

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 27, 2020

CLAIM NO. 201888718

WAYNE McDANIEL

PETITIONER

VS. **APPEAL FROM HON. JOHN H. McCracken,
ADMINISTRATIVE LAW JUDGE**

AREA WIDE PROTECTIVE and
HON. JOHN H. McCracken,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and BORDERS, Members.

ALVEY, Chairman. Wayne McDaniel (“McDaniel”) appeals from the November 13, 2019 Opinion and Order dismissing his claim, and the December 12, 2019 Order denying his petition for reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge (“ALJ”). The ALJ determined McDaniel did not sustain work-related injuries on March 20, 2018, when the driver of a vehicle he had attempted to flag down pushed him to the ground.

On appeal, McDaniel argues his confrontation with an irate motorist did not take his action outside the course and scope of his employment. We disagree and affirm.

McDaniel filed a Form 101 on May 2, 2018, alleging he sustained injuries to his tailbone (fractured coccyx), low back, and neck on March 21, 2018. On that date, he was assaulted by the driver of a car he had attempted to stop while he was working as a flagger on a jobsite for Area Wide Protection (“AWP”). McDaniel later amended his claim to include the allegation of an injury to his left foot. The ALJ determined McDaniel did not sustain a work-related left foot injury. On appeal, McDaniel acknowledges in his brief that he has abandoned his claim for a left foot injury. Therefore, we will not outline any of the evidence filed in support of that allegation. In his Form 104, McDaniel outlined his employment history consisted of working as a truck driver, custodian, and flagger/traffic control.

McDaniel testified by deposition on May 21, 2018, and at the final hearing held September 17, 2019. McDaniel was born on July 31, 1967, and he resides in Louisville, Kentucky. McDaniel is a high school graduate, and attended vocational school. In addition to the jobs listed in the Form 104, he also worked as a gravedigger. He testified he sustained multiple injuries while working for AWP on March 20, 2018, not March 21, 2018 as alleged in the Form 101. McDaniel testified he is diabetic, and prior to this incident, he underwent an amputation below the right knee. Subsequent to the incident, he eventually underwent an amputation below the left knee.

McDaniel began working for AWP as a flagger/traffic controller in June 2017. At the beginning of the workday, he received a safety briefing. Afterward, signage was placed, the vehicle was parked, and orange cones were placed around the vehicle. He then stopped or slowed traffic using a paddle. Another AWP employee was located further down the road, at the other end of the worksite, to ensure the flow of traffic.

On March 20, 2018, he attempted to stop a vehicle. The driver of the vehicle complained he would be late for work. After advising the driver he would have to wait, McDaniel was threatened and told to get out of the way. He stated the driver swerved to get around him, then stopped the vehicle and got out, accusing McDaniel of striking his car with the paddle. McDaniel admitted the paddle struck the vehicle. The driver then shoved him down to the road where he landed on his buttocks. The driver then drove away. McDaniel was fired by AWP shortly afterward. He complained of low back, neck, and tailbone pain due to the incident. He testified his back pain later resolved.

Eric Gene Cooper (“Cooper”), regional safety manager with AWP, testified by deposition on June 10, 2019. He testified he saw McDaniel at the worksite on March 20, 2018. Cooper stated McDaniel was standing in the middle of the road, and improperly flagging traffic. He noted McDaniel was not wearing all of his safety equipment, his vest was not zipped, and the stop/slow sign was not properly installed on its staff. He observed McDaniel standing in the middle of the road arguing with a driver. He also witnessed McDaniel striking the driver’s car with his paddle. He specifically testified, “As the Camaro was driving around it, Mr.

McDaniel never moved his feet, and he took his stop paddle and smacked that Camaro right up in front of his driver's side door and held it against that Camaro until it passed." The driver then exited his vehicle, and pushed McDaniel to the ground.

William Daniel ("Daniel"), safety trainer with AWP, was with Cooper at the time of McDaniel's incident on March 20, 2018. He first observed McDaniel standing in the middle of the road as they approached the jobsite. He noted McDaniel was not using the pole for his stop/slow paddle. He stated a red Camaro attempted to swerve past McDaniel, but did not contact him. He observed McDaniel's paddle contact the fender of the Camaro. The driver then got out and shoved McDaniel to the ground. McDaniel did not complain of physical problems after the fall. Daniel stated all flaggers were required to complete safety training prior to working for AWP. He noted McDaniel was not wearing all of his safety equipment at the time of the incident.

