RENDERED: September 11, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002555-WC

HAZARD MORE FOR LESS — APPELLANT

V.

PETITION FOR REVIEW FROM A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-7153

DONALD FUGATE, RON CHRISTOPHER (DIRECTOR OF SPECIAL FUND), HONORABLE DONALD G. SMITH (ADMINISTRATIVE LAW JUDGE) and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, GARDNER and SCHRODER, JUDGES.

GARDNER, JUDGE. Hazard More For Less (Hazard) appeals from an opinion of the Workers' Compensation Board (the board) which affirmed an opinion and order of the Administrative Law Judge (ALJ). The ALJ found Donald Fugate (Fugate) to be 25%

occupationally disabled and apportioned all liability against Hazard. We affirm the opinion of the board.

The function of this Court's review of the board's opinion is to correct the board only where we find that the board 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 Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992). We have closely examined the facts, the law, and the arguments of counsel, with particular emphasis on Hazard's claims of error. We cannot conclude that the board has misconstrued the law nor that it committed an error in assessing the evidence so flagrant as to cause gross injustice. As we cannot improve upon the opinion of the board, we adopt it as the opinion of this Court. The board stated in relevant part as follows:

> Fugate, born January 21, 1960, was employed by Hazard as its meat manager. He sustained a work related injury on November 30, 1995 while lifting a case of beef which he estimated weighed 90 pounds. He felt severe low back pain which radiated into his legs. He went to the local emergency room and was treated by Dr. Chaney that day.
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> Medical evidence in the record consisted of the medical reports of Drs. Harry Lockstadt, Timothy Wagner, and Robert Goodman and the deposition of Dr. Roddie Gantt. Dr. Wagner, in a report dated August 16, 1996, indicated that diagnostic testing consisting of x-rays, an MRI, a myelogram, and a CT scan were all normal. Dr. Wagner's impression was low back pain secondary to strain with no permanent impairment. He felt Fugate could return to work as a cashier. He opined a large component of Fugate's problem was due to depression from the death of his brother which he apparently caused.

Dr. Lockstadt evaluated Fugate on October 22, 1996. He reported that x-rays demonstrated minor disk degeneration at L4-5. He further indicated that MRI scanning showed some minor disk degeneration at L4-5 and L5-S1. Dr. Lockstadt diagnosed mixed pain syndrome involving strains of the sacral sulcus, and the ligaments which support the facet joints and L4-5 and L5-S1 as well as interspinous ligaments. As to causation, Dr. Lockstadt reported that the mechanism of the injury that the patient described likely resulted in his symptoms. He felt that in all likelihood with the heavy lifting, ligaments were torn loose in the back that support the pelvis to the sacrum and to the lumbar spine so that these areas became destabilized and resulted in the pain pattern which Fugate described. On the issue of apportionment, Dr. Lockstadt indicated that preexisting disease was not grossly identified on physical examination or on MRI scanning, and only minor disk degeneration at L4-5 and L5-S1 was seen. He found no preexisting impairment. Dr. Lockstadt assessed a 5 to 10 percent impairment rating pursuant to the AMA guidelines.

Dr. Gantt at the University of Kentucky Pain Clinic began treating Fugate on June 5, 1996 with physical therapy and pain medication. His final diagnosis was low back pain/strain, myofascial pain syndrome. Dr. Gantt was not specifically asked concerning any preexisting condition, nor did he assess an impairment rating under the AMA guidelines.

Dr. Goodman examined Fugate on December 9, 1996. He reported that x-rays of the lumbar spine showed spina bifidfa occulta at S1, osteoporosis, and narrowing at L5-S1. He characterized all studies as normal. Dr. Goodman assessed an impairment rating possibly up to a maximum of 2 to 3 percent, half due to arousal because of the duration of Fugate's complaints.

The ALJ reviewed the evidence in the record and concluded that Fugate was suffering an occupational disability of 25 percent. On the issue of apportionment, the ALJ relied on Dr.

Lockstadt's evidence which indicated that Fugate's problems were related to the work injury without apportionment of impairment due to the arousal of the otherwise noted minor disk degeneration. On appeal, Hazard argues the ALJ should have made a 50/50 apportionment pursuant to KRS 342.1202 based on the testimony that there was preexisting, degenerative changes that were aroused into disabling reality.

Since Hazard was unsuccessful before the ALJ in connection with the issue of apportionment, the question on appeal is whether the evidence compels apportionment pursuant to KRS 342.1202. Wells v. Phelps Dodge Magnet Wire Co., Ky. App., 701 S.W.2d 411 (1985). Compelling evidence has been defined as evidence which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). It is not enough for Hazard to show the record contains some evidence which would support a different conclusion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). Furthermore, it is within the province of the ALJ to believe part of the evidence and disbelieve other parts whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Store, Ky., 560 S.W.2d 15 (1977). As long as the ALJ's determination is supported by any evidence of substance, it cannot be said the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Hazard cites the case of Bennett v. Special Fund, Ky. App., 919 S.W.2d 225 (1996), for the proposition that as long as there is evidence in the record of a degenerative condition and a physician testifies that it was aroused into disabling reality, apportionment is mandated. In Bennett, supra, the underlying condition for which apportionment was sought was identified, but there was a failure in the medical proof which established that it played any role in the occupational disability or impairment found. Hazard argues that since both doctors, Goodman and Lockstadt, identified the preexisting condition as

> degenerative disk disease, the ALJ should have apportioned 50 percent of the liability to the Special Fund.
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> The Board, having reviewed the evidence, the ALJ's decision, and the law on apportionment, finds no error. In Bennett, supra, the Court agreed with the ALJ and the Board that the mere invoking of the language 'preexisting,' 'dormant,' or 'nondisabling' condition is inconclusive on the issue of apportionment. Instead, there must be some evidence that there has been an arousal of a preexisting condition. In this case, Dr. Lockstadt identified some minor disk degeneration but refused to make an apportionment on that condition. While Hazard would have rather had the ALJ rely on the testimony of Dr. Goodman that the work incident aroused the degeneration into disabling reality, such is not compelled. Clearly, Dr. Lockstadt's testimony provides support for the ALJ's refusal to make an apportionment against the Special Fund.

Having found no error in the Board's review of the opinion and order of the ALJ, we affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. L. Roark
Hazard, Kentucky

BRIEF FOR APPELLEE SPECIAL FUND:

Benjamin C. Johnson
Louisville, Kentucky