

**Commonwealth Of Kentucky**

**Court Of Appeals**

No. 97-CA-2205-WC

GENERAL MOTORS CORPORATION

APPELLANT

V. PETITION FOR REVIEW FROM A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-95-16037

J. T. CLARK, SPECIAL FUND,  
SHEILA C. LOWTHER  
(ADMINISTRATIVE LAW JUDGE)  
and WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, GARDNER and GUIDUGLI, JUDGES.

GARDNER, JUDGE. General Motors Corporation (GM) appeals from an opinion of the Workers' Compensation Board (the board) affirming an opinion of the Administrative Law Judge (ALJ). J. T. Clark (Clark), an employee of GM, filed a claim for workers' compensation

benefits as a result of a back injury he allegedly suffered while working for GM. The ALJ concluded that Clark suffered an injury of appreciable proportions while working for GM in October 1994, that he had sustained a thirty percent occupational disability, that fifteen percent was attributable to a preexisting active condition, and that GM bore liability for the other fifteen percent. The ALJ found no arousal of a preexisting dormant disease or condition. On appeal, GM argues that the ALJ's opinion and award was not based upon any evidence of substance having probative value, that the probative evidence in the record compels assignment of all disability to the Special Fund and that Kentucky Revised Statute (KRS) 342.1202 is unconstitutional as it applies to this case. This Court affirms the board's opinion.<sup>1</sup>

We have reviewed the board's opinion and hereby adopt it in relevant part:

No party filed a petition for reconsideration pursuant to KRS 342.281 following rendition of the ALJ's decision. Accordingly, the ALJ's award shall be conclusive and binding as to all questions of fact. KRS 342.285(1). Moreover, the appeals before the Board herein are prosecuted pursuant to KRS 342.285(2)(d). In order for the ALJ's decision to be 'clearly erroneous,' the ALJ's findings must be unreasonable under the evidence presented. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Clark, born November 12, 1935, has an eighth grade education with no specialized or vocational training. He has been employed by

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<sup>1</sup>Clark attempted to file a cross-petition with this Court, but this petition apparently was not timely filed and thus, only GM's appeal is now before this Court.

GM since 1970. Clark testified before the ALJ that he sustained an injury to his low back in October 1994 when he slipped in a puddle of water while inspecting a car. As a result, he underwent a lumbar discectomy at L4-5 on January 27, 1995 which was performed by Dr. David Lange. A co-worker at GM, Tom Rampenthal, corroborated the incident as described by Clark. Rampenthal testified that he and Clark were working together performing a final paint inspection on vehicles manufactured at GM. Rampenthal stated that he observed Clark step off of a ramp at the left rear of the vehicle to be inspected and ". . . his feet went flying. And he was hanging onto - one arm to the rear of the car and the other arm was at our worktable." Rampenthal stated that when Clark got to his feet he was holding his back and stated to him he thought he had pulled something. Following a recuperative period, Clark returned to work at GM in July 1995. Thereafter, he did allege a second injury on January 12, 1996 when he claimed he slipped on a patch of ice in GM's parking lot and fell. However, the ALJ noted that Clark only missed a brief period of work following that episode and he remains employed at GM.

Medical evidence was presented from Clark's treating surgeon, Dr. Lange; from Dr. Thomas Schneider, GM's plant physician; and, Dr. Kearns Thompson, who evaluated Clark in October of 1996.

Dr. Lange recorded a patient history from Clark of having several small injuries at work which culminated in a slip and fall on October 7, 1994. In his Form 107 medical report, Dr. Lange indicates that based upon physical examination and MRI testing, he diagnosed a herniated disc at the L4-5 level causally related to Clark's work-related injury. Dr. Lange reports that he performed an L4-5 discectomy surgical procedure on January 31, 1995, with successful removal of small fragments of disc material. His report additionally notes that Clark's condition was not due, in part, to an arousal of a pre-existing dormant non-disabling condition or congenital abnormality. He also felt that

Clark did not have an active impairment prior to the work-related injury.

