of three facet joint injections, one sacroiliac joint injection and two rhizotomies. The procedures provided some relief, but not of a lasting nature. Archer did not file a workers' compensation claim, but ceased working for Kohl's because he could no longer perform the job. Despite receiving treatment, Archer continued to experience numbness in his toes and pain in his low back and down through his legs.

Archer, a carpenter, subsequently began working for Back in 2007. He underwent lumbar rhizotomies on July 11, 2008, August 5, 2008, and August 19, 2008, for recurring pain from the Kohl's injury. Less than one month after the last rhizotomy, Archer suffered a work-related injury on September 4, 2008, while working for Back on a home remodeling project. As he was walking across a beam in an attempt to settle it into its final position, Archer lost his balance and fell nine to twelve feet to the ground. He landed on his feet but then fell onto his back. After lying still for awhile, he got up and tried to shake off the effects of the fall. Unfortunately, while loading items into his truck a few minutes later, excruciating pain shot through Archer's mid-chest, his arms, and his low back and legs. Archer

went to the hospital where he was x-rayed, given pain medication and referred to Dr. Harry Lockstadt, an orthopaedic surgeon.

Back's chief complaint on appeal is that Dr. Lockstadt, one of two physicians² commenting upon causation, provided evidence via written forms and reports and a deposition that was confusing and contradictory, a point commented upon by the ALJ in his opinion. Because the ALJ relied heavily upon Dr. Lockstadt's opinion, we detail the evidence attributable to him.

Archer met with Dr. Lockstadt on September 10, 2008, and was diagnosed with mechanical low back pain. Dr. Lockstadt noted that Archer exhibited the same pain pattern ("lower back pain radiating to the right lower extremity, into the left lower extremity and down into the foot with numbness in the right great toe and some left toe numbness") three months before his fall and immediately after his fall.

On June 10, 2009, Dr. Lockstadt completed a Form 107 Medical Report diagnosing Archer with "mechanical facet joint pain, lumbar spine" and causally relating that diagnosis to the September fall. The form reflected that

² Dr. William Lester performed an independent medical evaluation of Archer. Diagnosing a lumbar strain, he noted Archer had suffered from chronic active back pain since 2003 and underwent rhizotomies in July and August of 2008. Dr. Lester found Archer's current complaints were the same as those he experienced as a result of his 2003 injury and could not say his current complaints resulted from the September 2008 fall. He opined Archer had an active impairment before he fell in September and noted that Archer had stated in 2005 that he could no longer do heavy construction work. Dr. Lester stated Archer may need future treatment for his 2003 injury, but not as a result of his 2008 fall.

Archer underwent an MRI of the lumbar spine on September 23, 2008, which revealed "mild-moderate facet degeneration. No canal stenosis, nerve root compression or fracture." Thereafter, on October 21, 2008, Archer "underwent an EMG test which was negative for radiculopathy." He also "underwent a series of lumbar epidural injections with no significant symptom reduction." Afterwards, Archer "was referred to a pain management clinic and underwent several rhizotomies with no lasting improvement. On 4-13-09 he was placed at MMI and put on permanent restrictions at the Light Physical Demand Level." Noting Archer "has had multiple rhizotomies in the past," Dr. Lockstadt assigned him an eight percent whole body impairment, but attributed only five percent of that rating to Archer's pre-existing active condition. Dr. Lockstadt specified that Archer did not have the physical capacity to return to his former position with Back.

Dr. Lockstadt completed a medical questionnaire and a narrative report on September 24, 2009. On the medical questionnaire, he stated the September fall was not a permanent injury, but rather a temporary exacerbation of Archer's pre-existing active condition resulting in no permanent impairment or restrictions and requiring no future medical attention. In the narrative report, he stated his review of additional records confirmed Archer "had a pre-existing back pain with radiculopathy prior to this accident. Therefore, during the interval of his fall, he had some aggravation of his pain, but with treatment, we were able to get

him back very close to his pre-fall status of September 2008. Therefore, the event of September 4, 2008 was a temporary exacerbation of his symptoms.” Dr.