In support of his claim, McDaniel filed the March 21, 2018 note from Dr. Ryan Hata at Norton's Hospital. Dr. Hata noted McDaniel complained of sacral pain into his right buttock stemming from being pushed down. McDaniel denied having numbness, tingling, or weakness. He noted McDaniel's previous history of an amputation below the right knee due to diabetes. X-rays revealed a closed coccyx fracture.

AWP filed records from Pearl Medical Care for treatment McDaniel received from December 8, 2017 through May 21, 2018. Those records reflect ongoing treatment for low back pain, type 2 diabetes mellitus, and hypertension.

The March 22, 2018 treatment note does not reflect the March 20, 2018 incident. On April 21, 2018, McDaniel complained of low back pain, and a broken coccyx of four weeks duration.

Dr. Richard Holt evaluated McDaniel on August 20, 2018 at the request of his attorney. AWP filed the report. McDaniel reported being pushed down by a driver while working on March 20, 2018, landing on his buttocks. Dr. Holt diagnosed peripheral vascular disease, diabetes, and tobacco abuse. He assessed a 0% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) for the broken coccyx, which he stated had healed. He opined McDaniel has no impairment for a work injury. Dr. Holt recommended sedentary work only due to McDaniel’s loss of balance and continued problems with his left foot.

Dr. Daniel D. Primm, Jr., evaluated McDaniel at AWP’s request on June 4, 2019. He noted McDaniel is a poorly controlled diabetic. McDaniel reported a March 20, 2018 work incident. He stated McDaniel sustained a coccyx fracture due to that accident. Dr. Primm stated that condition was now healed with no residuals, and would have healed within four months. He stated McDaniel has no impairment pursuant to the AMA Guides as a result of any work injury.

A Benefit Review Conference was held on September 18, 2019. The following were identified as contested issues: the physical capacity to return to the type of work performed at the time of the injury, notice, work-related injury/causation, benefits per KRS 342.730, temporary total disability (“TTD”) benefits, ability to return to work, unpaid or contested medical expenses, whether McDaniel

sustained any injury in the course and scope of his work, and maximum medical improvement as it relates to TTD.

The ALJ concluded McDaniel did not sustain a work-related injury on March 20, 2018. The ALJ stated he was not inclined to believe McDaniel's version of what happened at the time of the incident. The ALJ noted that both Cooper and Daniel observed the incident between McDaniel and the driver of the Camaro. They both observed McDaniel striking the vehicle with his paddle. The ALJ also noted that it is unquestioned that the Camaro driver exited his vehicle afterward and pushed McDaniel to the ground. He noted McDaniel was fired after the incident. The ALJ cited to Hayes Freight Lines v. Burns, 290 S.W.2d 836 (Ky. 1956), which states, "In order for an injury to arise out of employment, there must be a causal relationship between the employment and the injury. If the injury was brought about by reason of some other cause having no relation to the claimant's employment it cannot be said to have arisen out of employment."

The ALJ determined the driver exited the vehicle and pushed McDaniel down because he struck the Camaro with his paddle. The ALJ noted there is no evidence there was any contact between McDaniel and the Camaro until he struck it with his paddle. The ALJ further determined, "[t]he driver clearly ignored McDaniel's order to stop. However, using the paddle to strike the car because the driver disregarded his stop order is not an act within the course and scope of employment as a flagger and from the evidence, is the reason the driver pushed McDaniel to the ground." The ALJ determined any injuries sustained by McDaniel were outside the course and scope of his employment.

McDaniel filed a petition for reconsideration requesting the ALJ to reconsider his decision that the injury did not occur within the course and scope of his employment. He argued his actions did not take the incident out of the course and scope of employment. The ALJ entered an order on December 12, 2019 denying the petition as merely a re-argument of the merits of the claim.

On appeal, McDaniel argues his act of confronting an irate motorist did not take his actions outside the course and scope of his employment. We disagree. McDaniel cites to the holding in Hayes Freight Lines v. Burns, *supra*. Hall Contracting of Ky., Inc., v. Huff, 481 S.W.3d 811 (Ky. App. 2015), Allen v. Columbus Mining, 268 S.W. 1073 (Ky. 1925), Roark v. Alva Coal Corp., 371 S.W.2d 56 (Ky. 1956) in support of its argument.

