RENDERED: January 31, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001795-WC

JAMES D. SCHMITT — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 01-98685

HENDERSON ELECTRIC COMPANY;
RONALD E. JOHNSON, ADMINISTRATIVE
LAW JUDGE; AND THE WORKERS'
COMPENSATION BOARD — APPELLEES

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

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: In February 2001, in the course of his employment with Henderson Electric Company, James Schmitt fell and struck his left knee. He had injured the same knee several other times during the preceding eighteen years, in accidents unrelated to work, but apparently this fall made a bad situation much worse. Schmitt underwent surgery about a month after the accident. This was at least his third knee surgery, but whereas the earlier surgeries had provided a measure of relief from pain and had

enabled Schmitt to return to work, this surgery was not as successful. The knee remained extremely sore and stiff and severely limited Schmitt=s ability to walk, stand, crawl, or bend. The pain also interfered with his ability to concentrate. In September 2001, Schmitt applied for workers= compensation benefits. He claimed to be totally and permanently disabled. By order entered March 27, 2002, an administrative law judge (ALJ) found that Schmitt was indeed unable to perform any kind of work. Nevertheless he awarded benefits for only partial disability (calculated in accordance with KRS 342.730(1)(b)) because a significant portion of Schmitt=s impairment, he believed, was a result not of the February 2001 work incident but of Schmitt=s prior injuries.

Schmitt appealed from that ruling to the Workers= Compensation Board. His argument was essentially two-fold. First, he contended that the ALJ had unlawfully extrapolated from the medical testimony when he apportioned Schmitt=s impairment between current and prior injuries. Second, he maintained that, even if a portion of his disability was deemed unrelated to the work injury, his award should still have been based on total disability (in accordance with KRS 342.730(1)(a)) rather than partial disability. By order entered July 31, 2002, the Board rejected these contentions and affirmed the ALJ=s award. Schmitt thereupon appealed to this Court, where he raises the same two issues he brought before the Board. We too affirm.

Under the version of the Workers= Compensation Act[1] applicable to Schmitt=s injury, to be eligible for either partial or total disability benefits, a worker must show that he or she has suffered a work-related injury or disease that has given rise to a whole-body impairment as determined by the American Medical Association=s AGuides to the Evaluation of Permanent Impairment.@ The worker must then further show that the impairment has resulted in either a partial or a total inability to work.[2]

In this case, Dr. David Thurman examined Schmitt in October 2001 and testified on his behalf to the effect that Schmitt=s knee showed significant signs of degenerative disease and post-operative degenerative changes. He assigned an eight percent impairment under the AGuides.@ Based apparently on Schmitt=s having told him that he had had little trouble with the knee since his last surgery in 1990, Dr. Thurman opined that all of Schmitt=s current impairment could be attributed to the February 2001 injury.

Against this evidence, the employer presented the testimony of Dr. Thomas Reichard, the physician who had performed at least one of Schmitt=s prior surgeries, the one in 1990, and who had overseen his treatment until about 1994 and then had seen Schmitt again beginning in 1999. He testified that Schmitt's knee was seriously damaged at least as early as the 1990 surgery

[1]KRS Chapter 342.

[2]McNutt Construction v. Scott, Ky., 40 S.W.3d 854 (2001).

and that the re-examination in 1999 had shown that the earlier repairs had degenerated. At that time, he had recommended that Schmitt wear a brace and had given him a series of Hyalgan injections. Although he had not examined Schmitt after the latest incident, it was his opinion that Schmitt had had an eight percent impairment a year before the work-related injury occurred. On the basis of this testimony, the employer argued that none of Schmitt=s impairment should be attributed to the recent injury.

Although the parties thus tried to confront the ALJ with an all-or-nothing choice, the ALJ instead rejected both extremes and ruled that Schmitt=s eight-percent impairment would be attributed half to his prior injuries and half to the recent one. He justified this result by noting that Dr. Thurman had apparently not had the benefit of an accurate history of Schmitt=s problems and that Dr. Reichard had not had the benefit of a post-injury examination. On the one hand, Dr. Reichard=s testimony strongly suggested that Schmitt had incurred some degree of pre-injury impairment. Dr. Thurman=s testimony, on the other hand, was good evidence that with his recent injury Schmitt=s impairment had become worse. Splitting the difference, the ALJ believed, was fair to all concerned. The Board agreed and so do we.

