RENDERED: APRIL 22, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001135-WC

WHITE'S LODGING SERVICES APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-00019

FRANKIE SHIELDS; HON. DOUGLAS W.
GOTT, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,[1] SENIOR JUDGE.

WINE, JUDGE: White's Lodging Services ("White's Lodging") petitions this Court for review of an opinion and order by the Workers' Compensation Board ("the Board") affirming the opinion and award of the Administrative Law Judge,

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[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 KRS 21.580.

Honorable Douglas W. Gott ("the ALJ") finding the injuries to its employee, Frank K. Shields ("Shields"), to be compensable. On appeal, White's Lodging contends that the Board and the ALJ failed to consider previously imposed permanent work restrictions after a prior injury by his then-treating physician. White's Lodging also contends that the Board and the ALJ erred by failing to consider that Shields neglected to disclose on his hiring application that he had previously been injured and assigned permanent work restrictions. Finally, White's Lodging contends that the Board and the ALJ erred by imposing the three times ("3x") multiplier found in Kentucky Revised Statute ("KRS") 342.730(1) to enhance the award. Upon review, we affirm the Board.

I. Facts and Procedural History

Shields began working for White's Lodging in 2004 as a banquet houseperson. White's Lodging manages the Marriott Hotel in downtown Louisville, Kentucky. The position of banquet houseperson requires frequent lifting and moving of objects weighing from fifty up to one-hundred pounds. Shields's main job function as a banquet houseperson was to set up for banquets and conventions at the hotel, including the set-up of chairs, tables, dance floors, and stages. Shields described this work as physical in nature. He was eventually promoted to the position of lead man.

Shields testified in his deposition that he was involved in a motor vehicle accident in 1996. This accident occurred when he was traveling as a passenger in a vehicle that was struck in the side by another vehicle. Following the accident, Shields was under the care of Dr. Changaris who eventually performed a lumbar discectomy to repair injuries to Shields's back. Dr. Changaris imposed restrictions after the surgery of minimal lifting of less than ten pounds, and minimal bending, stooping, and climbing. Dr. Changaris instructed Shields that he could return to the workforce in a "sedentary" job classification.

On January 6, 2006, Shields was "breaking down" equipment in a banquet hall and moving heavy metal tabletops to a storage area at the Marriott. While performing these duties, Shields had the task of moving an eight-foot-long table top (weighing approximately 65 to 70 pounds) into a storage area. In order to move the table to the storage area, Shields was required to physically maneuver the table horizontally through a doorway and then twist the tabletop into a vertical position. Although Shields, then 48-years old, had managed to successfully perform this task on a number of previous occasions, on this particular date he experienced a pain in his lower back while placing the table top into storage.

After the accident, Shields went to Occupational Physicians Services ("OPS") for care, and returned to work on the same day under a restriction of light duty. Shields was treated by OPS on a few more occasions between January and

February of 2006. Shields eventually underwent back surgery for the injury by Dr. Villanueva. Shields testified that the back surgery did not help his back pain and that he continued to experience pain in his right leg and lower back. Shields was then referred to Dr. Chou for treatment.

During a deposition, Shields was asked whether he believed Dr. Changaris had ever released him from the restrictions he had been previously assigned. He responded that he did not believe he had. Shields testified at the hearing that, although he knew Dr. Changaris had placed restrictions on him, the duration and scope of those restrictions were never explained to him. He further testified that he did not know if the restrictions placed upon him were temporary or permanent restrictions.

Shields was eventually released by Dr. Changaris, who did not provide any instructions to Shields concerning the restrictions. Shields began working for White's Lodging eight years after he was last treated by Dr. Changaris. He testified that in that interim eight-year period, he had performed jobs requiring a similar exertional level as the job he performed at White's Lodging. Shields testified that he did not encounter any problems while working at White's Lodging until January 6, 2006. In fact, Shields testified that he was promoted to lead person where he was in the position of instructing others. Shields denied that he ever intentionally misled his employer regarding his previous injury.

