

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000621-WC

GLENN BUICK, INC..

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-91460

GARY GOODLETT;¹ HON. EDWARD HAYS,
ADMINISTRATIVE LAW JUDGE; WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,² SENIOR JUDGE

¹ Also spelled Gary "Goodlet."

² Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

CLAYTON, JUDGE: This is an appeal of a workers' compensation award in which appellee, Gary Goodlett, obtained permanent partial disability benefits of \$84.51 per week based upon a 7 percent impairment rating. Appellant, Glenn Buick, Inc. ("Glenn Buick") asserts on appeal that the Administrative Law Judge ("ALJ") erred by choosing an impairment rating which was awarded with the specific disclaimer that Goodlett had not yet reached maximum medical improvement ("MMI").

Based upon the following discussion, we affirm the decision of the Workers' Compensation Board (the Board) which upheld the ALJ's decision.

FACTUAL BACKGROUND

Goodlett was an employee of Glenn Buick and on March 17, 2006, injured himself while installing a transfer case on an automobile overhead. He stated that as he was attempting to place a screw with his right hand, the transfer case slipped and jammed his left arm and shoulder. Goodlett reported this to his supervisor but continued to work for the rest of the work day. After the weekend, Goodlett returned to work on Monday and sought medical treatment when his condition did not improve.

Goodlett did not return to work and filed a workers' compensation case on April 21, 2008. Goodlett asserted that while he had an issue with his shoulder in 1999, he had not had any pain until the injury occurred. Following the injury, Goodlett testified that he had difficulty performing household tasks and lawn maintenance. In an effort to ease the pain, he tried medications, physical

therapy, injections and surgery. At the hearing before the ALJ, Goodlett asserted that he could not perform any of his prior work activities because he cannot perform any function requiring him to reach above shoulder level, nor can he perform repetitive work.

Goodlett sought medical treatment and opinions from several doctors. Dr. Kaveh R. Sajadi originally treated Goodlett in 2006 and subsequently evaluated him in May of 2009. He set forth in his report that Goodlett continued to have no significant pain relief and performed an injection on Goodlett which provided no pain relief. Dr. Sajadi then referred Goodlett to a pain clinic to pursue further treatment for his chronic pain.

Dr. Stella Staley noted that Goodlett had a decrease in his range of motion and required medication for pain. Dr. Frank Burke diagnosed Goodlett with impingement syndrome and performed arthroscopic surgery in October of 2006, consisting of debridement of the rotator cuff and acromioplasty. Dr. Burke found that Goodlett had met MMI as of February of 2007 and assessed a 2 percent whole-person impairment based on the Linda Cocchiarella, MD, MSC, and Gunnary B.J. Anderson, MD, PhD, American Medical Association Guidelines to the Evaluation of Permanent Impairment, 5th Ed. (“AMA Guides”).

Dr. Jerold Friesen evaluated Goodlett’s injury in February of 2009. Dr. Friesen assigned a 2 percent impairment based upon the AMA Guides. In April of 2008, Dr. James Templin performed an independent medical examination (“IME”) on Goodlett and diagnosed him with chronic left shoulder pain syndrome,

chronic cervical pain syndrome, left shoulder impingement syndrome, and left shoulder partial rotator cuff repair. Dr. Templin opined that Goodlett had not reached MMI but stated that if the ALJ found he had, Goodlett would retain a 7 percent impairment rating under the AMA Guides. He also opined that he would not place Goodlett at MMI until after a cervical MRI scan was performed.

In August of 2007, Dr. Michael Kirk provided another opinion on Goodlett's injury. He recommended a consultation with a neurologist and an MRI. An MRI was subsequently performed with normal results. Dr. Eichorn of the Lexington Clinic also submitted a report regarding Goodlett's injury and prognosis. He ordered an EMG/NCS, the results of which showed no indication of severe injury to the peripheral nerves.

In July of 2008, Dr. Daniel D. Primm, Jr., evaluated Goodlett and advised him that he had reached MMI with a 4 percent impairment based upon the AMA Guides. Later, in November of 2008 Dr. Joseph L. Zerga evaluated Goodlett and noted he had dysesthesias and paresthesias in his left arm as well as mild carpal tunnel syndrome on his left, the latter of which was not related to his work injury.