Schmitt notes, rightly, that ALJs are generally not authorized to arrive at their own impairment assessments, but must make their findings in accordance with medical testimony.

Because there was no expert testimony attributing a four-percent impairment to his February 2001 injury, Schmitt insists that the ALJ exceeded his authority by making a four-percent finding. Schmitt reads this rule too narrowly, however. Although ALJs are not authorized to make impairment findings in excess of or at odds with the expert assessments, they are authorized, indeed they will often be obliged, to choose from among such testimony and to make reasonable inferences from it.[3] We agree with the Board that the ALJ did not abuse this discretion. He found, in accordance with the only expert testimony provided, that Schmitt=s impairment rating was eight percent. His further finding that some of that impairment was attributable to Schmitt=s prior injuries and some to his February 2001 injury was a reasonable inference from the competing medical opinions, both of which were based on less than all of the pertinent information. It is true that the ALJ=s choice of four-percent as the impairment attributable to the work-place injury, as opposed to five-percent, say, or two-percent, was arbitrary with respect to the medical proof. But it was not unreasonable. On the contrary, we agree with the Board that it was a reasonable and fair response to the limited information the parties submitted.

The ALJ also found, in agreement with Schmitt and Dr. Thurman, that Schmitt was completely and permanently unable to perform any type of work. Schmitt contends that this finding

[3]Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48 (2000); Jackson v. General Refractories Company, Ky., 581 S.W.2d 10 (1979).

amounts to a finding of total and permanent disability and that his award should thus have been half (in line with the fact that half of his impairment was deemed work-related.) of the award for total disability provided for in KRS 342.730(1)(a).

Unfortunately for Schmitt, the cases he cites in support of this contention have been superceded by changes in the Workers= Compensation Act. Under the version of the Act applicable to Schmitt=s injury, Apermanent total disability@ means not just the inability to perform any type of work, but rather the Ainability to perform any type of work as a result of an injury,@[4] where Ainjury@ means a work-related harmful change in the human organism.[5] The ALJ found that some of Schmitt=s inability to work was attributable to his nonwork-related impairment. The ALJ correctly ruled, therefore, that Schmitt was not totally disabled under the Act. Indeed, KRS 342.730(1)(a), which provides for the calculation of total disability awards, excludes nonwork-related impairment from the determination of total disability. Our Supreme Court has stated that this statutory exclusion renders a claim such as Schmitt=s--where the claimant suffers from a prior, active, nonwork-related disability and where the work-related injury is not alone sufficient to cause total disability--a claim for partial disability only.[6] The ALJ did not err, therefore, by

[4]KRS 342.0011(11)(c).

[5]KRS 342.0011(1).

[6]Spurlin v. Adkins, Ky., 940 S.W.2d 900 (1997); Edwards v. Louisville Ladder, Ky. App., 957 S.W.2d 290 (1997).

finding Schmitt only partially disabled, notwithstanding his complete inability to work, and by calculating his benefits accordingly pursuant to KRS 342.730(1)(b) rather than KRS 342.730(1)(a). Schmitt=s contention that this result is unfair would be better addressed to the General Assembly.

In sum, we agree with the Workers= Compensation Board that the ALJ=s apportionment of Schmitt=s impairment was not an abuse of discretion and that, given that apportionment, Schmitt was entitled only to partial disability benefits. Accordingly, we affirm the Board=s July 31, 2002, order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert L. Catlett, Jr.
Sales, Tillman & Wallbaum LPPC
Louisville, Kentucky

BRIEF FOR APPELLEE HENDERSON ELECTRIC COMPANY:

David L. Murphy
Clark & Ward Attorneys
Louisville, Kentucky