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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002038-WC

AUDI OF LEXINGTON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-66900

COLIN ELAM; HONORABLE
CHRISTOPHER DAVIS MARK,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, THOMPSON, and VANMETER, Judges.

COMBS, JUDGE: Audi of Lexington appeals from the decision of the
Workers' Compensation Board that vacated in part and remanded this matter to the
Administrative Law Judge (ALJ). The Board directed the ALJ to enter an order
awarding benefits consistent with a permanent, partial disability rating

substantially higher than the rating originally assigned by the ALJ. Following our review, we affirm the decision of the Board.

On November 5, 2005, Collin Elam, a car salesman with Audi of Lexington, was accompanying a potential buyer on a test drive when the vehicle in which they were travelling was rear-ended by another vehicle. It is uncontested that Elam suffered a work-related back injury as a result of the collision.

The medical evidence also indicated that Elam had suffered with chronic, active, and significant low back pain *prior* to the date of the motor vehicle accident. We shall re-visit the chronology pertaining to his pre-existing condition.

Elam indicated that he had first injured his low back while playing high school football in 1989. He received medical treatment immediately following that injury (including an MRI), and he did not continue to participate in football.

In May 2001, Elam came under the care of Dr. Sibel Gullo, who diagnosed him with a ruptured disk. Following an MRI in July 2001, Elam was diagnosed with degenerative disk disease with a herniated lumbar disk. He underwent a three-week course of physical therapy.

In May 2002, Elam returned to Dr. Gullo with complaints of low back pain. His pain medication prescriptions were renewed. Elam's pain continued unabated and, in October 2004, he underwent another MRI of the lumbar spine. The MRI revealed an old disk herniation that had stabilized and a fresh disk herniation at another location. Elam was referred to Dr. Yoshihiro Yamamoto. Dr. Yamamoto

believed that Elam's condition had been stable since 2001; he recommended conservative management and daily exercise.

In February 2005, Elam was seen again by Dr. Gullo for constant back pain radiating into his right buttock and right leg. Dr. Gullo suggested that Elam might consider epidural cortisone injections for relief. She referred Elam to Dr. Harry Lockstadt, an orthopedic surgeon.

In February 2005, Dr. Lockstadt examined the results of Elam's 2004 MRI and noted disk herniation at L4-5, a bulge at L5-S1, and mild to moderate joint arthritis. Dr. Lockstadt described Elam's condition as degenerative in nature. Dr. Lockstadt recommended a series of epidural cortisone injections and physical therapy. He further noted that Elam might be a candidate for a transforaminal discectomy. On June 8, 2005, Elam concluded a series of cortisone injections. Despite that treatment, however, he continued to experience moderate, low back pain.

Shortly after the work-related motor vehicle accident that occurred on November 2005, Elam again saw Dr. Lockstadt, who observed as follows:

Based on his pain, which was still quite severe prior to the motor vehicle accident I think it is worthwhile going ahead and updating an MRI scan. We will see if he would be a candidate for a disc replacement. The epidurals did not help him with his back pain previously. Therefore I do not think they would help this time either as he has a painful disc, which has been markedly worsened by the motor vehicle accident.

Follow-Up Evaluation report (November 7, 2005) at 1.

Elam underwent another MRI on November 17, 2005. Dr. Lockstadt concluded that the work-related motor vehicle accident very likely aggravated the L4-5 disk herniation. Due to the extent of disk degeneration observed on the MRI, Dr. Lockstadt concluded that Elam was *not* a candidate for transforaminal discectomy. Instead, he recommended a lumbar spinal fusion.

Following an independent medical evaluation performed in May 2006, Dr. John A. Guarnaschelli concluded that Elam's work-related motor vehicle accident was a substantial factor in causing his aggravated condition. Although Dr. Guarnaschelli did not assign an impairment rating at the time of his evaluation, he indicated that he would apportion one-half of Elam's impairment to his pre-existing, active condition.

