

RENDERED: October 25, 1996; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 96-CA-0002-WC

WILLIAM C. MILBY, JR.

APPELLANT

v.

PETITION FOR REVIEW  
OF A DECISION OF  
THE WORKERS' COMPENSATION BOARD  
WC-94-002769

JAMES MEDICAL EQUIPMENT;  
WILLIAM O. WINDCHY, ACTING  
DIRECTOR OF SPECIAL FUND;  
RICHARD H. CAMPBELL, JR.,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

\* \* \*

BEFORE: DYCHE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: In this petition for review of a decision of the Workers' Compensation Board (Board), appellant, William C. Milby, Jr. (Milby), argues that the evidence compels a finding of some permanent occupational disability and that the Board's assessment of the evidence is so flagrantly insupportable as to cause gross injustice.

Milby injured his low back on January 23, 1992 and February 5, 1992, in the course and scope of his employment. After the second injury, which, unlike the first, caused pain radiating into his legs, he began treatment with Dr. William L. Grisham, a chiropractor. In September 1993, Milby was walking across his property, when he raised his leg to step over a fence and immediately experienced an onset of severe pain and a burning sensation in his back. He once again was treated by Dr. Grisham.

The administrative law judge (ALJ) found that Milby had failed to establish an injury of appreciable proportions which resulted in any permanent occupational disability. He noted that Dr. Grisham did not impose any restrictions on appellant, that appellant is young and has advanced education, and that he has been able to continue to operate his own business. The ALJ also found that, based on Dr. Grisham's testimony, appellant's functional impairment did not manifest until the September 1993 non-work-related incident. The ALJ concluded that this was a non-work-related injury which was aggravated by a pre-existing, nondisabling condition precipitated by a work injury. Therefore, only medical expenses were awarded. The Board affirmed the ALJ's decision that the September 6, 1993 accident was an independent intervening event.

Dr. Grisham was the only doctor to testify in this case. The ALJ and the Board found his testimony internally inconsistent. X-rays taken in September 1993 were essentially the same as those taken after the February 1992 injury. Although

he assigned 20% functional impairment, his suggested restrictions were really indications of activities which could cause pain. He opined that the original injuries predisposed Milby to a weaker back and that the 1993 event was an exacerbation of the original injury. Dr. Grisham also stated that in order for the September 1993 accident to be a new injury, it necessitated greater trauma than what Milby described.

Appellant's burden before the Board was to establish that the evidence compelled a finding of an injury of appreciable proportions and resulting permanent occupational disability. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Before us, Milby must establish that the Board has "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

We find no error in the Board's handling of the issues raised by Milby. Ultimately, the ALJ, as fact-finder, has the sole authority to determine which part of the evidence he believes and which part he disbelieves. Caudill v Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). The conflicting testimony of Dr. Grisham allowed for the ALJ's finding, and neither the Board nor this Court can substitute its judgment for the ALJ's on questions of fact. KRS 342.285(2).

Appellant also contends that the Board misconstrued Beech Creek Coal Co. v. Cox, 314 Ky. 743, 237 S.W.2d 56 (1951),

and that Cox supports a finding that his September 1993 injury was an exacerbation of the work-related injury and thus compensable. In Cox, our highest Court adopted language from 58 Am.Jur., Workmen's Compensation, Section 198, page 706, and held that, "The general rule is that compensation must be allowed for all of the injurious consequences flowing from the original injury, and not attributable to an independent, intervening cause." In that case, Cox had broken his leg at work. While recuperating at home, he slipped outside and fell, breaking the leg again in a different spot. The medical testimony was that it would have been much less likely that he would have slipped and caused the second break had his joints not been stiff as a result of the work-related injury. The Court held that the old Board was justified in finding that the work injury contributed to the second break.

We find no misinterpretation of Cox by the Board. Once again, Dr. Grisham's testimony was sufficient to support a finding of compensable disability, pursuant to Cox, if the ALJ had been so inclined. But as set forth above, the ALJ's finding to the contrary is supported by substantial evidence. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Consequently, the Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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