

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000949-WC

SHOREWOOD PACKAGING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-00502

FLOYD MITCHELL BROOKS, JR.; HON.
JAMES L. KERR, ADMINISTRATIVE LAW
JUDGE; DR. EUGENE E. JACOB; AND
KENTUCKY WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Shorewood Packaging (Shorewood) petitions for review of an opinion of the Workers' Compensation Board of April 14, 2004. The Board affirmed in part, vacated in part, reversed in part, and remanded a decision of the Administrative Law Judge (ALJ). Shorewood first argues that the ALJ had been correct in finding that Shorewood's employee, Floyd Mitchell Brooks, Jr., retained the ability to work after he had injured his knee at work. It contends that the Board erred in reversing

the ALJ on this issue. Shorewood also believes that the Board erred in holding that the ALJ lacked authority to alter his original opinion as to the degree of Brooks's active impairment upon reconsideration. After a review of the record, we affirm.

Before his knee injury at Shorewood, Brooks had sustained an injury to his right knee which required multiple procedures -- including surgery -- in 2000 and 2001. He was able to return to his physically demanding work as a press operator at Shorewood in October 2001 without any restrictions. He continued working without any problems until February 6, 2002, when he hurt his knee at work. The injury involved a complete tear of his medial collateral ligament (MCL), a tear of his anterior cruciate ligament (ACL), and the detachment of his medial meniscus. Dr. Eugene Jacob, the orthopedic surgeon who had treated all of Brooks's previous knee problems, performed extensive reconstructive surgery in May 2002.

Brooks reached maximum medical improvement in November 2002. When Dr. Jacob placed many restrictions on his activities, Shorewood informed Brooks that it had no suitable work for him and terminated his employment in January 2003. In order to support his family, Brooks began running his own business, Digital Home Concepts, an enterprise that involved designing and selling home theater and audio systems primarily

in new homes. Upon making a sale, he associated with other contractors to install the entertainment systems.

Brooks filed a claim for workers' compensation benefits in March 2003. He complained about continuing disabling pain in his knee that prevented him from standing for very long. He also stated that he could not run, kneel, crawl, or squat -- all activities required by his work at Shorewood.

Before Brooks had filed his claim, Shorewood proceeded to hire two private investigators to watch him and to document his day-to-day activities. Shorewood introduced the report generated by its surveillance team (including two videotapes) to counter Brooks's claim for enhanced income benefits for workers who are disabled from performing their former job duties as provided in KRS¹ 342.730(1)(c)(1).

Two issues were presented to the ALJ: (1) Brooks's eligibility for enhancement of the triple permanent partial disability benefits and (2) conflicting evidence as to the degree and severity of his pre-existing active impairment. Dr. Jacob related that Brooks had a 9% impairment -- 50% of which was pre-existing. To this 4½% impairment rating, Dr. Jacob added 4% because of his pain, arriving at a total compensable impairment of 8½%. Shorewood's expert, Dr. Andrew L. DeGruccio, reported that Brooks had sustained a 20% impairment

¹ Kentucky Revised Statutes.

due to his right knee injuries. However, Dr. Gruccio attributed 75% of the impairment to Brooks's prior active condition with the result that 5% was assessed as to the work-related injury.

At the final hearing, Brooks responded to the testimony of the investigators with their videotaped evidence. He testified that he had not performed any heavy work at the various construction sites where they had filmed him carrying a small step ladder. He described his work as involving "going out and looking at jobs," "putting proposals together," "occasionally helping" those with whom contracted, and making sure that the installation of the home entertainment systems was done correctly. When asked about the physical constraints of this work, Brooks responded:

Occasionally, to do a proper evaluation of the job, sometimes I have to take, you know, a small ladder in and I'll have to climb and I'll have to look, just to get a visual of where wires need to be pulled and where, you know, if there's - what the special tools are that the guys are going to need, just to make a very accurate proposal. Occasionally, if I'm - if I happen to be there while they are doing the actual installation in the pre-wiring, occasionally they may ask me to lend them a hand or something, and I'll - I'll help them as much as I physically am able.

