

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000476-WC

AMERICAN GREETINGS CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-97-72445

CHARLES BRIGHT;  
HON. THOMAS A. NANNEY,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
REVERSING IN PART AND AFFIRMING IN PART  
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BEFORE: HUDDLESTON, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: American Greetings Corporation asks us to review an opinion of the Workers' Compensation Board (board) rendered January 28, 2000. Kentucky Revised Statutes (KRS) 342.290. We reverse in part and affirm in part.

Charles Bright was employed by American Greetings from 1976 until 1998. On June 10, 1997, he suffered a work-related lower-back injury. He continued to work until June 1, 1998, at which time his condition progressed to a point he could no longer work. On July 17, 1998, Bright filed a claim under the Workers'

Compensation Act. KRS Chapter 342. He sought income benefits for his lower-back injury as well as an alleged work-related hearing loss with last exposure on June 1, 1998. We consider the claims separately.

#### **HEARING-LOSS CLAIM**

Pursuant to KRS 342.315 and KRS 342.316(4)(b), Bright was ordered to be evaluated by university evaluator Dr. Ian Windmill, an audiologist. Audiometric testing revealed Bright to be suffering from a marked hearing loss. Dr. Windmill assessed Bright as suffering from a 24% impairment under the AMA Guidelines. He stated that Bright's audiograms established a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. The doctor further stated that within reasonable medical probability Bright's hearing loss is work related.

The administrative law judge (ALJ) disregarded the university evaluator's conclusions and found Bright failed to establish he was injuriously exposed to loud noise while in American Greeting's employ. Specifically, he found Bright's testimony to be inconsistent. The hearing-loss claim was dismissed.

On review, the board determined the ALJ erred in disregarding the university evaluator's report. It opined that "evidence necessary to overcome a university evaluator's conclusion must rise to a level that is greater than a preponderance." The board held that the evidence presented to

rebut the evaluator's conclusion did not rise to this level. Hence, it reversed the ALJ's determination on this issue and remanded the case for entry of an award in favor of Bright.

On appeal to this Court, American Greetings insists the board erred in reversing the ALJ's decision because the evidence did not compel a contrary result. We conduct our review of this issue under the precepts of Magic Coal Company v. Fox, Ky., \_\_\_ S.W.3d \_\_\_ (2000), which was rendered subsequent to the board's January 28, 2000, decision. Therein, the Kentucky Supreme Court set forth the weight to be accorded a university evaluator's conclusions and the evidence necessary to overcome same. It opined as follows:

KRS 342.315(2) creates a rebuttable presumption which is governed by KRE 301 and, therefore, does not shift the burden of persuasion. Pursuant to KRS 342.315(2), the clinical findings and opinions of the university evaluator constitute substantial evidence of the worker's medical condition which may not be disregarded by the fact-finder unless it is rebutted. Where the clinical findings and opinions of the university evaluator are rebutted, KRS 342.315(2) does not restrict the authority of the fact-finder to weigh the conflicting medical evidence. In instances where a fact-finder chooses to disregard the testimony of the university evaluator, a reasonable basis for doing so must be specifically stated.

Id. at \_\_\_.

In the instant case, the ALJ chose to disregard the evaluator's conclusions based upon Bright's inconsistent statements regarding his exposure to loud noise while employed at American Greetings. When interviewed by the university evaluator, Bright attributed his hearing loss to the noise level

at American Greetings' plant. However, an examination of the histories given by Bright to several of his physicians, prior to filing his claim, reveals he indicated the conditions of his work were, indeed, not noisy. On one particular visit for ear problems in 1996, Bright reported to Dr. Albert Cullum that he had been exposed to loud noises in the logging industry. Bright did not indicate to Dr. Cullum that he was subjected to excessively loud noise at the American Greetings' plant. The ALJ also stated there was significant evidence that Bright's hearing loss was a pre-existing active disability. Upon the whole, we are persuaded the ALJ stated a reasonable basis for disregarding the evaluator's report. See Magic Coal Company v. Fox, \_\_\_ S.W.3d \_\_\_. Furthermore, we do not believe the evidence compels a finding that Bright was injuriously exposed to loud noise at the American Greetings' plant. See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992). As such, we are of the opinion the board erred in reversing the ALJ's determination on the hearing-loss claim and remanding the case for entry of an award in favor of Bright. We reverse on the hearing-loss claim. The ALJ's decision will stand.

#### **LOWER-BACK INJURY CLAIM**

Bright was examined by Dr. Michael Best who assessed him with a lower-back strain resulting in a 5% impairment under the AMA guidelines. In his report, Dr. Best stated that 50% of Bright's impairment is the result of "pre-existing degenerative changes." The ALJ apparently interpreted these degenerative

changes as the effects of the "natural aging process" which are non-compensable under KRS 342.0011(1). The ALJ, thus, awarded Bright benefits based upon only a 2 ½% impairment rating.

On appeal, the board first noted that Chapter III of the AMA Guidelines states age-related changes are to be excluded before assessment of any impairment thereunder. The board then held that the existence of degenerative changes does not automatically establish age-related change. It further implied that if degenerative changes are not the result of the natural aging process, they may be compensable. Ultimately the board "revers[ed] the decision of the ALJ . . . with regard to Bright's injury claim and remand[ed] [the] case with instructions that Dr. Best's medical report be re-evaluated in accordance with [its] holding . . . ." We perceive no fault with the board's legal analysis and conclusions on this issue. Hence, we believe the board properly remanded this case for re-evaluation. We affirm on the lower-back injury claim.

In sum, the ALJ's rejection of the hearing-loss claim stands. The ALJ will reconsider the lower-back injury claim.

For the foregoing reasons, the decision of the Workers' Compensation Board is reversed in part and affirmed in part.

ALL CONCUR.

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