

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-002070-WC

MOSEN KHANI

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-11-73224

ALLIANCE CHIROPRACTIC; HON. OTTO D. WOLFF, IV,  
ADMINISTRATIVE LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Mosen Khani appeals from an Opinion of the Workers' Compensation Board affirming an Opinion and Order rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). ALJ Wolff determined that Khani did not suffer "injuries" as defined by the Act, and therefore dismissed

Khani's claim for benefits. Khani argues that ALJ Wolff committed reversible error by characterizing Khani's testimony as that of a lay witness rather than an expert, that Khani's injuries satisfied the statutory definition, and that he was entitled to medical and TTD benefits for a "temporary injury." We find no error, and affirm the Opinion on appeal.

Khani is a licensed chiropractor, and is the sole owner and operator of Alliance Chiropractic, LLC, which is located in Louisville, Kentucky. In 2011, he filed a Form 101 alleging that he sustained work injuries on February 28, 2011, August 22, 2011, and August 23, 2011, to "both hands, arms, shoulders, neck, lower back, left lower extremity and dental bridge" while moving or assisting patients in his capacity as chiropractor. Khani claimed that he first experienced neck pain on February 28, 2011, while performing chiropractic manipulations on a patient. About three weeks later, he sought medical treatment from Dr. Ghias Arar, a neurologist. Dr. Arar ordered neck and shoulder EMGs and MRIs and prescribed medication.

On August 22, 2011, Khani experienced low back and left leg pain when he prevented a heavy patient from falling. He returned to work the following day and experienced bilateral shoulder pain while performing manipulations on a patient. He later sought treatment from Dr. Arar, who ordered lumbar and bilateral shoulder MRIs. Khani also sought treatment from Drs. Mark Smith and Terry Hill. Khani attributed his dental bridge injury to his work incidents.

Khani would later testify that in 1988 he was involved in a motor vehicle accident which resulted in neck and arm injuries. According to Khani, his symptoms resolved after three or four months of treatment, and he had no more problems until February of 2011. Khani did acknowledge that he had "aches and pains" following the 1988 accident, and confirmed that Dr. David Rouben suggested a cervical fusion in 2006. Khani also said that he received treatment for low back "aches and pains" in 2006, from which he fully recovered. Khani also received treatment for right shoulder pain in 2006 or 2007, but said that he was mostly asymptomatic until 2011. Finally, Khani noted a left hand fracture in 1996 requiring open reduction, a right fibula fracture in 2006 or 2007, a left patella fracture in 2009, and carpal tunnel syndrome in 2004 or 2005. While acknowledging that the previous injuries and symptoms were in the same parts of his body he now attributes to the 2011 events, he said "the frequency, intensity, and duration of pain . . . have been different." On October 6, 2011, Dr. Warren Bilkey opined that Khani had no history of significant injuries affecting his neck, back or shoulders.

A large volume of medical evidence was produced relating to both the extensive pre-existing injuries and treatment, as well as that which allegedly resulted from the 2011 events. In a May 16, 2012 report, Dr. Bilkey diagnosed a February 28, 2011 work-related cervical strain and radiculopathy, an August 22, 2011 work injury lumbar strain, and an August 23, 2011 work injury bilateral shoulder pain. Dr. Bilkey noted that the complexity of Khani's diagnosis was

based in large part on his long history of pain resulting from cumulative events, and acknowledged that Khani experienced chronic neck pain. While noting that Khani's "days are numbered as a treating chiropractor", he concluded that Khani had reached maximum medical improvement ("MMI") with no recommendation of additional treatment. He declined to assign work restrictions, and assessed a 12% impairment for Khani's work-related neck injury and a 2% impairment for his work-related lumbar spine condition pursuant to the AMA Guides. As for Khani's shoulder pain, Dr. Bilkey concluded that Khani had not yet reached MMI. He recommended an orthopedic assessment and declined to assess a permanent impairment rating for the shoulder pain.

Other medical evidence included the August 29, 2011 report and September 13, 2011 addendum of Dr. Michael Best. Dr. Best concluded that Khani had significant pre-existing conditions prior to the February 28, 2011 work event. Based on his comparison of 2006 and 2011 EMG/NCV, Dr. Best found no objective evidence of a worsened condition relating to Khani's carpal tunnel syndrome, chronic C6 and C7 radiculopathy and right axonal peroneal nerve neuropathy. Additionally, Dr. Best determined that a May 5, 2011 cervical spine MRI revealed nearly identical findings of prior cervical spine MRIs. In the September 13, 2011 addendum, Dr. Best stated that he reviewed numerous MRI studies and found no evidence of work-related conditions.

Finally, Dr. Russell Travis disagreed with several aspects of Dr. Bilkey's October 6, 2011 and May 16, 2012 opinions. Dr. Travis noted that a July

21, 2006 lumbar spine MRI was not significantly different from one taken on September 2, 2011, and a review of the medical records shows Khani's low back complaints to be pre-existing. Dr. Travis found no permanent injury to the spine as defined by KRS 342.0011(1) arising out of the February 28, 2011 or August 22, 2011 work incidents, and found that an impairment rating was not warranted for either the cervical or lumbar spine. He concluded that any current impairment rating to Khani's lumbar or cervical spine would be 100% attributable to pre-existing conditions dating as far back as 2006.