After reviewing the evidence, the ALJ was more persuaded by Dr. Jacob, the treating surgeon. He accepted Dr. Jacob's opinions with respect to degree of impairment

attributable to Brooks's right knee injuries as well as the 50/50 apportionment between the prior active and the work-related injuries. However, in rejecting Brooks's claim for application of the triple multiplier in KRS 342.730(1)(c), the ALJ based his decision on the surveillance videotapes:

Addressing whether [Brooks] attains the physical capacity to return to the type of work-related [sic] performed at the time of the injury, the Administrative Law Judge has reviewed the surveillance video tapes filed by [Shorewood] and concludes that [Brooks] retains the physical capacity to return to the type of work performed at the time of the injury, which [Brooks] described as including standing, bending, kneeling, lifting, carrying, climbing steps and working in awkward positions.

ALJ's Opinion and Award, October 21, 2003, pp. 7-8.

Accordingly, Brooks received an award of \$30.96 per week for a period not to exceed 425 weeks based on the unadorned 8½% impairment rating.

Both Brooks and Shorewood filed motions for reconsideration. Brooks argued that there was no evidence to support the ALJ's determination that he was not entitled to the enhanced income benefits. His motion was denied.

In its motion, Shorewood argued that the ALJ erred in relying on the impairment rating of Dr. Jacob because he had used the 4th edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" (Guides)

rather than the more current 5th edition. The ALJ agreed that Dr. Jacob had used an incorrect edition of the Guides and granted Shorewood's motion. He then amended his decision and awarded benefits corresponding with Dr. DeGruccio's 5% permanent partial impairment rating.

In its review, the Board concluded that the ALJ improperly relied upon this evidence in denying enhanced income benefits as it was not sufficient to support his finding that Brooks retained the physical capacity to perform his pre-injury work.

As urged by Brooks, we have reviewed the videotapes. We agree with Brooks [that] the videotapes show him carrying a stepladder and other light-weight objects to and from his pick-up truck. We further agree with him that the tapes do not show him working at a construction site. The tapes do show him walking deliberately with an altered gait and having trouble ascending steps at a physiotherapy establishment. Dr. Jacob restricted Brooks to sedentary work. While some of the videotaped activities of Brooks might be viewed as more than sedentary, they all appear to be well within the limitations described in the functional capacity evaluation report. Brooks described the heavy labor necessary to perform his job duties with Shorewood. At most, the tapes show Brooks bending at waist level on two occasions, but not lifting anything of significant weight. The loading of his truck at the loading dock was done at waist level. While Brooks is shown carrying a light aluminum stepladder on three occasions, he is not seen climbing it, which he admits doing. He was not seen stooping,

crawling, kneeling, lifting heavy weights, or working in an awkward position.

. . . The critical inquiry is whether the claimant is physically capable of performing the same job he was performing at the time of injury, and this analysis must take into account the component part[s] of the claimant's job requirements. A proper analysis requires a comparison of the physical requirements of the pre-injury employment and post-injury capabilities based on a totality of the lay and medical evidence of record. Carte v. Loretto Motherhouse Infirmary, Ky.App., 19 S.W.3d 122 (2000). Here, the ALJ seemingly focused on the videotape evidence as being determinative. While the tapes may have some evidentiary value, it is our opinion that standing alone they do not constitute substantial evidence to support the finding that Brooks is physically capable of performing his pre-injury employment on a regular and sustained basis. On this issue, the ALJ's finding is insufficient and the matter must be remanded for additional findings to support the ultimate conclusions.

Opinion of the Board, April 14, 2004, pp. 11-13.

The Board rejected Brooks's argument that the ALJ erred when he amended his previous decision, abandoning the opinion of Dr. Jacob and relying instead on the overall impairment rating assessed by Dr. DeGruccio. However, it agreed with Brooks that apportionment was a separate matter and that the ALJ was not permitted to reconsider his opinion as to the apportionment of pre-existing active impairment.

Dr. Jacob opined 50% of Brooks'[s] impairment was preexisting and Dr. DeGruccio

determined 75% of Brooks'[s] impairment was preexisting. The ALJ, in his original opinion, relied on Dr. Jacob's opinion of preexisting active impairment. Even though Dr. Jacob's impairment rating was properly rejected as not being based on the current edition of the Guides, his opinion addressing the percentage of impairment attributable to the work injury was not so fatally flawed. Dr. Jacob's opinion on this issue represents a distinct medical opinion separable from the impairment rating. That portion of Dr. Jacob's opinion constitutes substantial evidence. In Wells v. Beth-Elkhorn Coal Corp., Ky.[App.], 708 S.W.3d 104 (1985), the Kentucky Court [of] Appeals instructs that an ALJ, on petition for reconsideration, may not reconsider the case on the merits or change his factual findings. The ALJ's choice to adopt Dr. DeGruccio's opinion on this issue represents a departure from the rule and must be reversed.