In August 2006, Dr. Robert Sexton reviewed Elam's medical records. Based on his review, Dr. Sexton concluded that 90% of Elam's need for low back treatment was a result of his pre-existing impairment. Dr. Sexton was not convinced that there had been any increase in Elam's impairment due to the motor vehicle accident.

In December 2007, Dr. Timothy Kriss conducted an independent medical evaluation. With respect to causation, Dr. Kriss noted as follows:

Obviously, Mr. Elam has very chronic, very active, and very significant low back pain prior to November 5, 2005. He is very upfront about this. The records of both Dr. Gullo and Dr. Lockstadt confirm quite a bit of treatment for this low back pain in the months and years immediately prior to November 5, 2005, including epidural steroid injections in February, March, and June

of 2005. Thus, at an absolute minimum, this pre-existing active chronic low back pain from degenerative disk disease must play a large role in Mr. Elam's ongoing back problems.

On the other hand, the car accident of November 5, 2005, does not appear to have been a typical or minor "rear-end" collision; the impact occurred at approximately 50 mph on the interstate. Certainly, this mechanism of injury is capable of causing permanent harmful change to Mr. Elam's low back, in addition to any pre-existing active conditions.

In my opinion, the lumbar MRI scans "before and after" the November 5, 2005 accident provide unequivocal objective medical evidence of permanent harmful change as a direct consequence of this November 5, 2005 work injury. While there is no significant worsening in the chronic L5/S1 disk herniation, the L4/L5 disk herniation is 'new,' and the presence of the inferiorly migrated free fragment is highly suggestive of recent trauma. Furthermore, the Modic changes at L5/S1 are consistent with end plate edema, not present on the MRI scans prior to November 2005, and also consistent with recent tissue damage.

Independent Medical Examination report at 3-4.

Based on his evaluation, Dr. Kriss determined that the work-related motor vehicle accident had caused an increase in Elam's impairment. With respect to an apportionment between the work-related and non-work-related causes of the increase in impairment, Dr. Kriss concluded as follows:

I find the clinical history of significant back pain of 20 years duration in a still very young man in his 30's more impressive than the radiographic changes on the most recent lumbar MRI scan, and would therefore apportion the majority of Mr. Elam's current lumbar condition and symptoms (63% of the total lumbar causation) to his pre-existing active condition of degenerative disk disease and

apportion the minority of Mr. Elam's current lumbar condition any symptoms (37% of total lumbar causation) to the work-related motor vehicle accident of November 5, 2005.

Id. at 4.

With reference to the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, ("AMA Guides"), Dr. Kriss assigned to Elam a 5% impairment rating *pre-existing* the automobile accident and an 8% impairment rating *following* the car accident. Mirroring the apportionment outlined above, Dr. Kriss attributed the 3% increase in Elam's permanent, partial impairment to the effects of the 2005 work-related motor vehicle accident.

In March 2009, Elam underwent the lumbar spinal fusion recommended by Dr. Lockstadt. The fusion was successful, and Elam was released to return to work by Dr. Lockstadt in December 2009.

Dr. Kriss did not evaluate Elam following his surgery. He did not express a post-surgical opinion concerning Elam's over-all impairment. Nor did he address the apportionment of the impairment between Elam's pre-existing, active impairment and his work-related impairment.

In March 2010, Dr. Lockstadt testified by deposition that prior to the work injury, Elam qualified for an active impairment rating "of no more than 5 percent." Following surgery and with reference to the *AMA Guides*, Dr. Lockstadt increased Elam's impairment rating to 21%. Dr. Lockstadt stated that Elam's worsened

condition and the need for surgery were likely caused by the work-related motor vehicle accident of November 2005.