Dr. Schneider, GM's plant physician, testified in connection with Clark's records while employed for GM. Clark had reported to the plant physician on June 6, 1988 that he had hurt his back on May 20, 1988 while pulling mufflers and A-frames, and using large wrenches. He subsequently was on sick leave for a sprain and strain. On June 21, 1988, Clark was returned to work by the independent medical officer. On October 10, 1990, an entry in Clark's records by the nurse on his medical record, indicated that he had jerked his back while walking and had lost his balance. The assessment by the nurse at that time was questionable strain and he was given heat and Ibuprofen. On November 21, 1990, Clark's record indicates that he reported to the nurse that his new job was aggravating his back. The nurse prescribed heat, analgesics, and stretching and informed Clark to return as needed. Dr. Schneider stated that Clark reported to medical on October 11, 1994 that he had sustained a right-sided low back ache which started when he was on the job on October 7, 1994. He was given Ibuprofen in the medical department for that condition. By November 29, 1994, Dr. Schneider testified that Clark complained to him of low back pain radiating down his right leg. Clark stated to Dr. Schneider at that time he had slipped but caught himself in the injury occurring in early October 1994. At that time, Dr. Schneider felt Clark had a low back sprain. He examined Clark on December 5, 1994 and his assessment of Clark at that time was that he may have a lumbar strain, may have disc disease, and possibly a protrusion.

Dr. Schneider stated that he had not referred Clark to an outside physician, but indicated to him that he might wish to see his own orthopedic physician. However, it was Dr. Schneider's assessment that there was no injury that occurred at the plant that would warrant the plant paying for a visit to a physician since Clark had had a history of long-standing back problems. Dr. Schneider indicates that Clark returned to work at GM on

May 22, 1995 following release from Dr. Lange with restrictions of no lifting over 25 pounds and no repetitive bending for six weeks. He notes that Clark returned to work without restrictions on July 3, 1995. Thereafter, his records indicate that Clark slipped and fell on January 12, 1996 in the parking lot and returned to work February 1, 1996 without any restrictions.

Dr. Thompson, an orthopedic physician, performed an independent medical examination of Clark on October 24, 1996. Clark provided this physician with a history that he first had low back problems in 1971 and was out of work from his job on GM's assembly line for two to three months. He noted Clark related that following his transfer to GM's Bowling Green facility in 1981, that he experienced low back pain in 1983 while picking up a heavy box and was off work for a short time. Dr. Thompson received a history of his current back complaints originating in the middle of October while walking around a car to inspect it, slipping in water, falling, and experiencing recurrent low back pain. Based on his examination and review of records, Dr. Thompson's opinion was that Clark had degenerative disc disease prior to his fall; that he had some herniation or bulging of a disc manifested by right leg and buttock pain, and that the work incident was just one more episode in a series of back discomforts. He felt that the separate episodes of pain experienced by Clark prior to the October 1994 incident would be consistent with a herniated disc. He additionally opined that Clark retains a permanent partial functional impairment rating of approximately 8% to the body as a whole as a result of his degenerative disc condition which has been surgically treated. Dr. Thompson did not believe that the incident in October 1994 resulted in any harmful change to Clark's anatomy.

In connection with whether Clark sustained a work-related injury in October 1994, the ALJ stated that she found testimony from both Clark and Rampenthal as credible and persuasive. Additionally, the ALJ noted the

records about which Dr. Schneider testified as to Clark's past complaints and complaints during the time frame of October 1994, that led the ALJ to conclude that Clark had proven that he, in fact, experienced a work-related injury in early October 1994. Additionally, the ALJ determined the injury was one of appreciable proportions. The ALJ noted that although Clark had experienced episodes of back pain prior to October 1994, none were as serious, nor was there ever any prior suggestion that surgery had been either contemplated or recommended. Evidence from Dr. Lange supported the ALJ's conclusion that the herniated disc surgery was directly related to the October 1994 low back injury.

