

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2010-CA-002061

BACK CONSTRUCTION COMPANY, INC.

APPELLANT

v.

**PETITION FOR REVIEW OF DECISION BY
WORKERS' COMPENSATION BOARD**

MATTHEW J. ARCHER, HON. EDWARD D. HAYS, ALJ
and WORKERS' COMPENSATION BOARD

APPELLEES

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**RESPONSE TO PETITION FOR REVIEW BY
APPELLEE MATTHEW J. ARCHER**

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of this Response to Petition for Review by Appellee Matthew J. Archer was mailed, postage prepaid, this ____ day of December 2010, to the following: Hon. Dwight Lovan, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, KY 40601; Hon. Edward D. Hays, 657 Chamberlin Avenue, Frankfort, KY 40601; and Roberta K. Kiser, Pohl Kiser & Aubrey, PSC, 167 W. Main Street, Suite 100, Lexington, KY 40507.

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COUNTERSTATEMENT OF THE CASE

Appellee Matthew J. Archer fell some 9-12 feet from a beam while working at a construction site for appellant Back Construction on September 4, 2008. Archer had performed, up to the time of his fall, regular construction duties including, on some days, operating a 120 pound plus jackhammer for up to six hours a day. As a result of the injury sustained in his fall on September 4, 2008, Archer can no longer perform carpentry work and struggles with everyday household task. Appellant claims no substantial evidence supports the ALJ's finding of a work-related injury.

Summary of Testimony and Evidence Regarding Archer's Job, Injury and Medical Treatment

Appellant Matthew J. Archer is now 39 years old and worked for Back Construction from August 2007 through September 4, 2008, when he fell at a construction site and was injured.

Back Construction is principally in the residential construction and remodeling business. (Tr. at 6).¹ Many projects would begin with demolition, “tearing out walls,” “taking down brick or interior walls to jack hammering a basement floor.” (Id.). Following the demolition phase, Archer’s duties as a carpenter would shift to timber framing and finish carpentry. (Id.).

Archer’s work for Back Construction included operation of heavy equipment including jackhammers, concrete saws, little Bobcats and “just any and all power tools.” (Tr. at 6-7). At projects where the demolition was particularly extensive, Archer could operate a jack hammer up to six hours per day. (Tr. at 7). The jack hammer, an electric model, weighed in the 120-150 lbs. range. (Tr. at 8). Archer, of course, from time to time carried heavy construction materials: concrete bags weighing up to 80 lbs., lumber, boxes of tile, block and brick and the like. (Tr. at 7-8).

On September 4, 2008, Archer, in order to settle a main beam and being the heaviest man on the crew, walked upon the beam, shifted his weight around and got the beam to settle into place. (Tr. at 9). When climbing down he lost his balance and fell about 12 feet or so to the ground. (Id.). Archer landed awkwardly on his feet, went to the ground, tried unsuccessfully to shake it off and return to work before succumbing to

¹ The prefix “Tr.” refers to the transcript from the Benefit Review Hearing on December 17, 2009.

overwhelming pain and again collapsing to the ground. (Tr. at 11-12). He was taken to the emergency room. (Tr. at 12).

The injury Archer sustained on September 4, 2008, has changed completely his life: climbing steps has become difficult; he can no longer start his lawnmower and was compelled to buy a riding mower; he certainly cannot do carpentry work or even wear a tool belt; after about 20-30 minutes of sitting the pain will force him to get up and walk which after about 20-30 minutes will generate its own disabling pain. (Tr. at 14).

Archer's ability to bend and control his body has significantly reduced since his injury sustained September 4, 2008. (Tr. at 15). He had previously experienced some numbness and tingling in his toes (Archer does have a history of back problems) but since the fall his toes are numb and "just dead." (Tr. at 16). Cold, wet weather now causes pain where before it did not. (Tr. at 17). Archer took over-the-counter Tylenol-3 on an as-needed basis before September 4, 2008; he now takes Tegretol and Seroquel, eight 5 mg Percocets per day and two 20 mg Opanas per day. (Tr. at 17-18).

Archer cannot return to carpentry. (Tr. at 19). Back Construction has acknowledged that fact and supported Archer's claim for long-term disability benefits. (Plaintiff's LTD claim at pp. 54-63 of plaintiff's submitted exhibits).

Following his injury Archer sought and obtained treatment from Dr. Harry Lockstadt. After acknowledging Mr. Archer's fall and injury, Dr. Lockstadt explained its effects as follows:

Q: Is it fair for us to conclude that it would be your opinion that the fall Mr. Archer suffered on September 4, 2008 has had an impact on his functional capacity, but you're not sure the scope of that impact? Is that fair?

