RENDERED: December 4, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002413-WC

FIELD PACKING COMPANY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 91-026301

MURRAY ROWLAND; HON. SHEILA C. LOWTHER, ADMINISTRATIVE LAW JUDGE; SPECIAL FUND; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 1997-CA-002663-WC

SPECIAL FUND — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 91-026301

FIELD PACKING COMPANY; MURRAY ROWLAND; HON. SHEILA C. LOWTHER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; ABRAMSON[1] AND JOHNSON, JUDGES.

JOHNSON, JUDGE. Field Packing Company (Field) petitions and the Special Fund cross-petitions for review of a Workers' Compensation Board (Board) opinion rendered on September 5, 1997, which affirmed the Administrative Law Judge's (ALJ) decision. The ALJ found Murray Rowland (Rowland) to have met his burden of proof on his motion to reopen and awarded him permanent total disability benefits. Liability was apportioned equally between Field and the Special Fund. Field argues that there was insufficient evidence to support (1) the ALJ's findings of an increased occupational disability; or (2) the ALJ's findings that Rowland's original occupational disability was 40%. In its cross-petition, the Special Fund adopts Field's arguments as to the sufficiency of the evidence, and additionally argues that Rowland's benefits should have been limited to 88.84% rather than 100%. The Special Fund argues that the appropriate rate should be calculated by subtracting 11.16% from the 100% award because 11.16% represents the difference in rate found by the ALJ (40%) and the actual amount of Rowland's original settlement (28.84%). Having reviewed the record and considered the parties' arguments, we affirm.

Rowland, a 63-year-old man with an eighth grade education and no specialized training, worked at Field for over fifteen years primarily as a maintenance worker. Rowland testified that his position required him to lift up to 120

[1]Judge Abramson concurred in this opinion prior to leaving the Court on November 22, 1998.

pounds, walk most of the time, bend, and get in tight places. In February 1987, Rowland picked up a small conveyer to place it back into a packaging machine, fell and injured his lower back. In November 1989, Rowland underwent back surgery for this injury. The surgery was performed by Dr. Michael Kavolus (Dr. Kavolus), an orthopedic surgeon. Rowland returned to work for Field in February or March 1990 at his regular job, where he worked until December 1990. There is conflicting evidence as to whether Field terminated Rowland or whether Rowland quit working for Field; however, there is no dispute that Rowland has not been employed since December 1990.

On July 24, 1991, Rowland filed a workers' compensation claim for permanent partial disability benefits. The claim was settled in December 1991. Rowland received a lump sum payment of $25,646, which represented payments of $70.52 per week for 425 weeks. The amount of the settlement reflected a 28.84% occupational disability. Liability was apportioned approximately 68.5% to Field and 31.5% to the Special Fund. After the settlement Rowland was successful in receiving unemployment benefits. Rowland testified that at the time of the settlement he was able to push mow his yard, walk approximately one block and play pool.

In June 1992, Rowland was referred by Dr. Kavolus to Dr. William Madauss (Dr. Madauss), a neurosurgeon, who performed a vertebral fusion on Rowland in November 1992. After Dr. Madauss performed the first fusion, Rowland experienced temporary improvement. However, Rowland's condition worsened and he applied for and was awarded Social Security total disability

benefits back to his last date of employment in December 1990. In 1994, Rowland's condition had declined to the point that Dr. Madauss was forced to perform yet another vertebral fusion. Rowland testified that since the second fusion he has been unable to perform even the most sedentary tasks. He claims that he cannot sit for more than ten minutes at a time and spends 85% of his day lying on the couch with a cushion placed behind his back.

On May 2, 1996, Rowland filed a motion to reopen his workers' compensation claim based upon a worsening of his condition which he claimed resulted in a permanent total occupational disability. Field opposed the motion based upon noncompliance with a regulation. On June 6, 1996, the Chief ALJ overruled Rowland's motion to reopen based on this regulatory noncompliance. On July 3, 1996, Rowland refiled his motion to reopen his claim. On August 12, 1996, an ALJ determined that Rowland had made a prima facie case for reopening and the matter was assigned to an ALJ for the taking of proof. In his deposition, Rowland stated that he has not been able to return to work since he left Field in December 1990.

Dr. Madauss testified that Rowland did well after his first fusion and might have been able to perform sedentary work. Dr. Madauss stated that the second fusion was probably unsuccessful and suggested that since Roland was a smoker any further surgery was not recommended. Dr. Madauss sought and received a second medical opinion confirming this conservative approach. Dr. Madauss stated that since the second fusion, Rowland had been "less capable of doing even minimal activity

. . . ." Dr. Madauss opined that Rowland had made all the improvement possible "barring a miracle", that he had a 40% impairment rating based on AMA guidelines and that Rowland was not capable of lifting anything or standing or sitting for prolonged periods. Dr. Madauss concluded that Rowland "cannot even perform sedentary type work."