Dr. Ellen Ballard conducted an independent medical examination of Shields on December 3, 2007 and reviewed the notes of Drs. Changaris and Villanueva. She noted that Shields had undergone two prior back surgeries. She further noted that Dr. Villanueva had assigned a 13% impairment rating to Shields (and did not consider the prior surgery), and that Dr. Changaris had previously assigned a 14% impairment rating to Shields. She noted that of Dr. Changaris's 14% impairment rating, there was a baseline of 12% and an additional 2% for having had surgery on more than one level. Dr. Ballard noted that, strictly speaking, Shields would have an additional 2% for the additional surgery. Dr. Ballard did not believe Shields had any new restrictions. She testified that Shields definitely violated the restrictions previously imposed by Dr. Changaris and that his present condition had a direct connection to his voluntary violation of those previous restrictions. She further testified that, although Dr. Changaris's records did not state whether the restrictions he imposed were intended to be permanent, she believed that they were.

A human resources manager with White's Lodging also testified. She was shown an employment application completed by Shields and she acknowledged that Shields had signed the last page thereof to be hired as a shipping and receiving supervisor. She noted, however, that Shields was not hired into the shipping and receiving position, but rather as a banquet houseperson. The

human resources manager testified that Shields would never have been hired as a banquet houseperson if it had been understood that he had injured his back in a motor vehicle accident and had lifting restrictions.

The ALJ, in his decision and award, found that an injury did occur on January 6, 2006. He awarded benefits to Shields based on a 2% impairment rating with the imposition of the 3x multiplier under KRS 342.730(1)(c)1 and KRS 342.730(1)(c)3. The ALJ also awarded temporary total disability benefits for the period from May 17, 2006 to May 15, 2007. The ALJ noted in his opinion that White's Lodging sought to avoid liability on two separate grounds.

The ALJ first addressed White's Lodging's defense that Shields misrepresented his physical capabilities in his job application. The ALJ found that Shields did not knowingly and willingly make a false misrepresentation as to his physical condition or medical history under KRS 342.165(2)(a). The ALJ found Shields's testimony that he had experienced no back problems in the six years leading up to the injury to be credible. The ALJ stated,

> Given his asymptomatic condition following the surgery performed many years prior, and his successful return to work beginning around the year 2000, there is no reason to believe that Shields was not being truthful when he represented his ability to perform work for [White's Lodging] that required some lifting up to 100 pounds.

The ALJ further noted that, while it wasn't necessary to his decision, the "ADA Acknowledgement" on the employment application did not ask the applicant to

verify that he had no work restrictions, but merely asked the applicant to verify that that he was "able to perform the essential functions of the job."

The ALJ found that it would be unreasonable to expect an unsophisticated laborer like Shields to read anything more into the question other that what it plainly asked. Nonetheless, the ALJ stated he was not suggesting that Shields's claim would be barred under KRS 342.165 even if the question had been asked and could be lawfully posed. The ALJ noted that the employer did not require a pre-employment physical and did not ask Shields about his medical history. The application did ask about Shields's criminal history, to which Shields responded truthfully. The ALJ noted:

> The facts of this case simply do not come close to those in which this statute has been applied [such as in *Gutermuth v. Excel*, 43 S.W.3d 270 (Ky. App. 2001)] . . . [where] the claimant had falsely denied that she had been off work due to work injuries, failed to list six operations on her upper extremities, and denied ever having had problems with her back, or shoulders.

The ALJ noted that Shields was simply asked whether he could perform the essential functions of the job as described, to which he truthfully and reasonably answered that he was.

The ALJ also considered the defense raised by White's Lodging that it was not responsible for Shields's injury because Shields was working in excess of the restrictions assigned to him by Dr. Changaris in 1997. The ALJ noted that

White's Lodging bore the burden of proof in asserting this defense. The ALJ noted that the entire basis for this defense was Shields's testimony in response to a question as to whether Dr. Changaris had ever lifted the restrictions from 1997, to which he answered, "No. I don't believe he has." The ALJ did not view the statement as having as much significance as White's Lodging places on it, noting that the question was "thrown in" at the end of the deposition and that it was unclear how Shields was to answer the question since he had never been back to see the doctor.