Id., pp. 14-15.

In this appeal, Shorewood argues that the Board exceeded the proper scope of its review in remanding the matter to the ALJ for more findings on the issue of Brooks's physical capacity. Shorewood claims that the Board improperly substituted its own assessment of the evidence for that of the ALJ. It also argues that the Board erred when it held that the ALJ lacked the authority to change his finding on the issue of the degree of Brooks's pre-existing active impairment. Shorewood believes that the Board's opinion "results in a distorted impairment rating." (Appellant's brief, p. 15.)

The scope of our review of the issues raised by Shorewood is limited. We may correct the Board only where we perceive that it has "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

We have reviewed the record, and we wholly agree with the Board's determination that the videotapes fail to establish that Brooks was capable of performing his pre-injury work. Contrary to Shorewood's argument, the videotapes do not "show Brooks working on construction sites for extended periods of time." (Appellant's brief, p. 10). We agree with the Board that the ALJ had no reasonable basis for concluding that Brooks retained the same range of ability to move and work that he had enjoyed prior to his injury.

Shorewood emphasizes that the evidence on this point was conflicting, urging that the ALJ was not required to recite all of the evidence on which he relied when he rejected Brooks's claim of inability to engage in the type of physical activities required of him as a press operator. Other than the videotapes, Shorewood does not point to any evidence to support this argument. And we have not discovered any evidence to support the conclusion of the ALJ that Brooks retained previous physical

capability. Thus, we hold that the Board did not err (much less did it do so flagrantly) in assessing the evidence.

We turn next to Shorewood's argument that Dr. Jacob's apportionment of Brooks's impairment (50% to the February 2003 work injury and 50% to his preexisting impairment) was unreliable. Shorewood has not cited any convincing authority on this point. As noted by the Board, a determination of proper apportionment requires a medical opinion separate and distinct from the issue of the degree of impairment, which is to be determined solely by reference to the Guides. Since Dr. Jacob had treated all of Brooks's knee injuries, he was certainly well qualified to address the issue of apportionment.

Dr. DeGruccio, Shorewood's expert, stated that the issue of apportionment was a difficult one and that Brooks presented a "quite complicated orthopedic case." In attributing 75% of Brooks's impairment to his pre-existing impairment, Dr. DeGruccio reported that Brooks's prior injuries were so serious and debilitating that they warranted the assessment of a higher percentage of active impairment than the 50% that had been assigned by Dr. Jacob.

The apportionment dispute (75/25 or 50/50) as to impairment attributable to the pre-existing injury *versus* the work injury was not related to the Guides -- nor was it subject to resolution by resort to the Guides. Upon reconsideration,

the ALJ had rejected Dr. Jacob's overall impairment rating in favor of Dr. Gruccio's figure because that number had to be based on the most current edition of the Guides. However, although the impairment rating of Dr. Jacob had been flawed because he used the wrong edition of the Guides, there was no such taint or problem as to his apportionment number. Therefore, the ALJ's original finding with respect to apportionment was not susceptible of amendment on reconsideration. Wells, supra, specifically directs that an ALJ cannot alter his factual findings on reconsideration. Under these circumstances, we hold that the Board did not err in its application of controlling precedent.

In summary, we hold that the Board did not err: (1) in reversing the ALJ's finding that Brooks retained the ability to do the work that he had done prior to his injury; (2) in affirming the ALJ'S overall impairment rating as assessed by Dr. DeGruccio under the most current edition of the Guides; and (3) in holding that the ALJ erred when he amended his original finding on the issue of apportionment of the impairment between a prior injury and the work-related injury.

We affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

D. Gaines Penn
Bowling Green, Kentucky

BRIEF FOR APPELLEE FLOYD
BROOKS:

Paul K. Murphy
Louisville, Kentucky