Lockstadt confirmed his belief that Archer had a whole body impairment of eight percent before the September fall.

On October 8, 2009, Dr. Lockstadt was deposed. As of April 13, 2009, he had restricted Archer to “light work” directing him to minimize:

repetitive bending, twisting through the spine; alternating between sitting, standing and walking; allowing for frequent changes in posture. Minimize use of a ladder, mainly as – with his back pain, he may be unsafe on a ladder. Minimizing repetitive Work (sic) above the shoulder, and minimizing the amount of bending that he does.

He opined that Archer’s fall worsened his pre-existing condition but that with medication and injections he would return to his pre-fall status. When asked whether Archer had returned to his pre-fall functional capacity, Dr. Lockstadt initially said it was difficult to say, but he thought he was close.

Dr. Lockstadt acknowledged his conclusions were partially based on the history provided by Archer whom he considered truthful since he had revealed his prior back pain and rhizotomies. Less than a month before his fall, Archer underwent a right-sided rhizotomy from L1 to L5 which Dr. Lockstadt characterized as a very aggressive procedure indicating a “significant back problem.” When asked about objective findings of permanent changes, Dr.

Lockstadt mentioned widening of the facet joint at the L2-3, L3-4 and L4-5 levels and instability of the small joints in the back that have been worn down.

In light of the intensive pain treatment Archer had received, Dr. Lockstadt found it hard to believe that just two days before the fall Archer had spent much of the day operating a jackhammer weighing between 100 and 125 pounds. Upon learning of Archer's pre-fall activities, Dr. Lockstadt concluded the fall had, in fact, impacted his functional capacity substantially "into the foreseeable future."

From the Form 107 completed by Dr. Lockstadt, it was unclear whether he had reviewed the medical records of Drs. Luis Vascello and Paul Brooks before completing the document. In responding to a subsequent written questionnaire, he clarified that he had reviewed their files when he prepared the Form 107, a fact supported by other portions of the record. Later, when deposed, he initially testified he had reviewed Dr. Vascello's report but later was confused as to whether he had reviewed either report prior to completing the form. Dr. Lockstadt opined that while Archer probably does not require additional medical treatment at this time, Archer might require treatment in the future. Dr. Lockstadt concluded by stating the September fall did not change Archer's eight percent whole body impairment, even though he had previously testified that the fall had

impacted Archer's functional capacity for the foreseeable future, and that only five percent of that rating was attributable to pre-existing conditions.

On February 16, 2010, the ALJ issued a twenty-five page opinion, award and order allowing Archer to recover temporary total disability benefits, permanent partial disability benefits and current and future medical benefits. The ALJ stated in part:

When considering all of the evidence submitted by Dr. Lockstadt "on balance", and when considered in its entirety and under the totality of the factual circumstances found herein to exist, the ALJ believes and does hereby find that Matthew Archer has a permanent impairment to the body as a whole of 8% based on the AMA Guides, 5th Edition and that prior to the work related injury his active impairment was only 5%, thereby resulting in a 3% permanent impairment to the body as a whole attributable to the work event of September 4, 2008. This finding is supported by Dr. Lockstadt's 107 report and it is certainly supported by the Plaintiff's testimony to the effect that he is in a worse condition now than he was prior to the injury and that his work capacity has been reduced as a result of the injury. It is also supported by the fact that Dr. Lockstadt placed rather strict restrictions upon the Plaintiff, whereas prior to the accident, Mr. Archer was working without apparent restrictions and was performing physical tasks which far exceed the restrictions later imposed by Dr. Lockstadt. It is also supported by the fact that Plaintiff fell approximately 9 feet, perhaps as much as 12 feet. This constituted a significant traumatic event and one which would be expected to produce a permanent impairment.