On cross-examination, Dr. Madauss agreed that Rowland had not worked since the first day he saw him and that he had never released Rowland to work. Dr. Madauss expressed the belief that since he began treating Rowland, Rowland had developed junctional instability in his spine. Dr. Madauss stated that Rowland experienced a great deal of pain due to the failure of the second fusion and he added that Rowland now walked with a simian gait and required a cane.

A final hearing was held on January 29, 1997, with the only contested issues being whether Rowland's occupational disability had increased from December 1991 to July 1996, and the apportionment of any award. During his testimony at the hearing, Rowland changed his testimony from his deposition and denied that he had been totally disabled since he left Field. Dr. Madauss' deposition with Roland's medical records attached was entered into evidence. Mrs. Olive Rowland testified that her husband's condition had changed since the time of settlement. She stated that in December 1991 her husband went fishing, played pool, traveled, mowed yards, and helped her around the house. She testified that these activities ceased when he had his last surgery in 1994. She testified that "he can't walk good, he

can't bend, he can't lift. He just can't do nothing [sic]." She stated that since the last surgery, Rowland spends around 80% of his time on the couch.

Ronald Neal (Neal), Field's Director of Human Resources, testified that Rowland voluntarily quit his job because Rowland claimed he was not physically able to work five days a week. Neal stated that Rowland was not terminated and that he had no complaints about Rowland's work performance. Neal opined that at the time Rowland left Field he was capable of holding other employment. Field presented no medical evidence.

The ALJ determined that Rowland was permanently and totally occupationally disabled as of July 3, 1996. In explaining the basis for her finding, the ALJ stated as follows:

> This has been a troubling case to the Administrative Law Judge. The testimony offered by the three lay witnesses is certainly confusing. However, having had the opportunity to observe all three witnesses at the hearing, and having otherwise carefully reviewed all the evidence contained in the record, it is the finding of the Administrative Law Judge that the Plaintiff's condition did worsen dramatically. This is evidenced by the subsequent surgeries performed by Dr. Madauss. Dr. Madauss estimated that after the original procedure, Mr. Rowland retained a 5% functional impairment. This is consistent with the fact that the Plaintiff was able to return to work and work for at least ten months in his regular occupation. Dr. Madauss testified that the Plaintiff now retains a 40% functional impairment, and is incapable of performing even sedentary work. Based upon this, it is the finding of the Administrative Law Judge that the Plaintiff has sustained his burden of demonstrating a worsening of his condition and is now totally and permanently occupationally disabled. Peabody Coal Co. v. Gossett, Ky., 819 SW2d 33 (1991).

The ALJ apportioned liability equally between Field and the Special Fund and ordered that each party pay $122.33 per week based upon their 50% share of a total occupational disability starting July 3, 1996, and continuing for as long as Rowland is disabled. Field was ordered to first pay the disability award for the number of weeks proportionate to its liability, with the Special Fund to pay for the remainder of the disability.

Both Field and the Special Fund filed petitions for reconsideration. Field argued the ALJ had erred in finding that Rowland's condition had worsened. Field argued the ALJ had failed to make a finding as to Rowland's occupational disability as of the date of settlement or to make an apportionment for pre-existing active disability which is non-compensable. Field also contended that the apportionment erroneously required Field to pay the Special Fund's portion for the first half of the award. The Special Fund requested findings of the actual amount of occupational disability at the time of the settlement and the percentage of disability represented by the settlement agreement. The Special Fund argued that Rowland is precluded from recovering the difference between those two amounts and that his disability award is limited to the amount represented by the settlement agreement plus the amount of increase in disability (28.84% + 60% = 88.84%).

By order dated May 22, 1997, the ALJ found that at the time of settlement Rowland had a 40% occupational disability. The ALJ found that Rowland had not been able to work for a substantial period of time after the injury and that during this

period he was temporarily totally disabled and that until Rowland returned to work at Field in February 1990 he remained permanently partially disabled. The ALJ found that when Rowland had filed the motion to reopen on July 3, 1996, that he was totally occupationally disabled.

On appeal to the Board, Field contended that there was no evidence of substance to support the finding of a 40% occupational disability at the time of the settlement. Instead, Field argued that Rowland was totally disabled in December 1990, and had just made a bad bargain by settling for a disability of only 28.84%. Hence, Field argued that there had been no change in Rowland's condition as required for an award upon reopening. The Special Fund agreed with Field that there was no evidence of increased occupational disability, and also argued that the ALJ erred in awarding benefits for a 40% occupational disability for the remainder of the original 425-week period and in not carving out from the award made on reopening for permanent total disability the difference (11.16%) in the percentage of disability which the claimant actually had at the time of his settlement (40%) and the degree of disability for which he had settled (28.84%).

