

RENDERED: MAY 10, 2002; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-002208-WC

WILLIAMSON ARH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-91-36414 AND WC-93-00133

MARY PHILLIPS; HONORABLE  
ROBERT L. WHITAKER, DIRECTOR OF  
SPECIAL FUND; HONORABLE DONALD G.  
SMITH, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APELLEES

### OPINION AFFIRMING

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BEFORE: DYCHE, BUCKINGHAM, AND JOHNSON, JUDGES.

DYCHE, JUDGE. Williamson ARH appeals from a September 12, 2001, opinion of the Workers' Compensation Board which affirmed an April 16, 2001, opinion and award. In the April 16, 2001, opinion and award, Hon. Donald G. Smith, Administrative Law Judge (ALJ), granted Mary Phillips's motion to reopen; found that Phillips had suffered a worsening of her physical condition; found her to be totally occupationally disabled and awarded her

\$51.27 per week from ARH and \$157.80 per week from the Special Fund. We affirm.

Phillips worked for ARH as a nursing assistant. On July 8, 1991, while at work, Phillips injured her neck and back while lifting a patient, one of the frequent duties she performed at ARH. Subsequently, on July 11, 1992, while at work, Phillips injured her left hand when a hand crank on a hospital bed gave way. Phillips filed a workers' compensation claim in 1993. In a January 23, 1995, opinion and award, ALJ Bruce Cowden found Phillips to be 20% occupationally disabled as a result of her neck and back injuries. The ALJ apportioned 50% to ARH and 50% to the Special Fund. Furthermore, the ALJ found Phillips to be 15% occupationally disabled due to her left wrist injury and apportioned all 100% to the Special Fund.

In support of her 1993 claim, Phillips presented the testimony by report of Dr. Joseph Rapier, M.D., who examined Phillips in May of 1993. He noted that Phillips had a decreased range of motion in her neck, low back, left wrist and left long finger. Dr. Rapier noted that x-rays of Phillips indicated some degenerative changes in Phillips's cervical and lumbar spine and indicated degenerative and cystic changes in her left wrist. Dr. Rapier found no evidence of sensory, motor, or reflex abnormalities with Phillips. He opined that she suffered a 26% whole body impairment, according to the AMA Guides. Dr. Rapier assessed the following work restrictions for Phillips: lift no more than 20 pounds maximum; lift no more than 10 pounds

frequently; sit, walk, or stand less than six hours; occasionally climb, balance, stoop, kneel, crouch, crawl, or bend; and reach and handle in limited amounts.

Phillips also presented the testimony by report of Dr. James Templin, M.D., a specialist in pain management. Dr. Templin noted that Phillips suffered from decreased range of motion in her neck, low back, and left wrist. He noted that x-rays of Phillips indicated degenerative changes in her neck, low back, and left wrist. Dr. Templin assessed the following work restrictions: lift no more than 20 pounds maximum; lift no more than 10 pounds frequently; sit, walk, or stand less than six hours in a day; avoid repetitive use of her arms; and avoid repetitive bending, stooping, crouching, or kneeling.

In its defense of the 1993 claim, ARH presented the testimony by report of Dr. Krishnama Raju, M.D., an orthopedic surgeon. Dr. Raju noted that Phillips had some limited range of motion in her low back. He found no changes in sensory, motor, or strength in Phillips's lower extremities. He diagnosed Phillips with lumbar strain and opined that, with physical therapy and work hardening, Phillips should be able to return to work without any restrictions. Dr. Raju assessed no impairment rating for Phillips.

ARH presented the testimony of Dr. Anbu Nadar, M.D. Dr. Nadar testified that he had treated Phillips in 1985 for lumbar strain. He stated that he found no sensory, reflex, or motor changes in either of Phillips's upper or lower extremities.

