RENDERED: NOVEMBER 15, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001137-WC

RANDALL GOSNELL — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-91625

BANDI'S WELDING & STEEL ERECTION;
THOMAS A. NANNEY, ADMINISTRATIVE
LAW JUDGE, DECEASED; WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, DYCHE, AND POTTER[1], JUDGES.

DYCHE, JUDGE: We have examined the record herein, and find that the opinion of the Workers' Compensation Board fairly and adequately sets out the facts of this case, and applies the correct legal standards to those facts. Accordingly, we adopt that opinion as our own:

> Randall Gosnell ("Gosnell") appeals from the decision of Hon. Thomas A. Nanney, Administrative Law Judge ("ALJ"), finding he

[1]Senior Status Judge John Potter sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution.

had a 7% impairment rating pursuant to the *AMA Guides* and thus finding a permanent partial disability rating in accordance with that impairment rating.

Before the ALJ the only issue was extent and duration of occupational disability and, on appeal, Gosnell argues the ALJ erred in permitting the late filing of a medical report from Dr. Thomas Loeb on behalf of Bandi's Welding & Steel Erection ("Bandi") and further erred in relying upon Dr. Loeb's 7% impairment rather than Dr. Crawford's 25% impairment.

Gosnell was injured March 3, 2000 while moving some heavy metal, which apparently caused a herniated cervical disk. After approximately six weeks of medical treatment, his problems appeared to resolve and he was released to return to work without restrictions. However, in February of 2001 he had a reoccurrence of symptomatology and again returned to Dr. Crawford. Gosnell advised there had been an onset of symptomatology without any triggering mechanism. His condition continued to worsen and specialized testing was performed which revealed a herniated cervical disk at C6/7 with nerve root impingement. Continued conservative treatment failed and Gosnell underwent a cervical diskectomy and fusion. The claim was placed in abeyance, temporary total disability benefits were instituted and upon reaching maximum medical improvement, the claim was removed from abeyance and proceeded to a decision on the merits. Apparently, after reaching maximum medical improvement, Dr. Crawford permitted Gosnell to return to work and believed he was capable of performing the same work that he did at the time of the injury.

Dr. Crawford was introduced by way of medical records and reports. Upon Gosnell reaching maximum improvement, he assigned a 25% impairment rating based upon a DRE Category 4. Dr. Crawford believed the impairment was attributable to the injury in question but he would permit Gosnell to return to work.

On September 26, 2001, Bandi's moved for an extension of time in which to secure evidence from Dr. Loeb. Within that motion it was stated Dr. Loeb's first available appointment date was October 12, 2001. Bandi's sought an extension through and including October 20, 2001 and an order was executed on October 1, 2001 granting the motion for extension of time. A pre-hearing conference was held October 20, 2001 and, the parties being unable to resolve this matter, it was scheduled for a hearing on October 24, 2001. At the hearing, Bandi's counsel presented the report from Dr. Loeb. Counsel for Gosnell objected to the introduction of this report as being untimely submitted. The report itself was dated October 16, 2001. Counsel for Bandi advised the ALJ it had made diligent efforts to secure the timely production and receipt of the report from Dr. Loeb but had not received it until after the expiration of its proof time. The ALJ permitted the introduction of the report over the objection of Gosnell's counsel.

In his Opinion, the ALJ ultimately relied upon the report of Dr. Loeb in finding the appropriate impairment rating pursuant to the *AMA Guides* was 7%. In doing so, the ALJ made reference to the 25% assigned by Dr. Crawford and, as was requested of him by both parties during their argument at the hearing, he reviewed the *AMA Guides* in an effort to determine which impairment rating might be more appropriate. The ALJ stated that none of the medical records from the physicians indicated motion segment instability and, therefore, he did not believe the 25% assigned by Dr. Crawford was appropriate and relied upon the range of motion assessment of Dr. Loeb.

On appeal, Gosnell believes his due process was violated by the ALJ's permitting the late introduction of the medical report of Dr. Loeb and further believes the ALJ made an independent determination of the appropriate impairment rating in his review of the *AMA Guides*. Alternatively or in addition, Gosnell believes the ALJ

misinterpreted the *AMA Guides* and Dr. Crawford's impairment was the correct one.