After the close of proof, the ALJ found Goodlett had sustained a work injury to his left shoulder, that he was permanently partially disabled and that he had a 7 percent impairment based upon the AMA Guides. Glenn Buick appealed the ALJ's decision to the Board arguing that Dr. Templin's assessment of 7 percent impairment was inappropriate since Goodlett had not reached MMI. In addressing

Glenn Buick's argument during its motion for reconsideration, the ALJ explained that the record did not demonstrate a significant change to Goodlett's condition after Dr. Templin's assessment but that Goodlett had now reached MMI.

On appeal, the Board found as follows:

The ALJ provided a plausible and detailed explanation as to why he ordered an additional period of TTD [temporary total disability]. He also explained in detail why he chose to rely upon the opinion of Dr. Templin concerning impairment. The ALJ also noted that although he found pain management to be reasonable and necessary in principle, Glenn [Buick] is entitled to evaluate specific treatment and may avail itself to [sic] relief pursuant to applicable statutes and regulations. Finally, it was within the purview of the ALJ to make a determination that Goodlett [sic] does not retain the ability to perform the work [sic] which he was engaged at the time of his work injury. There exists ample evidence of record to support these findings.

Workers' Compensation Board Decision of March 1, 2010, at 11-12. Glenn Buick now appeals the Board's decision.

STANDARD OF REVIEW

As a reviewing court in workers' compensation cases, our function is to correct the Board when we believe it "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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

"It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a

workers' compensation claim.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). We recognize that it is within the broad discretion of the ALJ “to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party’s total proof.” *Caudill v. Maloney’s Discount Stores*, 560 S.W. 2d 15, 16 (Ky. 1977). With this standard in mind, we examine the merits of the appeal.

DISCUSSION

Glenn Buick begins with the argument that the ALJ’s selected impairment rating was erroneous and unsupported as a matter of law. Specifically, it contends that the Kentucky Workers’ Compensation Act (the Act) specifically requires the use of impairment ratings to determine a numerical level of a claimant’s disability and to assist in the calculation of permanent disability benefits owed as a result. We agree with this statement.

KRS 342.0011(35) provides that “permanent impairment ratings” are a “percentage of whole body impairment caused by the injury or occupational disease as determined by the ‘Guides to the Evaluation of Permanent Impairment,’” American Medical Association, latest edition. Glenn Buick argues that, in this case, the ALJ elected to choose, out of four different options, the ratings set forth by Dr. Templin. While acknowledging that, pursuant to controlling precedent, the ALJ, as fact-finder, has the authority to determine the weight, credibility and substance of the evidence, Glenn Buick asserts that this case is distinguishable.

The appellant asserts that Dr. Templin's report indicated that the AMA Guides do not allow a physician to provide an impairment rating if the physician does not find the patient to be at MMI. It specifically points to page nineteen of the AMA Guides which provides:

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of maximum medical improvement (MMI). It is understood that an individual's condition is dynamic. Maximum medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once

impairment has reached MMI, a permanent impairment rating may be performed.

AMA Guides, Section 2.4 at 19.

As set forth above in our standard of review, an ALJ's findings should not be disturbed by either the Board or a reviewing court if there is any substantial evidence to support his or her conclusions. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Hand in hand with this standard is the idea that the ALJ has broad discretion in making a determination regarding which recommended rating is appropriate. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997).

Dr. Templin recommended a final MRI prior to finding MMI. The ALJ examined the evidence and made a determination that Dr. Templin's ratings were persuasive and soundly based. In ruling on Glenn Buick's motion for reconsideration, the ALJ found no appreciable difference likely to occur as a result

of further testing to alter Dr. Templin's opinion regarding impairment rating. The Board found this to be a decision based upon valid evidence and we agree. The impairment rating which Dr. Templin found Goodlett to have was based upon his evaluation of Goodlett's medical history, injury and current condition. Thus, we affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

James O. Fenwick
Lucas R. Braun
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jackson W. Watts
Versailles, Kentucky