He stated that x-rays indicated degenerative changes in her left wrist, and Dr. Nadar believed that Phillips suffered from a weak grip in her left hand. Dr. Nadar noted that x-rays indicated degenerative changes in her lumbar spine. Dr. Nadar testified that his impression was that Phillips suffered from cervical and lumbar strain and a sprain in her left wrist with arthritic changes. According to the AMA Guides, Dr. Nadar opined that Phillips was 7% impaired due to her low back and 10-12% impaired due to her left wrist. He assessed the following work restrictions for Phillips: lift no more than 50 pounds maximum, and lift no more than 30-35 pounds frequently.

In defense of Phillips's 1993 claim, ARH also presented the testimony by report of Dr. Earl Foster, M.D. Dr. Foster found restriction in the range of motion in Phillips's left wrist, and x-rays indicated an inflammatory process in the left wrist joint. Dr. Foster diagnosed Phillips with rheumatoid arthritis in her left wrist.

On September 11, 2000, Phillips filed a motion to reopen the 1995 opinion and award and alleged that both her back and left wrist had worsened. In support of the motion to reopen, Phillips presented the testimony, by August 21, 2000, report, of Dr. Joseph Rapier, who noted that Phillips's range of motion in her low back had decreased since he had last examined her in 1993. Dr. Rapier noted that Phillips had no range of motion in her left wrist. Dr. Rapier used the Range of Motion model and opined that Phillips now had a 21% impairment due to the low back

and a 20% impairment due to the left wrist. When combined, Dr. Rapier opined that Phillips now suffered from a 37% whole body impairment, according to the AMA Guides. Dr. Rapier assessed additional work restrictions for Phillips: no lifting, bending, walking, standing, sitting, climbing, reaching, grasping, or operating machinery. Dr. Rapier opined that Phillips was now limited to sedentary work, and any work she now did should give her the option to sit or stand as needed.

In response to Phillips's motion to reopen, ARH deposed Dr. Rapier and presented his testimony to the ALJ. Dr. Rapier testified that he first examined Phillips in 1993 and that he examined her in 1995 after she fell at work and re-injured her low back. Dr. Rapier testified that after the 1995 fall Phillips complained of increased back pain. During the deposition, Dr. Rapier admitted that Phillips's new complaints were essentially the same as those in 1993. Dr. Rapier testified that the only changes in Phillips's condition between 1993 and 2000 were changes in her range of motion, which were subjective in nature. Dr. Rapier testified that new x-rays indicated that Phillips had increased degenerative changes but such changes were caused by normal aging. Dr. Rapier stated that, using the DRE Model found in the AMA Guides, he would currently assess Phillips with a 5% impairment. Further, he testified that this was the same rate of impairment that Phillips suffered from in 1993, under the DRE Model.

ARH presented the testimony by report of Dr. Richard

Sheridan, M.D., an orthopedic surgeon. After he examined Phillips and reviewed her medical records, Dr. Sheridan felt that she suffered from rheumatoid arthritis. Dr. Sheridan opined that Phillips had suffered a left wrist sprain in 1992 that had now resolved itself and that she suffered a lumbar strain in 1991 that had also resolved itself. Dr. Sheridan found no evidence of radiculopathy in Phillips's lower extremities and discovered no objective findings regarding Phillips's low back. According to the AMA Guides, Dr. Sheridan assessed a 0% impairment rating for Phillips.

Once again, ARH presented the testimony by report of Dr. Earl Foster, who treated Phillips. In 1994, Dr. Foster performed surgery on Phillips for a torn medial meniscus in her right knee. Later, he completely replaced Phillips's right knee. Dr. Foster indicated that Phillips suffered from rheumatoid arthritis.

ARH also presented the testimony by deposition of Dr. Nadar. Dr. Nadar testified that he re-examined Phillips in January of 2001. Dr. Nadar testified that he made no objective findings of a change in Phillips's condition from his 1994 examination to the 2001 examination. He testified that Phillips had a decrease in her range of motion but noted that this was a subjective finding. According to Dr. Nadar, x-rays indicated that Phillips suffered from degenerative changes in the left wrist. In fact, Dr. Nadar noted that Phillips's left wrist was completely fused. Regarding Phillips's lumbar spine, Dr. Nadar

testified that Phillips's low back was normal for a person of her age, although he noted the presence of some arthritis. Dr. Nadar felt it unnecessary to place any additional work restrictions upon Phillips.

