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# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-000069-WC

UNITED PARCEL SERVICE, INC. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 02-95122

RALPH BLANKENBAKER; SHEILA LOWTHER, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; GRAVES, SENIOR JUDGE.[1]

GRAVES, JUDGE: United Parcel Service, Inc., petitions for review from an opinion of the Workers' Compensation Board which remanded the decision of the Administrative Law Judge (ALJ) for additional findings upon the issue of whether the present injury brought a dormant preexisting condition into disabling reality. We affirm.

[1] Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

## FACTUAL AND PROCEDURAL BACKGROUND

In 1991 Ralph Blankenbaker injured his left knee while in the employ of United Parcel. He had surgery performed on the left knee in February 1992. As a result of the injury Blankenbaker was off work for one year and received temporary total disability benefits during this period of time. He returned to work without restrictions. The primary issue at hand is whether the 1991 injury resulted in a dormant condition brought into a disabling reality by the present injury and whether the ALJ adequately addressed the issue in his opinion and award.

On February 13, 2002, Blankenbaker, while on duty in his job as an air marshal for United Parcel, suffered a second work-related injury to his left knee. The injury, which is the subject matter of this litigation, occurred when Blankenbaker slipped on glycol (a spray used to de-ice planes) while trying to get stairs up to a plane. On January 27, 2003, Blankenbaker underwent a second operation on his left knee

As a result of his February 2002 injury, Blankenbaker filed a claim for workers' compensation benefits. Following an evidentiary hearing, on May 26, 2006, the ALJ issued an opinion and award wherein he recommended that Blankenbaker be awarded permanent partial disability benefits. Though Blankenbaker had been assessed a whole-body impairment rating of 14%, the ALJ carved-out 8% of that as being related to a prior existing condition, thus basing his benefits on a 6% whole-body impairment.

Blankenbaker filed a petition for reconsideration wherein he argued that his benefits should have been based upon a 14% impairment rating because the evidence

established that he had a preexisting dormant asymptomatic condition which was brought into a disabling reality by the February 2002 injury. The ALJ denied the petition for reconsideration and Blankenbaker appealed to the Board.

On December 15, 2006, the Board issued an opinion remanding the case to the ALJ upon the issue of whether Blankenbaker had a preexisting dormant condition which was brought to a disabling reality by the present injury. The Board concluded that the ALJ had not adequately addressed the issue in his opinion and award This petition for review followed.

STANDARD OF REVIEW

We begin by noting our standard of review. First, we give broad deference to the ALJ's factual findings. "The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v.. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). The ALJ, as fact-finder, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Magic Coal v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). And, as always, our

review of questions of law is de novo. *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky.1998).

Our function in reviewing the Board's decision "is to correct the Board only where the [ ] Court perceives the Board 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*, 827 S.W.2d 685, 687-88 (Ky. 1992).

DISCUSSION

Before us, United Parcel contends that the Board erred by remanding the case to the ALJ upon the issue of whether Blankenbaker had a pre-existing dormant condition which was brought to a disabling reality by the present injury.

In his opinion and award, relying upon the medical opinions of Dr. William Renda the ALJ determined that Blankenbaker had a 14% whole-body impairment. The ALJ further relied upon the medical opinions of Dr. Renda and Dr. Thomas Loeb in assessing the impairment as 40% related to the present injury, and 60% as related to a pre-existing condition. Accordingly, of the 14%, the ALJ carved-out 8% as related to Blankenbaker's pre-existing discrepancy.[2] As relevant to this appeal, the ALJ made the following findings:

> 7. The ALJ also recognizes the testimony of Dr. William Renda taken by the Plaintiff. Dr. Renda opined that upon the surgery he found a fair amount of arthritis in the patellafemoral joint which is under the kneecap between the

[2] We note that 60% of 14% is 8.4%. It is unclear why the ALJ rounded-off to 8%; however, the parties have not raised the discrepancy as an issue and we do not further consider the matter.

