RENDERED: AUGUST 10, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002885-WC

ROBERT PHILPOTT — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-55560

RAINBO BAKERY; HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Robert Philpott petitions for review of an opinion of the Workers' Compensation Board rendered on November 5, 1999. The Board appeared to interpret changes made by the Legislature effective December 12, 1996, as precluding any award for disability resulting from the arousal of a dormant, non-disabling disease or condition by reason of a work-related event. Consequently, it remanded Philpott's award for total occupational disability benefits to the Administrative Law Judge "on the issue of compensability based on the definition of injury contained in KRS 342.0011(1)." Having concluded that the Board's ruling is

inconsistent with the recent case of McNutt Construction v. Scott,[1] we reverse and remand.

On March 13, 1997, Philpott injured his back while lifting multiple trays of bread in the course of his employment for the appellee, Rainbo Bakery. Philpott took over-the-counter medication and continued to work until March 18, 1997, when his back pain increased and began radiating down his left leg. He has not worked since that date. On October 30, 1997, Philpott underwent a discectomy at the L4-5 level by neurosurgeon Dr. Susanne Fix. Following the surgery, Philpott continued to complain of pain in his low back that radiated into his left leg.

On October 6, 1997, Philpott filed an application for resolution of injury claim against Rainbo and the Special Fund. The Special Fund was dismissed by order dated October 16, 1997. After an arbitrator dismissed his claim for lack of notice, Philpott requested a hearing before an ALJ. In the ALJ's opinion and award dated June 15, 1999, Philpott's back injury was found to be work related and he was found to have given proper notice to his employer. The ALJ found Philpott to be "suffering a total 100% occupational disability" and he did not exclude any disability as a result of the "natural aging process."

In its appeal to the Board, Rainbo argued that the Board in Wolverine Janitorial Service v. Harold R. Wheatley, Claim No. 97-91736 had "concluded that the December, 1996 Amendments to the Kentucky Workers' Compensation Act evidenced an intention by the legislature to exclude compensation for arousal

[1]Ky., 40 S.W.3d 854 (2001).

of a pre-existing, dormant condition. As such, any award of permanent disability benefits made in favor of the claimant herein should properly have been reduced by one-half." Rainbo relied on the testimony of Dr. John Nehil, an orthopedic surgeon, in support of its argument that 50% of Philpott's back condition was attributable to the arousal of a dormant, pre-existing, non-disabling condition and one-half of his disability should be excluded from the award as being due to the effects of the natural aging process. Simply stated, it was Rainbo's position that the Legislature did not intend for employers to be responsible for those benefits previously imputed to the Special Fund.

In its review, a majority of the Board agreed with the argument's advanced by Rainbo and rendered an opinion relying on Wolverine, as follows:

> The ALJ's decision concerning compensability of the award on the issue of the natural aging process is somewhat more problematic. Since the rendition of the ALJ's Opinion and Award and order on petition for reconsideration, this Board issued its decision in Wolverine Janitorial Service v. Harold R. Wheatley, (Claim No. 97-91736). In Wolverine, this Board held that the 1996 amendments to the definition of injury contained in KRS 342.0011(1) were intended by the Legislature to absolve employer's [sic] from liability from the effects of the natural aging process, whether active or dormant, existing prior to a work-related traumatic event. Now, to be compensable, an injury requires a "work-related traumatic event . . . arising out of and in the course of employment, which is a proximate cause producing a harmful change in the human organism as evidenced by medical findings." The new definition of "injury" expressly does not include the effects of the natural aging process. See, KRS 342.0011(1). In

Wolverine, the Board believed that the medical evidence which attributed on[e]-half of Wheatley's functional impairment to the "natural aging process" was a significant factor. That evidence was uncontroverted. Here, in Philpott's case, the medical opinion is controverted as to the factual determination. In addition, since the Board published Wolverine, we subsequently decided Heitzman Bakeries v. Tina Poole, (Claim No. 97-95158) on September 10, 1999. Therein, we took the opportunity to further expand on our ruling [in] Wolverine Janitorial Service. We opined that not every pre-existing disease or condition is automatically excluded under the 1996 Act. Under KRS 342.0011(1), as amended in 1996, we believe pre-existing changes and congenital defects are no longer compensable even when aroused by work-related traumatic event unless those conditions themselves are medically proven to be the proximate result of an injured employee's past work activities. Pre-existing changes that manifest in excess of normal aging, whether caused by repetitive activity at work over time or occurring as the result of a prior work injury or work-related disease, are compensable provided the arousal of these conditions can be demonstrated through objective medical findings. Similarly, we held that degenerative changes that occur subsequent to a work-related traumatic event are also compensable provided the changes are medically foreseeable, proximately related, and result in some degree of measurable impairment under the AMA Guides as evidenced by objective medical findings.