Following a formal hearing, the ALJ concluded from the evidence that the changes to Elam's low back and the subsequent surgery were work-related and compensable. He also determined that Elam suffers with a 21% over-all impairment as a result of his low back condition. In reaching a decision with respect to the compensable portion of Elam's impairment, the ALJ was persuaded that Dr. Kriss had accurately analyzed the apportionment necessary between Elam's pre-existing, active impairment and his work-related impairment. From Dr. Kriss's analysis, the ALJ inferred that 63% of Elam's *post-surgery impairment* was attributable to his pre-existing, active condition and that the remaining 37% was work-related and compensable. Consequently, the ALJ awarded income benefits on a disability rating derived from a 7.77% impairment rating (21% over-all impairment x the 37% work-related rating). Elam's petition for reconsideration was denied, and he appealed to the Board.

On review, the Board concluded that the ALJ erred as a matter of law by extrapolating from Dr. Kriss's analysis to reach a permanent impairment rating that had not been offered by any medical expert. In light of the record, the Board indicated that the ALJ was compelled to accept the testimony of Dr. Kriss and Dr. Lockstadt pertaining to their assignment of a 5% pre-existing, active impairment rating and to exclude only that 5% from the over-all 21% (or 16%) in calculating Elam's award of income benefits based upon a permanent, partial impairment. The

Board vacated this part of the ALJ's decision and remanded for entry of an award of benefits consistent with a 16% permanent impairment rating. Audi of Lexington then filed this appeal.

On appeal, Audi contends that the Board erred by concluding that the ALJ's apportionment of Elam's permanent impairment between pre-existing, active impairment and impairment produced by the work-related injury was erroneous as a matter of law. Audi argues that the ALJ properly exercised his discretion to infer a subsequent progression of Elam's pre-existing condition that contributed to a greater overall impairment rating following the spinal fusion. We disagree.

As Audi correctly notes, Elam's 21% impairment rating in this case is based upon the spinal fusion undertaken by Dr. Lockstadt in March 2009. This procedure requires an automatic 20-23% impairment rating under the *AMA Guides*, and the ALJ found that "[i]nasmuch as [Elam] has had a compensable fusion the only realistic, overall impairment rating that can be selected is the 21% assigned by Dr. Lockstadt." Opinion, Order and Award at 10. Nevertheless, Audi argues that to assume that the 5% pre-existing, active impairment assigned by Dr. Kriss and Dr. Lockstadt remained static while the work-related portion of the impairment alone increased is unreasonable. Audi contends that the Board improperly substituted its judgment for that of the ALJ in this case.

An award of permanent, partial disability benefits under Kentucky's Workers' Compensation Act is based solely upon a finding that a work-related injury resulted in a particular permanent impairment rating pursuant to the *AMA*

Guides. Kentucky Revised Statute[s] (KRS) 342.730(1)(b). Since income benefits are based on impairment and disability that resulted from work-related injuries, pre-existing, active impairment must be excluded from the permanent, partial disability award. In *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206 (Ky.2003), the Supreme Court of Kentucky observed that the assessment of an impairment rating is a medical determination that must be made by a medical expert.

The ALJ's findings of fact are not at issue in this matter. Instead, we are asked to review the Board's application of law to the facts. We do so *de novo* without deference to the Board's conclusions. *Newberg v. Thomas Industries*, 852 S.W.2d 339 (Ky.App.1993).

In this case, we agree with the Board that the ALJ was not at liberty to assume from Dr. Kriss's analysis that the portion of Elam's permanent impairment rating attributable to his pre-existing impairment progressed at a rate commensurate with that portion of his impairment attributable to the work-related injury. There was simply no medical testimony to support the ALJ's inference that Dr. Kriss's ratio of 5:8 would continue unaltered when Elam's over-all impairment climbed to 21%. No expert medical testimony supports Audi's hypothesis that the Board's calculation grossly underestimated the impact of Elam's pre-existing, active impairment in contributing to the need for the surgery upon which his ultimate impairment was based.

The Board did not overlook or misconstrue controlling statutes or precedent in concluding that the ALJ's calculation was erroneous. Subtracting Elam's pre-existing, active impairment rating of 5% from his overall impairment rating of 21% following the work-related accident, the Board properly determined that Elam should have been awarded permanent, partial disability benefits based upon an impairment rating of 16%.

We affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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