Back petitioned for reconsideration and in the alternative requested additional findings. Back argued the ALJ had erroneously found Archer sustained an injury on September 4, 2008, because he relied on Archer's complaints that he was worse after his fall and did not cite objective medical evidence of an injury. Back claimed there could be no work injury because there was no change in Archer's impairment rating—it was eight percent both before and after his fall. Back asserted the ALJ ignored the fact that Archer complained of the same post-fall ailments just days before his fall. According to Back, while the ALJ stated he relied upon the medical opinion of Dr. Lockstadt in reaching his conclusions, Dr. Lockstadt never attributed the widening of Archer's facet joints to the September fall. Back also argued Dr. Lockstadt gave conflicting statements about whether he had reviewed Archer's prior medical records before preparing the Form 107. In denying the petition on June 6, 2010, the ALJ wrote in part:

Dr. Lockstadt's testimony constitutes good and sufficient evidence of the fact that the September 4, 2008 work injury had an impact on Mr. Archer's functional capacity; that the impact was "substantial"; that the negative impact on Mr. Archer will endure or extend into the foreseeable future; that the September 4, 2008 fall caused Mr. Archer to suffer, and to continue to suffer, from a substantial negative impact in his functional capabilities; that the work incident contributed to a permanent harmful change in the claimant's back; that the permanent harmful change is demonstrated by objective medical findings; and that as a result of the work injuries sustained by the claimant, he is now subject to restrictions and limitations to which he was not subject

prior to the work incident, to wit, a lifting limit of 20 pounds maximum and 10 pounds repetitive; a restriction that he minimize repetitive bending and twisting through his spine; that he minimize repetitive work above the shoulder; that he minimize the amount of bending in which he engages; that he alternate between sitting, standing, and walking so as to allow for frequent changes in posture; and that he minimize his use of a ladder. The ALJ does hereby adopt and incorporate this testimony of Dr. Lockstadt as additional findings of fact herein, to the extent that said evidence was not specifically recited or “found” in the Opinion, Award, and Order.

On October 12, 2010, by a vote of two to one, the Board issued a 43-page opinion (with dissent) affirming the ALJ’s decision. The majority wrote in part:

In this case, it is clear by his answer to Question 1 contained in the questionnaire dated September 24, 2009, Dr. Lockstadt had reviewed the medical records from Dr. Paul Brooks (dates of service 5/19/08 – 8/5/08) and Dr. Vascello (dates of service 9/21/05 – 8/19-08) when he completed the Form 107. Dr. Lockstadt also testified on page 15 of his deposition he had previously reviewed the medical records of Dr. Vascello. This statement is confirmed in a chart note dated October 29, 2008 (seven months prior to completing the Form 107) attached to Dr. Lockstadt’s deposition wherein he documents the rhizotomy procedures performed by Dr. Vascello including the one performed in August 2008 at the request of Dr. Brooks, one month prior to the alleged injury. It is clear Dr. Lockstadt’s opinion contained in his Form 107 as it applies to the issue regarding whether the September 4, 2008 injury generated a permanent impairment rating was not corrupt due to it being incomplete and/or inaccurate since Dr. Lockstadt had reviewed Dr. Vascello’s medical records prior to completing his Form 107. The very fact that he later

changes his mind on the issue is of no consequence when it has been demonstrated Dr. Lockstadt's prior opinion contained in his Form 107 provides substantial evidence to support the ALJ's findings.

Aside from Dr. Lockstadt's statement in the questionnaire that he did have Dr. Brooks' records when the Form 107 was prepared, we see no evidence in the record indicating Dr. Lockstadt had Dr. Brooks' report prior to completing the Form 107. However, even if we assume *arguendo* Dr. Lockstadt did not have Dr. Brooks' reports, we believe Dr. Lockstadt's Form 107 still constitutes substantial evidence. In his testimony, Dr. Lockstadt placed significance on the fact Dr. Brooks in his August 5, 2008 report discussed a possible rhizotomy which Dr. Lockstadt stated was "a very aggressive procedure for pain" indicating Archer had significant pain. It is important to note Dr. Lockstadt actually had the August 19, 2008 record of Dr. Vascello who, on referral from Dr. Brooks, administered the rhizotomy discussed in Dr. Brooks' August 5, 2008 report. Dr. Lockstadt clearly had a correct understanding of Archer's condition as it existed in August 2008, one month prior to the work injury. Further, we note the exam and description of Archer's condition in Dr. Brooks' May 19, 2008 report does not materially differ from the exam and description contained in Dr. Vascello's June 26, 2008 report which Dr. Lockstadt had at the time he completed his Form 107.