The ALJ pointed out that since Shields had never returned to Dr. Changaris's care due to the fact that he had not encountered any more problems with his back, there had never been an opportunity for Dr. Changaris to lift the restrictions. The ALJ noted that the restrictions could not be argued to have been permanent, any more than they could be argued to be temporary, because Dr. Changaris's notes did not say one way or the other. Bearing in mind White's Lodging's burden, the ALJ found it had failed to prove its defense. The ALJ further noted that the case law on this defense dealt only with using the defense within the context of pending injury claims, not to avoid liability on a current claim based upon an employee's alleged failure to follow medical advice. Consequently, the ALJ found that Shields was not under any restrictions at the time of his 2006

injury, and further that he presently has restrictions which would prevent him from returning to his pre-injury work, thus entitling him to the 3x multiplier.

White's Lodging filed a petition for rehearing, which was denied by the ALJ. White's Lodging appealed to the Board, which affirmed the ALJ. White's Lodging now petitions this court for review of the Board's opinion.

II. Standard of Review

When reviewing a decision of the Board, we will affirm the Board absent a finding that the Board has misconstrued or overlooked controlling law or has so flagrantly erred in evaluating the evidence that gross injustice has occurred. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). In order to properly review the Board's decision, we are ultimately required to review the ALJ's underlying opinion. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Where, as here, the ALJ finds in favor of the employee -- who bears the burden of proof-- we must ask only whether there is "some evidence of substance to support the finding, meaning evidence which would permit [the ALJ] to reasonably find as it did." *Id*. at 643. Substantial evidence is defined to mean evidence of relevant consequence which would induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co*., 474 S.W.2d 367, 369 (Ky. 1971).

Upon review, we also consider that the ALJ as fact-finder 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). The ALJ may choose to accept or reject any testimony, or to believe or disbelieve any part of the evidence, regardless of whether it hearkens from the same witness or the same adversary party's total proof. *Magic Coal v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). Thus, on appeal, mere evidence to the contrary of the ALJ's decision is not sufficient to require a reversal. *Id.*

III. Analysis

White's Lodging argues on appeal that the evidence demonstrated (1) Shields knowingly violated the restrictions previously assigned to him by Dr. Changaris; (2) there was no employment relationship between White's Lodging and Shields because of Shields's misrepresentation on his employment application; and (3) the ALJ erred in applying the 3x factor in finding that Shields could not return to the type of work he did for White's Lodging because Shields's existing work restrictions prohibited him from doing exactly that type of work.

We first address White's Lodging's argument that Shields knowingly violated the restrictions assigned to him by Dr. Changaris, thus causing his own injury. White's Lodging relies on KRS 342.035(3), which provides, in pertinent part:

> No compensation shall be payable for the death or disability of an employee if his or her death is caused, or if and insofar as his disability is aggravated, caused, or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.

KRS 342.035(3) is an affirmative defense. The burden of proof for this affirmative defense is placed upon the employer, who must demonstrate (1) that the claimant failed to follow medical advice, (2) that such failure was unreasonable, and (3) that the unreasonable failure caused the disability in question. *Luttrell v. Cardinal Aluminum Co*., 909 S.W.2d 334, 336 (Ky. App. 1995); *Teague v. South Central Bell*, 585 S.W.2d 425, 428 (Ky. App. 1979). "The determination of whether the failure to follow medical advice is unreasonable is a question of fact for the ALJ." *Luttrell* at 336, *citing Fordson Coal Co. v. Palko*, 282 Ky. 397, 138 S.W.2d 456 (1940).

In the present case, the ALJ did not view Shields's testimony that he "[didn't] believe" Dr. Changaris had released him from the restrictions as being particularly significant, due to Shields lack of education and sophistication.[2] The ALJ opined that, in Shields's mind he was giving a logical answer since he had never returned to Dr. Changaris for care. The ALJ further stated that it was impractical to expect someone like Shields to return to his former doctor to ask that the restrictions be lifted if he felt capable of working beyond them, especially after

[2] Shields has only an eighth grade education.

so many years had transpired. Further the ALJ noted the restrictions made no mention of permanency. Finally, the ALJ found it significant that Shields had returned to the workplace several years before the subject incident with no recurrence of symptoms from the 1996 injury.

We think the evidence supports these findings. Shields testified that he was asymptomatic and worked without problem or discomfort from 2000 to 2006. He further testified that he was physically capable of the heavy moving and lifting required by his job at White's Lodging, which was evidenced by the fact that he was promoted to lead houseperson while there. Finally, a review of Dr. Changaris's restrictions, contrary to the testimony of Dr. Ballard, does not reflect that the restrictions were intended to be permanent.