“Injury” is statutorily defined in KRS 342.0011(1) as a work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment, proximately causing a harmful change in the human organism evidenced by objective medical findings. As the claimant in a workers’ compensation proceeding, McDaniel had the burden of proving each of the essential elements of his claim, including work-relatedness/causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because McDaniel was unsuccessful in his burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Compelling evidence” is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ’s decision is

limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

McDaniel requests this Board to re-weigh the evidence and substitute its judgement for that of the ALJ. This we cannot do. The ALJ acted squarely within his discretion in finding the pushing incident did not fall within the course and scope of McDaniel's employment.

KRS 342.610(3) states, "Liability for compensation shall not apply to injury, occupational disease, or death to the employee if the employee willfully intended to injure or kill himself, herself, or another." A similar situation was recently addressed by the Kentucky Supreme Court in Trevino v. Transit Authority of River City, 569 S.W.3d 400 (Ky. 2019). There, a bus driver was involved in an altercation with a passenger. The Court noted the ALJ in that case determined Trevino's actions were deliberate and intended to inflict harm on the assailant. The ALJ further determined Trevino's actions escalated the situation.

In addressing KRS 342.610(3), the Kentucky Supreme Court stated:

The legislature's intent here is clear: if a claimant's aggressive or inflammatory behavior proximately causes violence, thus resulting in injury to the claimant, the claimant is not entitled to compensation under Kentucky's Workers' Compensation laws. *See Livingood v. Transfreight, LLC*, 467 S.W.3d 249, 258 (Ky. 2015) ("KRS Chapter 342 evinces a legislative intent that an employee should not benefit from his own wrongdoing.") To be clear, there may be other but-for causes at issue. However, the key question here is whether the claimant's willful conduct was the proximate cause of his injury.

In this instance, the ALJ determined the assailant did not strike McDaniel with his car; he merely attempted to get around the traffic stop. It was not until McDaniel struck the car with his paddle that the assailant stopped, got out, and pushed him to the ground. The ALJ specifically found as follows:

“In order for an injury to arise out of employment, there must be a causal relationship between the employment and the injury. If the injury was brought about by reason of some other cause having no relation to the claimant's employment it cannot be said to have arisen out of employment.” Hayes Freight Lines v. Burns, Ky., 290 S.W.2d 836 (1956). In the case at bar, the evidence is clear that the reason the driver stopped the Camaro, got out, and pushed McDaniel to the ground is because the paddle struck the front driver side of the car. The proof is clear that McDaniel and the driver had been arguing before the incident with the paddle. The evidence is overwhelming that McDaniel's striking the car with his paddle is the reason he was pushed to the ground. McDaniel is not certain he struck the car with his paddle, but stated it could have happened because he fell backwards when the car drove off and ran over his foot. The ALJ understands McDaniel's position, however, there was no contact between the car and McDaniel. Cooper and Daniel stated McDaniel's feet never moved when the car went by him. They both had a clear view of McDaniel taking the paddle and striking the car. The ALJ is convinced that the reason McDaniel was knocked to the ground was because he struck the car with his paddle. The ALJ finds the testimony of Cooper and Daniel more credible as to what happened at this point than that of McDaniel. Based upon the testimony from everyone who testified, an argument was occurring between McDaniel and the driver. The driver clearly ignored McDaniel's order to stop. However, using the paddle to strike the car because the driver disregarded his stop order is not an act within the course and scope of his employment as a flagger and from the evidence, is the reason the driver pushed McDaniel to the ground. The result would be different if the paddle striking the vehicle was purely an accident. However, given the testimony of what occurred, the ALJ does not believe that it was an accident.

The ALJ relies on Cooper and Daniel to find that McDaniel injured his back and shoulder due to an act outside the course and scope of his employment. The ALJ dismisses McDaniel's claims for injury to his back and shoulder.

Although he did not specifically cite to the case, we find the ALJ performed the appropriate analysis pursuant to Trevino v. Transit Authority of River City, supra. The ALJ's decision is supported by the evidence, and a contrary result is not compelled. Therefore, we affirm.

Accordingly, the November 13, 2019 Opinion and Order, and the December 12, 2019 Order on petition for reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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