On appeal, Back does not dispute that Archer, an employee, fell from a beam while on a residential construction job in 2008. Its contention is that the fall did not result in a three percent permanent change to Archer's condition because his post-fall complaints and symptoms were identical to those he had experienced, and for which he had received treatment, since 2003. Specifically,

Back alleges Dr. Lockstadt overlooked the medical records of Drs. Brooks and Vascello in assessing Archer's whole body impairment and the ALJ therefore erred in basing his decision on Dr. Lockstadt's opinion. This petition for review followed. Because we agree with the Board's astute analysis of the evidence, we affirm.

ANALYSIS

KRS 342.285 provides that an ALJ's decision is "conclusive and binding as to all questions of fact" and that the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.290 limits the scope of our review to the Board's decision and to errors of law arising before the Board. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999). Our standard of review of a Board decision "is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009) (citing *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)). We review an ALJ's award to determine whether his findings were reasonable under the evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

The "ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence."

Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993) (citation omitted). When the claimant prevails before the ALJ, an appellate court will not disturb the findings of fact if they are supported by substantial evidence of a probative value. *Transportation Cabinet v. Poe*, 69 S.W.3d 60, 62 (Ky. 2001). “Substantial evidence” has been defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). It is also within the province of the ALJ to believe one part of an expert's opinion and to disbelieve other parts of such opinion. *George Humfleet Mobile Homes v. Christman*, 125 S.W.3d 288, 294 (Ky. 2004); *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334, 337 (Ky. 1985). It is not enough for reversal of an ALJ's factual finding to show that there is merely some evidence that would support a contrary conclusion. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). If there is substantial evidence in the record to support the fact-finder's determination, the findings will be upheld, even though there may be conflicting evidence. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).

After reviewing the complete record, we simply cannot say the ALJ's decision is unsupported by substantial evidence. While it is true that intense questioning during Dr. Lockstadt's deposition produced seemingly inconsistent responses, such confusion may be attributed to distinctions in medicine and law.

In doing their jobs, the lawyers legitimately tried to pigeonhole Dr. Lockstadt's answers and reduce them to broad statements and generalizations, but as Dr. Lockstadt testified, "it's not quite that easy."

Ultimately, Dr. Lockstadt stated Archer's fall on September 4, 2008, worsened his existing lower back pain for the foreseeable future. According to Dr. Lockstadt, while his whole body impairment rating of eight percent was unchanged by the fall, only five percent of that rating was attributable to his pre-fall condition, thus three percent of his impairment rating was attributable to the fall. In short, while Archer's impairment rating may have remained constant under the measurements of the AMA Guides, the fall represented an additional causative factor to his disabling condition requiring apportionment. Based on the evidence presented to the ALJ, it is indisputable that the traumatic fall in 2008 substantially and negatively impacted Archer's functional capabilities. Archer, himself, made no secret of the fact that he experienced significant back pain prior to his on-the-job fall, as was evidenced by the number of rhizotomies he underwent, including three in close proximity to his fall. However, Dr. Lockstadt was unaware of Archer's abilities in the days immediately prior to the fall.

In what can only be called an "aha" moment, Dr. Lockstadt expressed surprise upon learning that Archer had operated a heavy jackhammer for most of the day just two days before the fall, and realized the traumatic impact the fall had

on Archer's condition. Now, according to Archer's testimony and examinations, his functional capabilities are extremely limited. Thus, Archer's post-fall abilities are far different from his pre-fall status. Archer's veracity and his description of his pre-fall and post-injury symptoms and capabilities, in conjunction with Dr. Lockstadt's medical examinations and opinions, provide ample support for the decisions of the ALJ and the Board.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Roberta K. Kiser
Lexington, Kentucky

BRIEF FOR APPELLEE:

Hon. Robert L. Abell
Lexington, Kentucky