A: That is correct. Yes. I can fully agree with that. (Lockstadt depo. at p. 11).

Q: Okay. Would you agree that the fall on September 4, 2008 has had some impact on Mr. Archer's functional capacity?

A: I would, yes.

Q: Would you agree that the impact is substantial?

A: I could agree to that, yes.

Q: Do you have an opinion as to when, if ever, the impact will disappear and he'll be back in the same status he was prefall?

A: In legal terms, into the foreseeable future, I think would be a good answer for that.

Q: You mean the negative impact will – negative impact on Mr. Archer will endure for the foreseeable future?

A: Yes. (Lockstadt depo. at pp. 13-14).

Dr. Lockstadt identified the following as the medically necessary restrictions he had imposed on Archer:

... light work, allow him to lift up to 20 pounds, and on a intermittent basis, 10 pounds on a more frequent basis; minimizing 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 above the shoulder, and minimizing

the amount of bending that he does. (Lockstadt depo. at pp. 6-7).

He confirmed that these restrictions were necessitated by the fall on September 4, 2008:

Q: Okay. Is there any relationship between these restrictions and – you’ve agreed that Mr. Archer as a result of the fall on September 4, 2008 had a substantial negative impact on his functional capacity. I, therefore, presume that related to that substantial negative impact are these restrictions. Is that fair –

A: Yes.

Q: -- correct?

A: Yes.

Q: So, therefore – please bear with me – as a result of the September 4, 2008 fall, it’s your opinion that Mr. Archer continues to suffer from substantial negative impact in his functional capabilities, therefore, making applicable the restrictions that we discussed earlier. Is that fair?

A: I can agree to that, yes. (Lockstadt depo. at pp. 19-20).

Dr. Lockstadt explained, in response to questioning by defense counsel, that Archer had suffered from the September 4, 2008 fall as follows:

Q: Well, we don’t have the Special Fund anymore, unfortunately, Dr. Lockstadt, so it’s kind of all on the employer now. So my question to you is, are you saying that this work incident resulted in a permanent harmful change in this gentleman’s back?

A: It has a contribution to his back injury; that’s correct.

Q: So it's a permanent harmful change demonstrated by objective medical findings?

A: Yes. (Lockstadt depo. at p. 21).

Dr. Lockstadt then goes on to describe the objective medical findings showing the permanent harmful change to Archer. (Lockstadt depo. at p. 21-22). He reiterated that Archer suffered from much greater pain and much reduced functional capacity. (Id. at p. 24). He also stated that Archer "could benefit from further treatment." (Id. at p. 18).

Archer submitted a Form 107-I completed by Dr. Lockstadt with his claim. This report stated that Archer suffered an 8% whole body impairment of which 3% was attributable to his fall on September 4, 2008. Subsequently, appellant submitted a document completed by Dr. Lockstadt on September 24, 2009, on which he appeared to retract his opinion on the Form 107. (Lockstadt depo, ex. 2). Some further confusion was perhaps created regarding Dr. Lockstadt's review of Archer's previous treatment by Drs. Brooks and Vascello. (*Compare* Lockstadt depo., ex. 2 and Lockstadt depo. at pp. 16-17). In any event, Dr. Lockstadt's records do indicate that he reviewed Archer's prior treatment records apparently from Dr. Vascello. (*See* Lockstadt depo. ex. 1).

Evidence Regarding Archer's Prior Back Problems

It is obvious and undisputed that Archer has a prior history of treatment for back problems. Within sixty days of September 4, 2008,

Archer underwent three rhizotomies. (Tr. at 24). Nonetheless, he remained capable of performing and did do his heavy labor intensive construction job with Back Construction up to September 4, 2008.

The ALJ's Opinion, Award and Order

ALJ Edward D. Hays found that Archer had an overall impairment of 8%, that 3% of this impairment attributable to his fall on September 4, 2008, and elaborated as follows:

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 task 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. (Opinion, Award and Order at pp. 22-23).

The Workers' Compensation Board's Decision Affirming

The Workers' Compensation Board ruled correctly that the ALJ's findings were supported by substantial evidence and affirmed the opinion, award and order.

ARGUMENT

POINT 1

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S FINDING THAT ARCHER SUFFERED A COMPENSABLE WORK-RELATED INJURY ON SEPTEMBER 4, 2008 TO WHICH IS ATTRIBUTABLE 3% OF HIS OVERALL 8% IMPAIRMENT.

