

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

Supreme Court of Kentucky

FINAL

2007-SC-000687-WC

DATE 7-10-08 EJA Gravitt D.C.

LINK BELT

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS  
2006-CA-000427-WC  
WORKERS' COMPENSATION BOARD NO. 00-58192

GARY CHAD CAMPBELL,  
HON. R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE AND  
WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

An Administrative Law Judge (ALJ) determined that a work-related injury caused the claimant's pre-existing condition at L1 to become symptomatic and result in a 5% permanent impairment rating. The Workers' Compensation Board and the Court of Appeals held that the evidence adequately supported the finding of causation and affirmed. Appealing, the employer asserts that the injury did not alter the claimant's permanent impairment rating such as occurred in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001), and that it may have warranted medical benefits but did not warrant income benefits. We affirm because substantial evidence supported the ALJ's decision.

The claimant was injured while working on December 7, 2000, when a 20- to 25-

foot-tall overhead door malfunctioned, causing it to descend and strike the top of his head. The force of the blow caused him to buckle to his knees. He was taken to the emergency room and referred to Dr. Menke, an orthopedic surgeon. Based on cervical and lumbar spine x-rays taken on December 15, 2000, Dr. Menke diagnosed injuries at C3-4 and L1 for which he took the claimant off work. He continued to provide off-work statements through most or all of February 2001, noting the neck and back injuries.

The claimant sought treatment with Dr. Lockstadt in March 2001, complaining of neck and scapular pain. An addendum to his April 24, 2001, report regarding the cervical condition indicated that the claimant was reporting some pain in the thoracolumbar area that had not been documented previously. On June 26, 2002, Dr. Lockstadt noted that the claimant's neck and lower back pain began after the work-related incident and had been managed for over a year with anti-inflammatory and pain medication.

Dr. Templin examined the claimant and reviewed medical records at his attorney's request in May 2002. The claimant complained at that time of pain throughout his spine. Dr. Templin noted that December 15, 2000, x-rays of the lumbosacral spine showed a compression fracture at L1 and degenerative changes with significant disc space narrowing at T12-L1. He also noted that MRI performed in January 2001 revealed bulging discs at C3-4, C3-5, and C5-6. He diagnosed the L1 compression fracture and cervical disc bulges as well as chronic cervical, thoracic, and low back pain syndromes. Dr. Templin assigned a 5% permanent impairment rating under the AMA Guides to the Evaluation of Permanent Impairment (Guides), DRE lumbar category II, noting "clinical history and examination findings compatible with a

specific injury with a compression fracture of 25% of L1" as being the criteria for the rating. He also assigned a 5% permanent impairment rating under DRE cervical category II and a 3% permanent impairment rating based on cervical pain. He stated that the claimant did not have an active impairment before the work-related injury. Dr. Templin recommended extensive restrictions and stated that the claimant did not retain the physical capacity to return to the type of work that he performed when injured.

The employer deposed Dr. Templin in October 2002. Asked if he assigned the permanent impairment rating to the lumbar spine based on the L1 compression fracture, Dr. Templin stated that he did so based on the compression fracture and degenerative changes. He acknowledged that the compression fracture existed before the December 2000 injury. He explained, however, that the absence of any history of previous low back complaints or any medical record of such complaints had led him to conclude that the injury aroused the pre-existing conditions at L1 into disability. Asked whether a pre-existing compression fracture, by itself, merited a 5% rating under the Guides, Dr. Templin responded that it did.

Dr. Kriss evaluated the claimant for the employer in August 2002. Although he assigned an 8% permanent impairment rating for the cervical condition, he thought that the lumbar complaints did not merit a rating. He based his opinion on a normal lumbar examination, the absence of evidence of lumbar radiculopathy except a single temporary episode, and the absence of persistent lower extremity symptoms. He reported that the L1 compression fracture existed before the injury occurred and was dormant. Although he thought that the claimant did experience lumbar pain, the mechanism of injury, physical examination, imaging studies, and symptoms led him to

conclude that a soft tissue strain was the cause.