The matter proceeded before ALJ Wolff, who rendered a forty-page Opinion and Order on March 19, 2013. ALJ Wolff determined in relevant part that though Khani appeared "generally credible", he did at times "seem evasive and contrived, trying to think of the best answer to help his cause." The Opinion, however, centered on KRS 342,0011(1), which defines "injury" as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of or in the course of employment which proximately causes a harmful change in the human organism evidenced by objective medical findings." ALJ Wolff found as the most persuasive and credible the opinion of Dr. Travis, and determined that Khani did not meet his burden of proof to demonstrate that a harmful change in the human organism occurred. ALJ Wolff found that Khani had not proven "injuries" as defined by the Act, and dismissed Khani's claim for benefits.

Thereafter, Khani prosecuted an appeal to the Board, wherein he challenged ALJ Wolff's assessment of his claim. The Board found as lacking in merit Khani's contention that the ALJ erroneously required proof of a structural change for there to be an injury as defined by the Act. Additionally, the Board found as unpersuasive Khani's argument that the ALJ failed to provide any analysis as to whether his injuries were temporary, permanent or work-related. Finally, the Board found that the ALJ did not commit reversible error in stating that, "Plaintiff is not considered an expert witness herein, but is considered to be only a lay witness." Ultimately, the Board concluded that "substantial evidence supports the ALJ's determination that Dr. Khani failed to prove he sustained an injury as defined by the Act, and no contrary result is compelled." This appeal followed.

Khani first argues that ALJ Wolff committed reversible error in characterizing Khani's testimony as that of a lay witness rather than an expert. He notes that he is a licensed chiropractor, which meets the definition of "physician" under KRS 342.0011(32), and that the Board erred in failing to so find. He contends that even though he is the claimant herein, his opinion on the medical issues is superior to that of a lay person, and such opinions are entitled to be considered in analyzing the entirety of the medical evidence.

Kentucky Rules of Evidence (KRE) 702 provides that expert testimony must be based on sufficient data or facts, the product of reliable principles and resources, and that the principles and methods have been reliably applied to the facts of the case. In the matter at bar, ALJ Wolff made specific

findings that some of Khani's testimony was evasive and, in the ALJ's view, formulated to support his claim for benefits. The ALJ has the sole province to determine the quality, character and substance of the evidence and to draw all reasonable inferences from that evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). The trial court is presumed correct in its rulings and judgments, and the burden rests with the appellant to overcome that presumption. *Caudill v. Caudill*, 212 Ky. 433, 279 S.W. 656 (1925). Khani has cited no precedent for the error he asserts, and has not overcome the presumption of correctness in the ALJ's disposition of this issue. Accordingly, we find no error.

Khani next argues that ALJ Wolff erred in finding that Khani's injuries did not meet the statutory definition of "injury". In support of this argument, Khani cites the definition of injury set out at KRS 342.0011(1), and directs our attention to *Gibbs v. Premier Scale Company*, 50 S.W.3d 754 (Ky. 2001). The focus of his claim of error on this issue is that there is no requirement that the "injury" be accompanied by an objective "structural change". Rather, he contends that "KRS 342.0011 allows subjective findings to be taken into account in assessing the entirety of the injury". Khani maintains that his subjective reporting of pain, numbness and physical limitations can be considered in concert with the objective EMG/NCV and MRI abnormalities to support a finding that he did suffer an "injury" as defined by the Act.

In the matter at bar, and as is often the case in work-related injury claims, the trier of fact was presented with conflicting medical evidence. To

summarize, Dr. Bilkey reported findings consistent with Khani's claim of work-related injuries. Conversely, Dr. Travis opined that the current medical studies of Khani showed no substantive change or additional injury relative to similar studies conducted as early as 2006. In relying on Dr. Travis's opinion, the ALJ stated that,

Having reviewed so many of Plaintiff's pre-2011 and a substantial amount of medical record and reports prepared following Plaintiff's alleged 2011 injuries, Dr. Travis is the most qualified to render expert medical opinions comparing Plaintiff's pre-2011 medical status to Plaintiff's post-2011 medical status.

Usually the evidence provided by an expert medical witness who has not examined the injured worker carries less weight than the evidence provided by the physician, who examined the injured worker, but in this particular case the focus is on the role of the Plaintiff's pre-2011 medical status played in determining his post-2011 work-injuries medical status. This determination is best made by the medical expert who is most familiar with the pre- and post-injury medical status of the injured worker, and in this claim, the most persuasive proof is from Dr. Travis.

The claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his cause of action before the ALJ, including whether he sustained an "injury" as defined by the Kentucky Workers' Compensation Act. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). Since Khani was unsuccessful in meeting this burden of proof, the question on appeal was whether the evidence was so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence so

overwhelming that no reasonable person could reach the same conclusion as the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985). Finally, the ALJ, as fact finder, has the sole authority to determine the weight, credibility and substance of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993).

ALJ Wolff found Dr. Travis' opinion most persuasive in concluding that Khani failed to prove that he sustained a compensable "injury" as defined by the Act. Substantial evidence supports this conclusion, and we find no error.

Finally, Khani maintains that ALJ Wolff committed reversible error in failing to award appropriate medical and TTD benefits for at least a "temporary injury." Specifically, Khani contends that the ALJ should have made a determination of whether his injuries were temporary, permanent or work-related. In disposing of this claim of error, the Board succinctly noted that "an obvious requirement warranting such an award would be a finding of any injury, temporary or permanent." In the matter before us, the ALJ clearly determined that Khani failed to prove any injury; therefore, the ALJ was not required to determine whether the purported injuries were temporary or permanent. We find no error.

For the foregoing reasons, we affirm the Opinion of the Workers' Compensation Board.

ALL CONCUR.

Ched Jennings

BRIEF FOR APPELLEE ALLIANCE

Louisville, Kentucky

CHIROPRACTIC:

Brian T. Gannon  
Louisville, Kentucky