Accordingly, the ALJ's finding that KRS 342.035(3) has no applicability in the present case was supported by substantial evidence. The ALJ's finding that there was no concrete evidence Dr. Changaris intended the restrictions to be permanent was supported by substantial evidence. Therefore, the first element of the test espoused in *Luttrell, supra* is not met.[3]

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[3] Interestingly, the ALJ also noted that the defense of "unreasonable failure to follow medical advice" has never been used in the way White's Lodging seeks to use it. Namely, the statute has typically been used to reduce or eliminate an award where the employee has unreasonably refused to follow medical advice concerning *the injury in the pending claim*. White's Lodging seeks to apply this logic to the failure to follow medical advice concerning a previous injury, not the injury which is the subject of the pending claim. It is easy to see the problems that this type of application of the statute might cause. However, we do not need to decide this issue today as this reasoning appears to be dicta and we affirm on the ALJ's other stated grounds.

We now turn to White's Lodging's second argument on appeal, namely, that there was no employment relationship between White's Lodging and Shields under KRS 342.165(2) because Shields made misrepresentations on his employment application. KRS 342.165(2) provides as follows:

> No compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable falsely represents, in writing, his or her physical condition or medical history, if all of the following factors are present:
>
> (a) The employee has knowingly and willfully made a false representation as to his or her physical condition or medical history;
>
> (b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring; and
>
> (c) There is a causal connection between the false representation and the injury for which compensation has been claimed.

White's Lodging's argument turns on the fact that Shields signed an acknowledgement on the employment application which provided that he had read the job description for the position of shipping and receiving supervisor (and/or "banquet houseperson") and was able to perform the essential functions of that job.

The ALJ found that Shields did not "knowingly and willfully make a false misrepresentation as to his physical condition or medical history" as required under KRS 342.165(2)(a). The ALJ found Shields's testimony that he had successfully worked without recurrence of his symptoms from 2000 until the time

of his application to White's Lodging in 2004, to be credible. The ALJ also pointed out the employer had not produced any evidence that Shields had any follow-up treatment after treating with Dr. Changaris in 1996. More importantly, however, the ADA acknowledgement on the employment application on which White's Lodging relies only required that Shields acknowledge he could perform the essential functions of that job, "*with or without an accommodation*." (Emphasis added). Indeed, the acknowledgment in question which forms the basis of White's Lodging's argument of a false misrepresentation on the application did not even require that Shields be able to perform the job *without* accommodation. In addition, the application did not ask Shields about his prior medical history. Therefore, Shields could not have falsely misrepresented his prior medical history. Accordingly, the ALJ's finding was supported by substantial evidence. We agree with the ALJ that this is not a situation where Shields was untruthful about prior injuries or surgeries, as the application did not request such information.

We now address White's Lodging's last argument on appeal that the 3x multiplier should not have been used. Because we affirmed the ALJ on White's first argument, it necessarily follows that White's Lodging cannot prevail on this last argument because the ALJ found that Shields was not under any restrictions at the time of his employment.

White's Lodging argues that, because Dr. Changaris's restrictions were permanent in nature, Shields was already prohibited from performing the type of work he was doing for the Mariott Hotel. Hence, according to White's Lodging, the 3x multiplier should not apply because Shields was already prevented from that type of employment. However, the ALJ having found that Dr. Changaris's restrictions were not permanent, also found that Shields was not under any restrictions at the time of his work injury.

The ALJ found that Shields *did have* restrictions following his January 6, 2006 injury while working for White's Lodging. The ALJ found that these restrictions prevented him from returning to his pre-injury work. The ALJ relied on the work restrictions imposed by Dr. Villanueva after the January 6, 2006, work injury which included no lifting over ten pounds, no repetitive bending or twisting, and no prolonged sitting or standing. These restrictions are clearly outside the job description of a banquet houseperson (which requires lifting of 50 to 100 pounds), and of a general unskilled laborer, which Shields had previously been. For these reasons, we affirm the Board on this issue as the ALJ's findings are supported by substantial evidence.

Accordingly, we hereby affirm the opinion of the Board.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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