The ALJ had evidence from Dr. Thompson that Clark retains an 8% functional impairment. In addition, Dr. Lange assessed Clark's impairment at 15% to the body as a whole. She determined Clark retains a 30% occupational disability.

In her determination that Clark had an active occupational disability of 15%, the ALJ relied on the record which reflected that Clark had been troubled by back complaints at least sporadically for some 20 years. Finally, in connection with the issue of apportionment between GM and the Special Fund, the ALJ noted that she had carefully reviewed the medical evidence of record and was unable to identify any medical evidence which suggests that a portion of Clark's permanent impairment is due to the arousal of a pre-existing dormant, disease or condition. She specifically noted that Dr. Lange testified there was no arousal and that Dr. Thompson appeared to be silent in that regard. Consequently, the Special Fund was dismissed and the remaining 15% occupational disability was assessed entirely against GM.

We believe the ALJ's determination that Clark suffered a work-related injury of appreciable proportions in the incident occurring in October 1994 is supported by substantial evidence. We believe these findings were reasonable under the evidence presented and are not therefore clearly erroneous. In her

findings, the ALJ relied on evidence of substance which has the fitness to induce conviction in the minds [sic] of a reasonable person. Smyzer v. B. F. Goodrich Chem. Co., Ky., 474 S.W.2d 367 (1971). Although GM points to selective testimony from the physicians which would support a reversal of the ALJ's opinion, that alone is not sufficient to modify the ALJ's determination. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

Here, the ALJ had the sole responsibility to determine the weight and credibility of the evidence. In doing so, the ALJ has the right to selectively rely on evidence on questions of fact and may reject or accept any testimony before her and believe or disbelieve various parts of the evidence, including evidence from the same witness. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); Codell Const. Co. v. Dixon, Ky., 478 S.W.2d 703 (1972).

In connection with apportionment of liability between GM and the Special Fund, the burden of proof was on GM. In Clark's case, GM failed in this burden. Thus, the question on review is whether the record compels such a finding in favor of GM. Wells v. Phelps Dodge Magnet Wire Company, Ky. App., 701 S.W.2d 411 (1985). Dr. Lange reported no evidence of any arousal of a pre-existing disease or condition into disabling reality. Dr. Thompson testified that it was not medically probable that any pre-existing conditions were aroused by the incidents in question. In order that the provisions of KRS 342.1202 become operative, there must be some evidence that there has been an arousal of a pre-existing condition. See, Bennett v. Special Fund, Ky. App., 919 S.W.2d 225 (1996). It is required that competent evidence of a probative nature be submitted to establish Special Fund liability. Competent evidence cannot rest upon mere surmise or guess. Even if the testimony could be considered as demonstrating a possibility of Special Fund liability, that is insufficient to compel any specific result. Markwell & Hartz, Inc. v. Pigman, Ky., 473 S.W.2d 842 (1971). We believe the evidence

relied on by the ALJ constitutes evidence of substance and a different result is not compelled. Special Fund v. Francis, supra.

For the foregoing reasons, this Court affirms the Workers' Compensation Board's opinion.<sup>2</sup>

ALL CONCUR.

BRIEF FOR APPELLANT:

James David Bryant  
Bowling Green, Kentucky

BRIEF FOR APPELLEE SPECIAL  
FUND:

Joel D. Zakem  
Louisville, Kentucky

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<sup>2</sup>GM has argued to this Court that KRS 342.1202, which calls for equal apportionment between an employer and the Special Fund for back injuries, is unconstitutional. GM states that the ALJ and the board completely ignored the issue. This argument is misplaced in the case at bar, because the ALJ found no arousal of a preexisting dormant condition. Such a finding is necessary before the statute even comes into play. See Bennett v. Special Fund, Ky. App., 919 S.W.2d 225, 227 (1996). Thus, the issue of the constitutionality of KRS 342.1202 need not be considered in this case.