In an April 16, 2001, opinion and award, ALJ Smith found that the condition of both Phillips's left wrist and low back had worsened. The ALJ found Phillips to be 100% totally disabled and awarded her \$51.27 per week from ARH that represented 50% of 50% of the total 100% for Phillips's low back; awarded her \$51.27 per week from the Special Fund that represented 50% of 50% of the total 100% for Phillips's low back and awarded her \$106.53 per week from the Special Fund that represented 50% of the total 100% for her left wrist. ARH appealed to the Workers' Compensation Board, which affirmed the April 16, 2001, opinion and award. This appeal followed.

Upon appeal, ARH presents two arguments: 1) the Board's determination that the evidence before ALJ Smith was exceedingly slim mandates a reversal of the April 16, 2001, opinion and award; and 2) ALJ Smith committed reversible error by failing to attribute all of Phillips's worsening and resulting disability to her wrist injury, her knee problem, and to her non-compensable back problems. We will address both arguments together since ARH through both arguments is merely challenging the sufficiency of the evidence.

We review a decision of the Workers' Compensation Board to determine whether it was erroneous as a matter of law.

American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission, Ky., 379 S.W.2d 450, 457 (1964). Further, where an ALJ has found in favor of the claimant, who bears the burden of proof, which in this case is Phillips, we must determine whether the ALJ's findings were supported by substantial evidence. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986); see Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). The Kentucky Supreme Court has commented that substantial evidence is, "evidence which would permit a fact-finder to reasonably find as it did." Special Fund v. Francis, supra at 643. In addition, it has defined substantial evidence as, "some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people." Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971). Furthermore, the ALJ, not the Board nor this court, has the sole discretion to determine the quality, character, and substance of the evidence before it. Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999), quoting Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); see Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Also, as fact-finder, the ALJ may choose to believe or disbelieve any part of the evidence presented, regardless of its source. Whittaker v. Rowland, supra at 481, quoting Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

To prevail on appeal, ARH must show that the evidence presented to ALJ Smith was not sufficient to convince reasonable



people that Phillips had suffered additional occupational disability. McNutt Construction v. Scott, Ky., 40 S.W.3d 854, 860 (2001). Special Fund v. Francis, supra at 643. As fact-finder, ALJ Smith had sole discretion to weigh all the evidence presented. Further, the ALJ has the sole responsibility to take the medical evidence and translate it into percentage of disability. Kilgore v. Goose Creek Coal Company, Ky., 392 S.W.2d 78, 79 (1965). As stated above, ALJ King could choose to believe or disbelieve all or part of any witness's testimony. ALJ Smith specifically found Phillips's own testimony very credible regarding the injuries that she suffered, the increase in pain she suffered subsequently, and the decrease in her range of motion she experienced in both her low back and left wrist. Furthermore, ALJ Smith found Dr. Rapier's testimony regarding Phillips's physical condition very credible and noted that his findings corroborated Phillips's testimony. Dr. Rapier opined that Phillips suffered from a decreased range of motion due to the injuries she received in 1991 and 1992, assessed a higher percentage of disability based on his expert findings and opined that she was capable of performing sedentary work only as a result of the worsening of both her low back and left wrist.

As stated above, ALJ Smith had sole discretion to weigh the evidence, judge the credibility of witnesses, and translate the evidence into a percentage of occupational disability. After reviewing the record, we, like the Board, are reluctant to substitute our discretion for that of the Administrative Law

Judge; therefore, we find that ALJ Smith's findings were supported by substantial evidence. Since ALJ Smith's findings were supported by substantial evidence, we are compelled to affirm both the opinion of the Workers' Compensation Board and the opinion of the Administrative Law Judge.

ALL CONCUR.

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