In an opinion dated September 5, 1997, the Board affirmed the ALJ's findings and stated in pertinent part as follows:

> Field refers us to Newberg v. Davis, Ky., 841 S.W.2d 164 (1992), in arguing that Rowland was required to show a change of occupational disability on reopening, not merely worsening of his condition. It contends that at the time of the settlement,

Rowland was in fact 100 percent occupationally disabled, referring to the fact that at the time Rowland had left his position at Field, was no longer looking for employment, had been awarded social security disability benefits commencing prior to the date of the settlement, and testified that he could not work prior to the date of the settlement because he was totally disabled. It contends the ALJ's finding that he was only 40 percent disabled at the time of the settlement is not supported by any evidence and fails to state the basis upon which such a finding was made.

* * * * *

In determining that Rowland was only 40 percent occupationally disabled at the time of his settlement, the ALJ referred to testimony from Dr. Madauss, the claimant, claimant's wife, and the Human Resources Director for Field. Although Rowland at one time testified he was incapable of working after he left Field, he at another point testified that in his opinion he was still capable of engaging in several different occupations after that date. Neal, in explaining why he did not contest Rowland's application for unemployment benefits, stated in part that he could not win the case because an employee who is not physically able to work for Field but is gainfully able to work somewhere else is still eligible for unemployment benefits. He also stated, in response to a question as to his opinion on whether Field was performing his job in an acceptable fashion on the date of his last employment, that he had no complaints with Rowland's work.

In our opinion, that evidence is evidence of substance supporting the ALJ's determination that Rowland was not 100 percent occupationally disabled at the time of his settlement. As to the ALJ's finding of a 40 percent occupational disability, we would only note that it is the function of the ALJ to translate functional disability into occupational disability, and the ALJ may use his discretion in deciding whether to fix occupational disability below, the same as, or greater than the functional disability shown in the medical evidence. General Tire

> & Rubber Co. v. Rule, Ky., 479 S.W.2d 629 (1972). The ALJ is afforded great leeway in reaching this decision.
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> The Special Fund contends the ALJ erred on reopening in indicating Rowland was entitled to $146.80 per week for the period commencing on the date his motion to reopen was filed and continuing for the remainder of the original 425-week period, contending that since claimant settled his claim for a 28.84 percent occupational disability, he is precluded from receiving any additional benefits based upon the ALJ's finding on reopening that at the time he settled that claim he was 40 percent occupationally disabled. It appears the ALJ has structured the award in the manner argued for by the Fund. The award for the weeks remaining after July 3, 1996[,] on the original 425-week period covered by the settlement is $146.80 per week, 60 percent of the $244.66 per week awarded Rowland for his permanent total disability commencing after the expiration of that 425-week period. The award, in effect, gives petitioners credit for the settlement agreement based upon the 40 percent occupational disability finding the ALJ made on reopening.
>
> We find no authority for the Fund's assertion that claimant's benefits for total disability, after the expiration of the 425-week period, are limited to benefits for 88.84 percent disability (the 60 percent increase on reopening and the 28.84 percent represented in the settlement agreement). After the expiration of the period covered by the settlement agreement, the claimant is entitled to benefits for a 100 percent occupational disability without reduction.

Field raises two issues in its petition for review, both of which deal with sufficiency of the evidence. Field argues (1) that Rowland failed to present any evidence of substance to prove that he sustained a change in his occupational disability; and (2) that the ALJ's finding that Rowland's

original occupational disability was 40% is not supported by any evidence of substance. This Court must affirm the Board's opinion unless we determine 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, 687-688 (1992).

Kentucky Revised Statutes 342.125(1), applicable at the time of this case, provides, in pertinent part that

> Upon motion by any party . . . or administrative law judge's own motion, an . . . administrative law judge may reopen and review any award or order on any of the following grounds:
>
> (a) Fraud;
>
> (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;
>
> (c) Mistake; and
>
> (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

In order to succeed upon reopening, the claimant has the burden of proving an increase in occupational disability. Gro-Green Chemical Co. v. Allen, Ky. App., 746 S.W.2d 69, 70 (1987); Jude v. Cubbage, Ky., 251 S.W.2d 584, 585 (1952). Evidence of an increase in functional disability alone is insufficient to sustain a finding on a motion to reopen that the worker has also sustained an increase in occupational disability. Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33, 35 (1991); Gro-Green, supra.

"[T]he appellee [claimant] ha[s] the burden of proving that he not only . . . sustained an increase in functional disability, but an increase in occupational disability as well." Gro-Green, supra, at 70.

