

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001538-WC

SENAD MEHIC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-69367

RC TWAY COMPANY;
HON. IRENE STEEN, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: An Administrative Law Judge (ALJ) overruled Senad Mehic's (Mehic) motion to reopen. The Workers' Compensation Board (the Board) affirmed. It is from the Board's opinion that Mehic appeals, arguing that the ALJ

erred when she found that his thoracic spine condition is not related to his work injury; when she did not award him any benefits based on his psychological condition; and when she failed to find that he has increased impairment and/or is totally and permanently disabled. For the following reasons we affirm.

FACTS

1. Procedural Background

Mehic suffered a work-related back injury on August 15, 2005. Following that injury, RC Tway Company¹ (Tway) paid Mehic temporary total disability benefits for approximately ten months and paid his medical expenses. Approximately two months after Tway suspended payment of temporary total disability benefits, the parties reached a settlement. As part of the settlement, Tway agreed to pay Mehic \$29.06 per week for a period of 1,804.19 weeks. The parties agreed that this represented 5.28% of Mehic's average weekly wage and commuted the weekly benefits to a lump sum of \$52,429.68. The parties also agreed that Mehic had been assigned a 13% impairment rating by Dr. Morrasutti for his back injury and that Mehic had been restricted to lifting 10 pounds, with no repetitive bending or twisting or prolonged standing.

In January 2008, Mehic filed a motion to reopen alleging that his disability had increased due to a psychiatric condition. Mehic also noted that Tway had denied medical treatment. The Chief ALJ granted Mehic's motion to

¹ We note that the defendant/employer is referred in the underlying action as "Kentucky Manufacturing RC Tway Company" and "RC Tway Company." The petition for review uses the name "RC Tway Company"; therefore, we will refer to the defendant/employer by that name.

the extent that the matter was assigned to an ALJ for further adjudication. Tway then filed a notice of claim denial, arguing that Mehic's psychiatric condition was not related to the work injury and that proposed medical treatment was not reasonable or necessary.

As noted by the Board, Mehic did not specifically state in his motion to reopen that his thoracic spine condition was at issue. However, during the course of litigation, the parties presented proof and the ALJ and the Board made determinations on this issue. Therefore, we will treat the issue of Mehic's thoracic spine condition as properly preserved.

2. Evidence Presented on Reopening

At the outset, we note that several of the medical reports filed by Tway specifically address the reasonableness and necessity of medical treatment. Because that is not an issue before us, we will not summarize that proof in any great detail.

Mehic testified by way of deposition and at the formal hearing that he, his brother, and another man owned a furniture business in Bosnia. In 1992, apparently because of the war, Mehic and his family were forced to leave Bosnia. They settled in Germany, where they lived as refugees until 2000. According to Mehic, because he was a refugee, he was not permitted to work in Germany. Furthermore, in 2000, he was told that he could no longer stay in Germany. Therefore, Mehic and his family emigrated to the United States, settling in Louisville, Kentucky. Approximately two months after arriving in Louisville,

Mehic obtained a job at Tway, a manufacturer of truck trailers. Mehic worked for Tway, performing medium to heavy manual labor, until his injury on August 15, 2005. He has not worked since then.

Following his injury, Mehic experienced pain in his low and mid back, with occasional radiation into his leg and occasional numbness in his feet and toes. He has treated with a number of physicians for his physical complaints, undergoing physical therapy and pain management. Mehic testified that he discussed surgery with Dr. Shields, but he chose not to have surgery because Dr. Shields could not sufficiently guarantee a good result. At the time of the formal hearing, Mehic's treatment for his physical symptoms consisted primarily of the use of narcotic pain medication. Despite his treatment, Mehic testified that his pain had increased to the point that he is forced to spend three to four days a week in bed.

In 2007, because he began to experience depression, anxiety, moodiness, and memory and concentration difficulties, Mehic began undergoing psychiatric treatment. That treatment appears to consist of in-person therapy and the use of anti-depressant medication. As with his physical symptoms, Mehic did not note any significant improvement in his psychological condition with this treatment.²

² We note that Mehic testified at the formal hearing that he had been injured in a motor vehicle accident approximately six weeks earlier. Because all of the medical evaluations took place before this motor vehicle accident, it is not pertinent to this appeal.

In support of his motion to reopen, Mehic filed medical records and/or reports from Dr. Drljevic, Dr. Shields, Dr. Bilkey, and Dr. Carter. Tway filed medical records and/or reports from Dr. Travis, Dr. Goldman, Dr. Shraberg, Dr. Castro, and Dr. Kriss. Tway also filed the depositions of Drs. Shraberg and Kriss as well as a copy of Mehic's 2006 myelogram report. We will summarize the pertinent parts of that medical proof below.

