

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000150-WC

KENTUCKY DEPARTMENT OF  
TRANSPORTATION

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC96-81060

BETTY HIMEBAUGH;  
HONORABLE J. LANDON OVERFIELD,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DYCHE, GARDNER AND KNOX, JUDGES.

GARDNER, JUDGE: The Kentucky Department of Transportation (KDOT) appeals from an opinion of the Workers' Compensation Board (the board) which affirmed an opinion and award of the Administrative Law Judge (ALJ). The ALJ determined that Betty Himebaugh (Himebaugh) was entitled to temporary total occupational disability and 20% permanent occupational disability. We affirm.

The facts are uncontroverted. Himebaugh began working for KDOT in 1998 as a seasonal toll booth collector. On August

19, 1996, she fell from a step ladder while cleaning a toll booth window and fractured two bones in her right leg. Himebaugh received medical treatment which is detailed in the record.

Himebaugh subsequently filed the instant petition seeking benefits, and the matter proceeded before the ALJ where proof was tendered. Himebaugh offered the medical report of treating physician Dr. Paul K. Forberg (Dr. Forberg), which noted residual muscle atrophy and weakness, pain with prolonged weight bearing, and limited ankle movement. Relying in whole or in part on AMA Guidelines, Forberg assessed a 30% loss of function of the leg which he translated to 14% whole body functional impairment. The assessment was based in part on the structural damage to Himebaugh's leg and the associated diminution in function, as well as on the level of pain which Himebaugh reported experiencing.

The ALJ also considered KDOT's medical evidence, which consisted of a report prepared by Dr. Daniel Primm, Jr. (Dr. Primm). Dr. Primm opined that Himebaugh's whole body functional impairment was in the range of 5% to 7%, and predicted that the impairment would improve in a matter of months. In deposition, Dr. Primm noted that there was no criteria in the AMA Guidelines for quantifying pain, and that it was ". . . just subjective on the physician and patient's part."

Finally, the report of examining physician Dr. Timothy R. Wagner (Dr. Wagner) was considered. He believed that much of Himebaugh's pain would resolve, and assigned a 2% whole body functional impairment. He further stated that the 2% impairment

was based solely on Himebaugh's report of pain, and that absent the pain he would assess no functional impairment.

Upon considering the evidence, the ALJ found the report of Dr. Forberg to be persuasive, and translated Dr. Forberg's assessment of 14% functional impairment into 20% occupational disability. Other conclusions were rendered which are not now at issue. KDOT appealed the award to the board, which affirmed. This appeal followed.

KDOT first argues that the board erred in affirming the ALJ's opinion because the AMA Guidelines do not permit pain to serve as a basis for increasing a functional impairment rating unless the pain is characterized as "chronic pain" or "chronic pain syndrome." It argues that Himebaugh does not have chronic pain, and that accordingly it was improper for Forberg to increase Himebaugh's functional impairment rating based on pain. We have closely examined the facts, the law, and the arguments of counsel on this issue, and find no error.

KDOT concedes that Chapter 15 of the AMA Guidelines permits the assessment of functional impairment as "add-ons" (i.e., increases) based on pain in certain circumstances, and that the physician may exercise discretion in assessing a functional impairment rating when those circumstances exist. The focus of KDOT's argument on this issue, then, is not whether pain may serve as a basis for assessing a functional impairment rating, nor whether the physician may exercise discretion in this regard, but whether Himebaugh is experiencing pain sufficient to justify an increased functional impairment rating.

Clearly, resolution of this issue requires the ALJ to consider the relevant medical evidence and to produce a finding of fact as to whether Himebaugh is experiencing ongoing pain resulting from her injury. This question, like all questions of fact, falls within the scope of the ALJ's sound discretion, Brockway v. Rockwell International, Ky. App., 907 S.W.2d 166 (1995), and in making this finding, the ALJ may choose which portions of the evidence to rely on and which portions to give less weight to. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Dr. Forberg opined that Himebaugh's pain was substantial and ongoing, and the ALJ's reliance on this opinion is not clearly erroneous. While Dr. Wagner did not agree with this determination, he did not state that he believed it to be in error, and, arguendo, had he done so the ALJ was entitled to accept Dr. Forberg's conclusions on this issue while rejecting Dr. Wagner's. Id. Similarly, Dr. Primm disagreed with Dr. Forberg's assessment of Himebaugh's pain, but again the ALJ is best positioned to consider conflicting evidence and to render findings of fact therefrom. Ultimately, we are bound to rely on the ALJ's findings of fact absent a showing that they are clearly erroneous, and no such showing has been made on this issue. Kentucky Revised Statute (KRS) 342.285; Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

In a related argument, KDOT maintains that the ALJ's opinion and award should be reversed because Dr. Forberg did not rely on the AMA Guidelines as a basis for finding of functional impairment, but rather relied on a computerized model used by the

California Workman's Compensation system. We do not find this argument persuasive. Chapter 15 of the AMA Guidelines provides for pain impairment ratings, and both the ALJ and the board concluded that Dr. Forberg's reliance on these Guidelines reasonably supports his assessment of Himebaugh's functional impairment rating. While it is true that Dr. Forberg considered extrinsic evidence (i.e., the California model), the printout of this model was not introduced into evidence and Chapter 154 sufficiently supports his assessment of pain as a basis for functional impairment. As the board noted, KDOT did not present medical testimony sufficient to explain how Dr. Forberg's calculations were in error nor to effectively impeach his functional impairment assessment. When all of the evidence on this issue is considered, we cannot conclude that the ALJ's findings, or the board's affirmation thereof, were clearly erroneous, Western Baptist Hospital v. Kelly, supra, and accordingly find no error.

For the foregoing reasons, the opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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