As a general rule, an ALJ has the sole authority to control the taking and presentation of proof. Searcy vs. Three Point Coal Co., 134 SW2d 228 (1939). As aptly pointed out by Gosnell, the practice regulations for the presentation of proof in a workers' compensation claim provide that a party seeking a motion for extension of time should request that extension at least five days prior to the expiration of the present proof time. 803 KAR 25:010 § 16(1). Additionally, Gosnell asserts that by providing that the submission date was the date of the hearing that he was prevented from providing rebuttal proof. Again, he appropriately states the regulations provide that in the event there is an extension of time proof time for the opposing party is automatically extended in those circumstances. 803 KAR 25:010 § 16(3).

We are of the opinion the ALJ was within his authority in accepting the evidence presented by Bandi from Dr. Loeb. Further, we do not believe the actions of the ALJ prevented Gosnell from presenting rebuttal proof to the report of Dr. Loeb if he so desired. By operation of the regulations, with or without an order from the ALJ, Gosnell automatically had fifteen days in which to present rebuttal evidence. There is nothing in the transcript of evidence nor by further pleading that would indicate the ALJ specifically or by implication prohibited Gosnell from seeking or presenting rebuttal proof. It is our opinion that the regulations by their very language automatically extend the proof time in these circumstances and no separate order is necessary. Further, as is required by KRS 342.033 and the practice and procedure regulations, if a report from a physician is submitted into evidence then the opposing party has a due process right to schedule and take that physician's deposition.

There is nothing in this record, however, that indicates Gosnell wished to or

attempted to schedule and take the deposition of Dr. Loeb. Nor is there is [sic] any pleading or indication in the record that Gosnell intended to or wished to present any specific rebuttal evidence. We have no doubt that had he so desired and even if additional time were necessary, the ALJ should have granted Gosnell the authority to do so. If a party desires to present rebuttal evidence or take a deposition, they cannot and should not simply sit quietly and wait for the time to expire and then complain they have been foreclosed from doing so. We find it interesting that while Gosnell filed a lengthy petition for reconsideration, no reference was made in that petition to a need for rebuttal evidence. Certainly, had Gosnell made a request and the ALJ prohibited him from presenting rebuttal proof to that of Dr. Loeb, a question concerning due process would be valid. However, neither he nor we can presume that the ALJ would fail to follow the law.

Since December 12, 1996, permanent partial disability benefits are computed based upon a mathematical formula beginning with an impairment rating pursuant to the *AMA Guides*. All involved in workers' compensation matters continue to struggle with the degree upon which an ALJ may analyze the *AMA Guides* in arriving at an impairment rating. On more than one occasion, this Board has clearly stated the ALJ may not offer an independent analysis and arrive at his own impairment rating. We have, however, frequently noted that it is the statute that adopts the *AMA Guides* as the basis for the assignment of an impairment rating and it is within the ALJ's authority to review those *Guides* in attempting to assess weight and credibility. Weight and credibility, when there is conflicting evidence, is solely for the determination of the ALJ. Codell Construction Co. vs. Dixon, Ky., 478 SW2d 703 (1972); Smyzer vs. B. F. Goodrich Chemical Co., Ky., 474 SW2d 367 (1971) and Magic Coal Co. vs. Fox, Ky., 19 SW3d 88 (2000).

> Here, we have two physicians who by training and qualifications would appear to possess the requisite ability to assign an impairment rating pursuant to the AMA Guides. They both did and, yet, their opinions are widely divergent. While Gosnell believes in this instance the ALJ went beyond his authority and further misread the *Guides* in determining that Dr. Loeb's 7% was more credible than was Dr. Crawford's 25%, in our opinion, Gosnell simply wishes us to reweigh and reanalyze weight, credibility and language contained in the *Guides*. That is not within our authority. See KRS 342.285. When, as here, medical tesstimony is presented by way of medical report and two physicians offer conflicting opinions both as to the amount of impairment and the manner in which the impairment is to be arrived at, then clearly it is within the authority of the ALJ to review the *Guides*, not for the purpose of offering an independent evaluation of a level of impairment but in an effort to ascertain which of two impairment ratings he believes to be more appropriate. Although Gosnell believes otherwise, it is nothing other than an exercise on the part of the ALJ in attempting to ascertain credibility. Without more information than that which exists in the reports themselves, the ALJ is obligated to conclude that both physicians believed their impairment to be valid, but the ALJ himself was obligated to bound by [sic] pick one. Neither we nor the parties may subsequently offer a different interpretation of the *Guides.*
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> Accordingly, the decision of Hon. Thomas A. Nanney, Administrative Law Judge, is hereby AFFIRMED and this appeal is DISMISSED.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffery A. Roberts
Murray, Kentucky

BRIEF FOR APPELLEE
BANDI'S WELDING AND STEEL
ERECTION:

J. David Boswell
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