As noted by the Board, Dr. Drljevic's records, which are handwritten, are difficult if not impossible to decipher. However, from what we can decipher, it appears that Dr. Drljevic treated Mehic for depression and related symptoms from mid-September 2007 through July 2008. Mehic attached a copy of page 220 of what we believe is the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment to his motion to reopen. It appears that Dr. Drljevic circled a number of items on this page indicating that Mehic has class three impairment in the areas of affect and behavior, class two impairment in the areas of judgment and thinking, and class one impairment in the areas of intelligence and perception. Dr. Drljevic did not give, as far as we can tell, a definitive total impairment rating, nor did she make a definitive statement regarding work-relatedness.

It appears from his records that Dr. Shields began treating Mehic in June 2007, for complaints of back and leg pain. Dr. Shields noted that Mehic had undergone physical therapy and two epidural blocks without any improvement in symptoms. Following his initial examination, Dr. Shields made a diagnosis of low back pain with S1 radiculopathy bilaterally "by history," and he recommended a

lumbar MRI. Tway initially denied Dr. Shields's request for authorization but later agreed to pay for that test, which revealed "modic" changes and narrowing at L5-S1 with a bulging disc at L4-5. Based on these findings, Dr. Shields recommended a myelogram, which Tway refused to authorize. This denial was, in part, the genesis of Mehic's motion to reopen. However, as previously noted, the reasonableness and necessity of the recommended myelogram is not an issue before us; therefore, we will not further review Dr. Shields's records regarding that recommended testing. We note that, in addition to the preceding, Dr. Shields's records contain a copy of the report of Mehic's August 2005 thoracic spine MRI which showed small disc protrusions at T7-9.

Dr. Bilkey performed an independent medical evaluation at the request of Mehic's attorney. Mehic complained to Dr. Bilkey of low back pain with radiation into the lower extremities, midline mid back pain, and occasional headaches. Following his review of the medical records and examination, Dr. Bilkey made diagnoses of thoracic strain, resolved lumbar strain with radiculopathy, myofascial pain, and de-conditioning. Dr. Bilkey related Mehic's conditions to the work injury and stated that Mehic should be confined to light duty with no lifting of more than 10 pounds, no repetitive bending and twisting, and no prolonged sitting, standing, or walking. Dr. Bilkey assigned Mehic a 5% impairment rating for his thoracic spine and an 8% impairment rating for his lumbar spine, for a total impairment of 13%.

Dr. Carter performed an examination related to Mehic's Social Security claim. Mehic complained to Dr. Carter of low back pain with pain in his legs and numbness in his feet and toes. Following his examination, Dr. Carter made diagnoses of chronic low back pain, lumbar disc pathology, and no radiculopathy. Dr. Carter stated that Mehic should avoid frequent or prolonged stooping and lifting, squatting, climbing, crawling, or kneeling with the ability to change positions as needed. Furthermore, he stated Mehic could lift up to 10 pounds occasionally.

Tway filed utilization review reports from Drs. Travis and Goldman. The focus of these reports is primarily on the reasonableness and necessity of the myelogram recommended by Dr. Shields. Therefore, we will not summarize either report at length. We do note, however, that Dr. Travis stated Mehic's August 2005 lumbar MRI was normal for a man Mehic's age and his August 2005 thoracic MRI showed only small disc protrusions at T7-9 with no cord contact or compression. Dr. Travis stated that Mehic's September 2007 MRI showed "a normal progression of age related degenerative changes with no focal findings . . . and no significant pathological changes." According to Dr. Travis, these test results revealed only degenerative changes, which are not related to Mehic's work injury.

In his utilization review report, Dr. Goldman stated that the medical records revealed no significant change in Mehic's symptoms and that there was no indication for surgery or additional testing. Dr. Goldman also noted that Mehic's previously assessed 13% impairment rating related to Mehic's lumbar spine.

Dr. Shraberg performed an independent medical evaluation at the request of Tway's attorney. Mehic complained to Dr. Shraberg of feelings of helplessness, sadness, uselessness, and irritability. Dr. Shraberg's examination revealed a depressed and flat affect and he indicated that Mehic's primary psychological symptoms are related to difficulty adapting to this culture, his long-term use of narcotic medication, and isolation due to limited English language skills and unemployment. Dr. Shraberg made diagnoses of adjustment disorder of adult life associated with situational stressors related to difficulty adapting to this culture and strained family relationships. He also stated that Mehic suffers from a mood disorder probably induced by use of narcotic medication. Dr. Shraberg assigned Mehic a GAF of 70 and a 0% impairment rating and stated that Mehic's condition is not related to the work injury.

Dr. Castro's May 31, 2007, report indicates that Mehic complained of low and mid back pain that interfered with his sleep and his ability to perform some activities of daily living. Following his examination, Dr. Castro made a diagnosis of musculoskeletal strain. Dr. Castro noted Mehic's work injury but did not directly address whether Mehic's symptoms are related to the work injury or whether Mehic has any impairment or restrictions.