Substantial evidence, common sense and logic all support the ALJ's finding, as the Workers Compensation Board ruled correctly. As a result of a fall of some 9-12 feet on September 4, 2008, Archer was transformed from a man capable of the most robust of construction work – for instance, operation of a 120 lb. + jackhammer throughout his shift – to a man incapable of routine household tasks and the challenges of normal living like climbing a flight of stairs. Accordingly, the ruling of the Workers Compensation Board should be affirmed.

The only issue here is whether substantial evidence supported the ALJ's findings. Substantial evidence is that 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). As the factfinder, the ALJ, as with a jury, has the authority to determine the quality, character and substance of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). The ALJ possesses sole authority to judge the weight of the evidence and inferences to be drawn from it. *Miller v.*

Eastern Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 331 (Ky. 1997);
Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334, 336 (Ky. App. 1995). It
is the ALJ's province, as the fact-finder, to resolve contradictions in the
evidence, even where they may arise from the same witness. *George
Humfleet Mobile Homes v. Christman*, 125 S.W.3d 288, 294 (Ky. 2004);
Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).
Deference must be afforded the ALJ's fact-finding prerogative because, in
order to reverse a decision by an ALJ, it must be shown there was no
evidence of substantial probative value to support the decision. *Special Fund
v. Francis*, 708 S.W.2d 641, 643-4 (Ky. 1986).

The assessment of impairment for purposes of determining a disability
rating in a workers compensation claim is a medical question solely within
the province of the medical experts. *Kentucky River Enterprises, Inc. v.
Elkins*, 107 S.W.3d 206 (Ky. 2003). Although assigning a permanent
impairment rating is for the medical experts, determining the weight and
character of medical testimony and drawing all reasonable inferences
therefrom are matters for the ALJ. *See Knott County Nursing Home v.
Nallen*, 74 S.W.3d 706, 710 (Ky. 2002). Furthermore, Archer's testimony
regarding his inability to work, even when standing alone, constitute
substantial evidence sufficient to support the outcome reached by the ALJ.
Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

Substantial evidence supports the following findings: (1) Archer suffered an “injury” on September 4, 2008, within the meaning of KRS Chapter 342; (2) Archer suffers from an overall 8% impairment; and, (3) 3% of the 8% is attributable to the events and injury he sustained September 4, 2008. Accordingly, the Court should deny appellant’s petition and affirm the Workers Compensation Board.

First, KRS 342.0111 defines injury as follows: “any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.” Dr. Lockstadt’s testimony details the objective medical findings supporting the finding that Archer indeed suffered an “injury” on September 4, 2008. (Lockstadt depo. at p. 21-22). In addition to Lockstadt’s testimony, there are the physical realities that Archer described and which are uncontested: a man that once operated a jack hammer for 6 hours in a shift now labors to climb a flight of stairs; his body control and movement is materially impaired; he is physically unable, as Back Construction’s support for his LTD benefits claim acknowledges, to perform or function at anywhere near the physical or occupational level that he could before the fall on September 4, 2008. Accordingly, substantial evidence supports such a finding.

Second, Archer submitted the Form 107 from Dr. Harry Lockstadt that states Archer's overall impairment is 8%. There is no contradiction to this conclusion anywhere in the record. Accordingly, substantial evidence supports the ALJ's finding that Archer suffers from an overall impairment of 8%.

Third, substantial evidence supports the ALJ's finding that 3% of Archer's overall impairment of 8% is attributable to the injury he sustained on September 4, 2008. Dr. Lockstadt so stated in the Form 107. While it is true that Dr. Lockstadt later gave testimony contradicting that opinion, the finding that Archer, as a result of the September 4, 2008, fall and consequent injury, an increased impairment and therefore an increase in his impairment rating attributable to the fall is supported by common sense, logic and the following:

- Archer was working with no restrictions prior to September 4, 2008
- Archer was not only working but working in a heavy and intense manual labor field prior to September 4, 2008, a job that included operation of 120-150 lb. jack hammer for the better part of an 8 hour shift, carrying around of construction materials and equipment and climbing around a construction site
- September 4, 2008 represents a clear, unmistakable demarcation line for Archer as since the fall he suffers severely reduced functional capacities and, as Back Construction itself acknowledges, is disabled from performing construction work

Substantial evidence supports the logical conclusion that the fall Archer suffered on September 4, 2008, unquestionably and substantially decreased his functional capacity while increasing his overall impairment. Substantial evidence, logic and common sense all support the ALJ's finding that 3% of Archer's overall impairment rating of 8% is as a result of the fall on September 4, 2008.

CONCLUSION

Because substantial evidence supports the ALJ's findings regarding Archer's injury and degree of permanent impairment, the appellant's petition should be denied and the decision of the Workers Compensation Board affirmed.

Respectfully submitted,

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