Among other things, the parties contested the extent and duration of disability and whether the lumbar condition was work-related. Relying on Dr. Templin, the ALJ determined that the claimant sustained a 13% permanent impairment rating due to the work-related cervical and lumbar injuries and, as a consequence, lacked the physical capacity to return to his previous work.

In a petition for reconsideration, the employer asserted that the L1 compression fracture warranted the same permanent impairment rating before and after the injury. It also asserted that if the incident at work caused the condition to become symptomatic, the symptoms had since resolved. Denying the petition, the ALJ stated that persuasive reports from Drs. Menke and Templin indicated that the claimant sustained a permanent partial disability due to the work-related lumbar injury. The employer appealed, asserting among other things that impairment from the L1 compression fracture was not compensable because it was not work-related.

Workers' compensation is statutory. Chapter 342 requires an ALJ to determine if the worker sustained a compensable injury and then determine the benefits to which the injury entitles the worker. KRS 342.0011(1) defines a compensable injury as being a work-related traumatic event that causes a harmful change in the human organism as evidenced by objective medical findings. McNutt Construction/First General Services v. Scott, supra, explains that a compensable injury includes work-related trauma that causes a pre-existing, dormant condition to become disabling and result in a functional impairment. KRS 342.020 entitles a worker who sustains a compensable injury to medical benefits at the time of injury and thereafter during disability, and KRS 342.730

entitles the worker to permanent income benefits based on the permanent impairment rating that the injury causes as determined under the Guides.

FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), notes that under the definition found in the Guides, impairment from a harmful change that is permanent may or may not rise to the threshold for a permanent impairment rating. The court determined that KRS 342.730(1)(a) and (b) equate a permanent impairment rating from an injury with disability that is permanent and appreciable enough to warrant income benefits. In Roberts Brothers Coal Company v. Robinson, 113 S.W.3d 181 (Ky. 2003), the court noted that a work-related injury must cause a permanent impairment rating to warrant a permanent disability award under KRS 342.730(1)(a) or (b). The court also noted that impairment and disability are not synonymous and that KRS 342.730(1)(b) bases the worker's disability rating on the permanent impairment rating that the compensable injury causes.

The employer no longer disputes that the claimant sustained a compensable injury insofar as the traumatic event aroused the pre-existing compression fracture and degenerative changes at L1, causing them to become symptomatic. Nor does it dispute the claimant's entitlement to medical benefits for the L1 injury. It appeals the decision to award income benefits for the injury, asserting that the injury merited no permanent impairment rating.

KRS 342.730(1)(b) bases a worker's entitlement to income benefits on the permanent impairment rating that a work-related injury causes and requires the rating to be determined under the Guides. It was the claimant's burden to prove every element of his claim for income benefits, including the permanent impairment rating that his

injury caused. KRS 342.285 designates the ALJ as the finder of fact, with the sole authority to weigh the evidence. Dr. Templin's testimony convinced the ALJ that the claimant's work-related lumbar injury warranted a 5% permanent impairment rating. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986), explains that when the fact-finder's decision favors the party with the burden of proof, the opponent's burden on appeal is to show that the decision was unreasonable because no substantial evidence supported it.

As noted in Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (2003), the proper interpretation of the Guides and the proper assignment of a permanent impairment rating are medical questions. Dr. Templin diagnosed a work-related lumbar injury to which he assigned a 5% permanent impairment rating. He acknowledged on cross-examination that a pre-existing compression fracture, by itself, would merit a 5% impairment rating. He did not, however, waver from the opinion expressed in his report, that the claimant had no "active" impairment until after the work-related injury. Dr. Kriss stated that the claimant sustained a lumbar sprain that resolved, but no medical testimony indicated that Dr. Templin misapplied the Guides when attributing a 5% lumbar impairment rating to the injury on the ground that it caused the pre-existing conditions to become symptomatic. Although his testimony might not have compelled an award, it provided substantial evidence to support the award that was made.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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