When a settlement has been reached between the parties, as in this case, then the ALJ must determine whether there has in fact been a change in the claimant's physical condition since the date of settlement that has produced an increase in the claimant's occupational disability. As stated in Davis, 841 S.W.2d at 166, the ALJ must determine "the difference between claimant's actual occupational disability on the date of the settlement, regardless of the figure for which he settled, and his occupational disability at the time of reopening." The ALJ is afforded great leeway in exercising her discretion when translating functional disability into occupational disability. Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469, 471 (1976). An ALJ must consider an individual's condition at the time of settlement as well as any circumstances bearing on the issue of occupational disability . See Commercial Drywall v. Wells, Ky. App., 860 S.W.2d 299 (1993); Wells v. Baker, Ky. App., 713 S.W.2d 476 (1986); and W.E. Caldwell Co., Inc. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (1946). A recitation of a percentage of disability in the settlement agreement is not controlling upon reopening. Commercial Drywall v. Wells, supra, at 302.

In our opinion, the evidence of record was subject to multiple reasonable inferences. However, the making of

reasonable inferences is for the ALJ and not for the Board or this Court. Jackson v. General Refractories Co., Ky., 581 S.W.2d 10, 11 (1979). The ALJ may reject or accept any testimony before her and may believe some parts of the evidence while disbelieving other parts, even if the testimony came from the same witness. Codell Construction Co. v. Dixon, Ky., 478 S.W.2d 703, 708 (1972). "When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

Admittedly, the evidence of increased occupational disability is conflicting. At the hearing, Rowland stated that at the time of the settlement he was capable of working at his former job at Field. He stated that he had looked for work after he left Field and before he filed a Social Security claim, but no one would hire him due to this age and the fact he had had back surgery. However, during his discovery deposition, Rowland conceded that his ability to work had not significantly changed and that he has not been able to work since he left Field. He also agreed that the Social Security Administration had determined that he was totally disabled from the time he was last employed at Field in December 1990.

Neal, the Director of Human Services at Field, stated that on Rowland's last day at Field, Rowland was performing his job in an acceptable manner. Neal expressed an opinion that at

the time Rowland left Field, he was able to be gainfully employed elsewhere. Dr. Madauss stated that the AMA guidelines assessed a 5% functional impairment rating based upon the surgery performed by Dr. Kavolus. Dr. Madauss expressed his opinion that Rowland was able to do sedentary work after Dr. Kavolus' surgery while, in contrast, Dr. Madauss opined that after he performed the two fusion surgeries, Rowland "cannot even perform sedentary type work." Dr. Madauss agreed that he had never released Rowland to return to work since he performed the first fusion in November 1992.

While this evidence is conflicting, the ALJ is free to choose to believe some parts of the evidence and disbelieve other parts. We believe the Board correctly determined that there is evidence of substance which supports the ALJ's opinion that Rowland was not 100% occupationally disabled at the time of his settlement but later became 100% occupationally disabled. While other fact-finders might have viewed the evidence differently, the findings made by the ALJ were supported by the evidence. We note that the ALJ has great leeway in translating functional disability into occupational disability. We cannot say that the Board in affirming the ALJ has "committed an error in assessing the evidence so flagrant as to cause gross injustice."

As mentioned previously, while Rowland settled his claim for a 28.84% disability, the ALJ determined his actual disability to be 40%. The Special Fund argues that Rowland's permanent disability benefits should be limited to a disability of 88.84%, consisting of the 60% increase on reopening and the

28.84% settlement portion. The Board stated that it did not find any authority for this position. In its cross-petition, the Special Fund cites from the following portion of Newberg v. Davis, supra, in support of its argument:

> The disability figure contained in a settlement agreement is a negotiated figure and may or may not equal the claimant's actual occupational disability. Under KRS 342.125, a claimant is required to show that a change in his physical condition since the date of the settlement has produced an increase in his occupational disability during that period in order to reopen the award. The relevant change in occupational disability, therefore, is the difference between claimant's actual occupational disability on the date of the settlement, regardless of the figure for which he settled, and his occupational disability at the time of reopening.

841 S.W.2d at 166. The Special Fund then states: "We fail to see how the law could be more clearly stated in favor of our argument." However, we conclude that the Special Fund's reliance on Newberg is misplaced. The above quote from Newberg, relied upon so heavily by the Special Fund, is taken out of context and applies to the question of determining the relevant change in the worker's condition for the purposes of reopening under KRS 342.125. The holding in Newberg does not address the issue before us. Id. In conclusion, like the Board, we find no authority for the Special Fund's argument.

For the foregoing reasons, we affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT, FIELD PACKING COMPANY:

BRIEF FOR APPELLEE, ROWLAND:

Hon. Christopher G. Safreed

Hon. John H. Helmers Owensboro, KY
Owensboro, KY

BRIEF FOR CROSS-APPELLANT,
SPECIAL FUND:

Hon. David R. Allen
Louisville, KY