Dr. Kriss performed an independent medical evaluation at the request of Tway's counsel. Mehic complained to Dr. Kriss of diffuse bilateral lower thoracic and low back pain with occasional radiation into his legs. Following his examination and review of Mehic's medical records, Dr. Kriss made diagnoses of

thoracic and lumbar strains with no evidence of nerve root compression, radiculopathy, spinal cord compression, or myelopathy. Dr. Kriss recommended weaning Mehic from narcotic medication, exercise, and a back brace to be worn when driving or active. Dr. Kriss stated that Mehic's complaints were out of proportion with his objective findings, noting that Mehic's ability to move was much greater when distracted than when formally tested. Although Dr. Kriss testified he could not definitively say that Mehic was voluntarily exaggerating his symptoms, he stated that Mehic has "given up" on himself.

Regarding the diagnostic studies, Dr. Kriss testified that they revealed degenerative changes at multiple levels in the lumbar spine with no nerve root compression, disc herniation, or other major structural problems. As to the thoracic spine, Dr. Kriss stated that Mehic's studies showed small disc herniations with no nerve impingement. Dr. Kriss stated that these degenerative findings were not the result of the work injury.

Dr. Kriss assigned Mehic a 5% whole person lumbar spine impairment rating but no thoracic spine impairment rating because Mehic's symptoms did not correlate with examination findings or diagnostic studies and were too diffuse. Furthermore, Dr. Kriss stated that the "mechanism of injury is pretty well disposed to causing a lumbar permanent harmful change, but not" thoracic because it takes a significant amount of torque to injure the thoracic spine.

Finally, Mehic's 2006 myelogram report indicates that he has disc bulging at L2-4, a disc herniation at L4-5, and slight disc degeneration at L5-S1.

STANDARD OF REVIEW

The ALJ has the sole discretion to determine the quality, character, and substance of the evidence and may reject any testimony and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same party's total proof. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). If the party with the burden of proof fails to convince the ALJ, that party must establish on appeal that the evidence was so overwhelming as to compel a favorable finding. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). When reviewing one of the Board's decisions, this Court will only reverse the Board when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). With the preceding in mind, we address the issues raised by Mehic on appeal.

ANALYSIS

Mehic first argues that the ALJ erred when she found that his thoracic spine condition was not related to the work injury. We disagree. Kentucky Revised Statute (KRS) 342.0011(1) defines injury as “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.”

In support of his argument, Mehic points to Dr. Kriss's statement in his report that Mehic suffered lumbar and thoracic strains as a result of the work injury. That is true. However, Dr. Kriss testified that the mechanism of injury was "well disposed" to cause "a lumbar permanent harmful change, but not really for thoracic." Furthermore, Dr. Kriss testified that, while it is possible Mehic's thoracic spine MRI findings are related to the work injury, it is not probable. That testimony is supported by Dr. Travis's statement that Mehic's diagnostic testing revealed only nonwork-related degenerative changes. Thus, there is sufficient evidence of record to support the ALJ's finding that Mehic's thoracic spine condition is not related to the work injury and the evidence does not compel a finding to the contrary.

Mehic next argues that the ALJ erred by not finding a work-related psychological condition. In support of this argument, Mehic first states that "Dr. Drljevic's opinion stands for the fact that [his] problems are work-related." Having reviewed Dr. Drljevic's records, we are not convinced that her opinion is as clear as Mehic would like. However, even if it is that clear, Dr. Shraberg stated that Mehic's psychological condition is not related to the work injury. While Mehic has done a yeoman's job of drawing lines connecting his various symptoms to the work injury, the simple fact is that Dr. Shraberg's opinion is evidence of substance upon which the ALJ could rely. The evidence to the contrary does not compel a finding in Mehic's favor.

Finally, Mehic argues that this matter should be remanded to the ALJ for a finding regarding his current impairment and whether he is permanently and totally disabled. The ALJ addressed this issue when she found that Mehic had not met his burden of proof because he had not shown a change of condition. While Mehic may not agree with or like the ALJ's conclusion, she made adequate findings in this regard, and we see no reason to remand for additional findings. In doing so, we note that the restrictions imposed on reopening – no lifting of more than ten pounds, no repetitive bending or twisting, and no prolonged sitting, standing, or walking – do not differ significantly, if at all, from those imposed by Dr. Morrasutti prior to settlement. Furthermore, although Dr. Bilkey assigned Mehic a 5% impairment rating related to his thoracic spine condition, the ALJ found that condition is not related to the work injury. Therefore, any impairment rating is also not related. As a final point on this issue, we note that Mehic's total impairment from Dr. Bilkey is the same as that imposed by Dr. Morrasutti and that Dr. Bilkey attributed only 8% of his total impairment rating to Mehic's lumbar spine, which is a significant improvement from Dr. Morrasutti's lumbar spine impairment rating of 13%. Thus, the ALJ's finding that Mehic failed to establish any increase in his lumbar spine impairment rating or any decrease in his ability to perform work activity is supported by the evidence and cannot be disturbed on appeal.

CONCLUSION

Having reviewed this matter, we must conclude that Mehic failed to overcome the steep burden of establishing that the evidence compelled a finding in his favor; therefore, we affirm the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Louisville, Kentucky

BRIEF FOR APPELLEE:

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