

RENDERED: October 17, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3461-WC

FLOYD S. PIKE & SON ELECTRIC COMPANY

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
NO. WC-95-019292

JOHN DALLAS BRANHAM;
ROBERT E. SPURLING, DIRECTOR OF
SPECIAL FUND;
HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDE; and
WORKERS' COMPENSATION BOARD

APPELLEE

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: DYCHE, EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Appellant, Floyd S. Pike & Son Electric Company (Pike), appeals from an opinion of the Workers' Compensation Board (the Board) entered on November 25, 1996, affirming an opinion, order and award entered by the Administrative Law Judge (ALJ) on July 19, 1996. On appeal, Pike contends that both the ALJ and the Board erred in not apportioning liability for 50% of the income benefits awarded to appellee, John Dallas Branham (Branham), to appellee, Special Fund. We reverse and remand.

Branham was employed by Pike as an electrical lineman. He was electrocuted on May 7, 1986, when a live wire struck his

right side. Branham stated that he blacked out for several seconds and fell three or four feet down the electric pole he was working on before he was caught by his safety belt. Branham was seriously injured as a result of the accident. He received temporary total disability benefits at the rate of \$316.54 per week from May 8, 1986 through March 29, 1995, totaling \$146,874.56. He has not worked since the accident.

This appeal arises from the ALJ's decision that Pike was not entitled to apportionment from the Special Fund for a back injury sustained by Branham as a result of the work-related accident. Pike contends that based on the testimony of Dr. Kenneth Graulich (Dr. Graulich) and Dr. Eugene Parr (Dr. Parr), apportionment was required. The Special Fund contends that the ALJ did not err in relying on the testimony of Dr. Roger Jurich in finding that no pre-existing active disability existed prior to Branham's accident.

Dr. Graulich testified that he saw Branham on January 16, 1996. Dr. Graulich testified that he ordered low back x-rays. His review of the x-rays showed "a tremendous amount of front and back or anterior and posterior spurring between the first and second lumbar vertebra representing rather severe arthritis of the wear and tear type at that level." He did not see any evidence of a compression fracture. He diagnosed low back pain syndrome with radiculopathy. Dr. Graulich testified that Branham had pre-existing degenerative changes in his spine which were triggered into disabling reality as a result

of the accident. He gave Branham a 10% permanent partial impairment rating for his back injury and apportioned 50% due to the pre-existing condition and 50% due to the work-related accident.

Dr. Parr stated that he saw Branham on February 14, 1995. He also took x-rays of Branham's lumbar spine. He testified that his review of the x-rays showed disc interspace narrowing at L1-L2 and L4-L5 accompanied by spur formation. He also noted an "old compression deformity" at the first lumbar vertebra and significant spur formation at L1-L2. Dr. Parr diagnosed degenerative arthritis of the lower back, accompanied by degenerative changes and an old compression fracture at L1 which had healed. Dr. Parr stated that he was unable to relate his findings to the work-related accident. He felt the injury predated the work-related accident. He assigned a permanent partial impairment rating of 15% attributing 5% to degenerative arthritis, 5% to the fractured vertebra, and 5% to reduced range of motion. Dr. Parr further testified that the degenerative changes were aroused into disabling reality by the work-related accident.

Dr. Lowe testified that he believed Branham was status post-ruptured disc at L4-L5. X-rays taken showed degeneration of the disc at that level. When asked whether the work-related accident was the cause of the impairment, Dr. Lowe stated:

The force of a sufficient amount of electricity passing through your body can do multiple things to you, including burn you and cause extreme muscle contraction, even

enough to rupture a disc, if that indeed occurred at the time, which it appears it might have.

When questioned about his findings of asymmetry of the L-1 vertebra and scoliosis, Dr. Lowe testified that "whether it is a preexisting condition or aroused into disabling reality or due to some pre-existing scoliosis is unknown to myself. One would suspect it is a residual of an old fracture of L1[.]" However, Dr. Lowe testified that assuming that the compression fracture was caused by the electrocution, the total impairment would be 25%.

Dr. Jurich testified that he is Branham's family doctor. He diagnosed a T-12 compression fracture which he attributed to the work-related accident. Dr. Jurich stated that compression fractures are common with high voltage accidents, and that Branham had no other history of injury or fall which would correlate his back problems with anything other than the accident. Dr. Jurich testified that due to the lack of x-rays taken before the accident, he could not say whether degenerative changes were or were not present before the accident.

The employer bears the burden of showing that apportionment is required. Wells v. Phelps Dodge Magnet Wire Co., Ky. App., 701 S.W.2d 411, 413 (1985). When the employer fails to satisfy this burden before the ALJ, we will not reverse a decision denying apportionment unless the evidence in the record compels us to do so. Wells, 701 S.W.2d at 413. We

believe that the medical testimony contained in the record compels a reversal in this case.

Although both Dr. Lowe and Dr. Jurich agree that Branham's back injury was caused by the work-related accident, neither doctor was able to say whether degenerative changes were or were not present at the time Branham was injured. In light of the fact that neither Dr. Lowe nor Dr. Jurich were able to testify as to the presence or absence of any pre-existing condition, their testimony is not sufficient to refute the testimony of Dr. Graulich and Dr. Parr regarding the presence of pre-existing degenerative changes. Green Valley Coal Co. v. Carpenter, Ky. App., 397 S.W.2d 134, 136-137 (1965). Furthermore, because the testimony of Dr. Graulich and Dr. Parr as to the existence of pre-existing degenerative was not contradicted, both the Board and the ALJ erred in relying on the testimony of Dr. Jurich and Dr. Lowe in holding that apportionment was not warranted. Collins v. Castleton Farms, Inc., Ky., 560 S.W.2d 830, 831 (1977). See also, Commonwealth v. Workers' Compensation Board of Kentucky, Ky. App., 697 S.W.2d 540 (1985).

Having considered the parties' arguments on appeal, the opinion and award rendered by the Board on November 22, 1996, is reversed and this case is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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