Further, in James McIntosh v. Link-Belt Construction Co., (Claim No. 95-49061) rendered September 17, 1999, the Board instructed that in utilizing the AMA Guides, as mandated by the Legislature, in the determination of impairment, that where the physician, in rendering an opinion as to the percentage of functional impairment for the spine under the Guides, uses the "Injury Model" or "Diagnosis-Related Estimates" (DRE) Model, as required by regulation, then the adjudicator need not be concerned with carving out "the effects of the natural aging process." That computation has already been accomplished by the AMA Guides in arriving at the functional disability rating to which the

> physician decides an individual is entitled, in his medical opinion. See, AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, 1993, pages 3/94 through 3/100.
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> In the case at bar, the ALJ concluded that Philpott was totally occupationally disabled based on his own testimony, as well as the testimony of Drs. Nehil and Fix. Dr. Fix, in her report of August 5, 1998, indicated that Philpott had severe disc deterioration from his injury. Dr. Nehil apportioned half of Philpott's impairment to the arousal of a pre-existing dormant condition or congenital abnormality; to wit: degenerative disc disease of the lumbar spine.
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> Inasmuch as our decision in Wolverine Janitorial Services, and subsequent decisions in Heitzman Bakeries and McIntosh, have been rendered since the ALJ's Opinion herein, we believe it is necessary to remand this matter to the ALJ on the issue of compensability based on the definition of injury contained in KRS 342.0011(1).

Philpott has sought review of the Board's opinion in this Court. His appeal was abated pending the resolution of the issue of the proper interpretation of KRS 342.0011(1) pending in the Supreme Court of Kentucky. Recent decisions from that Court have rejected the Board's interpretation of the statute.

In McNutt Construction, supra, the claimant, like Philpott, suffered a low back injury at work and required surgery. Medical testimony was offered that established that McNutt had a dormant, pre-existing, degenerative, arthritic condition of the lower spine which one doctor opined was consistent with the natural aging process. However, the ALJ determined that the claimant's disability was attributable to the work-related accident and not to the natural aging process. The

Board affirmed the ALJ and this Court affirmed the Board. In further affirming the ALJ's award, the Supreme Court held:

> Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury. We are not persuaded that the legislature's decision to abolish Special Fund apportionment with regard to traumatic injury claims had any effect on the longstanding principle that a harmful change to a worker's body which is caused by work is an "injury" for the purposes of Chapter 342 [footnote omitted].[2]

Thus, based on McNutt Construction, the Board erred in concluding that the ALJ was required to carve out of Philpott's award any disability attributable to his dormant back condition, aroused by the work-related injury.

In Guffey, supra, the Court reiterated that it was the role of the ALJ to "to translate the lay and medical evidence into a finding of occupational disability."[3] Where there is sufficient evidence to support the ALJ's findings, it is inappropriate for the Board to substitute its opinion for that of the ALJ. Clearly, the ALJ's determination that Philpott's March 1997 injuries alone caused his functional impairment is supported by the evidence. Specifically, evidence from Dr. Fix, upon whom the ALJ stated he relied, supports the ALJ's finding. Thus, the ALJ's findings are supported by substantial evidence and his

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[2]Id. at 859. See also Commonwealth, Transportation Cabinet v. Guffey, Ky., 42 S.W.3d 618 (2001).

[3]Guffey, supra at 621.

decision is not erroneous as a matter of law.[4]

Accordingly, the opinion of the Board is reversed and the matter is remanded with instructions to reinstate the award of the ALJ.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tamara Todd Cotton
Louisville, KY

BRIEF FOR APPELLEE, RAINBO BAKERY:

No brief filed.

[4]Special Fund v. Francis, Ky., 708 SW.2d 641 (1986).