kneecap and the thighbone in the front of the knee and also a torn cartilage on the medial meniscus which is on the inside of the knee and corresponding arthritis at the same area of the knee joint medially. **He indicated that the arthritis found in the knee predated the subject injury of February 13, 2002. He further noted that based on the type of history he would characterize this pre-existing arthritis to be a dormant asymptomatic condition. Moreover, he further confirmed that it was more likely than not that the work related injury that described to him occurring February, 2003** [sic] **was the precipitating event requiring medical attention that followed. He further stressed that absent an injury history to the contrary, he believed that the work injury of February 13, 2002 was the precipitating event which brought the pre-existing asymptomatic arthritic condition into disabling reality.** . . . He further indicated that this 8-10% impairment rating [for the patellafemoral joint] was due to patellafemoral joint arthritis which was obviously pre-existing and whether or not it was aroused or not by the injury one could debate but he thought that at least a portion of that is due to injury that he had.

8. The Administrative Law Judge recognizes the medical report of Dr. Thomas Loeb introduced by the Defendant/Employer dated February 11, 2006. Dr. Loeb diagnosed a twisting injury to the Plaintiff's left knee on February 13, 2002 which resulted in an exacerbation of pain and swelling. Dr. Loeb noted that the Plaintiff did respond to conservative treatment for a least nine months after his injury until he had a flare-up of his underlying pre-existing arthritis. **In Dr. Loeb's opinion, this gives more credence to the fact that the flare-up of severe pain in November, 2002 is more likely due to the pre-existing condition than due to the injury itself** as he recovered quite well from the injury and did not have a sustained period of discomfort from the time of his injury to the time of surgery. Diagnosis at the time of the surgery was marked arthritis as well as medial femoral condyle degenerative changes and a tear of the posterior horn of the medial meniscus. **He further opined that within a reasonable medical probability the Plaintiff's condition was caused secondary to the original surgery in 1991** and then the natural aging process from that point forward. He

did opine that the work injury did cause some aggravation of the underlying condition but in his opinion based on the clinical history he would apportion in agreement with Dr. Renda at 40% to the injury and 60% to the pre-existing condition. . . . **He further opined that Plaintiff did have a dormant condition without any active symptoms prior to the injury.**

9. The Administrative Law Judge finally recognizes the deposition of Dr. Richard Sheridan taken by the Defendant/Employer. Dr. Sheridan diagnosed left knee media meniscus tear and aggravation of pre-existing patellafemoral arthritis. **He further noted that based on the 1991 surgery the Plaintiff had a 2% whole body impairment due to a finding of chondormalacia.** He though the Plaintiff merited a 3% whole body impairment, 1% for the meniscal tear and 2% for the aggravation of the chondromalacia. Dr. Sheridan went on to say as it applies to the 8% impairment Dr. Renda assessed for a zero cartilage interval in the patellafemoral joint and noted that if the Plaintiff had an injury in 1991 that involved the patellafemoral joint and had it cleaned up, that Dr. Sheridan would expect there would be some narrowing in the patellafemoral joint prior to the February 13, 2002 injury. **Dr. Sheridan then noted that if the Plaintiff had debridement of the patellafemoral joint in 1991 then Dr. Sheridan indicated there was no way that the entire narrowing of the joint could have been caused by the 2002 injury alone and that it had to have had some contribution from the 1991 injury**. **Dr. Sheridan indicated that it would be double dipping to assess an 8% rating for a zero interval change and then put on top of that another 2% for arthritis.** On cross-examination Dr. Sheridan indicated that the Plaintiff informed him that after the first surgery he recovered in terms of building up his thigh muscle to the extent he was able to run and do just about everything. He further noted that the work injury of 2002 was the precipitating event that brought about the pre-existing asymptomatic condition into disabling reality. **On redirect examination Dr. Sheridan opined that prior to the February 13, 2002 incident that it is his testimony that the Plaintiff would have been assessed a 2% impairment. He**

> **now opines that the injury that is the subject matter of this litigation would have generated a 3% impairment. He now thinks the Plaintiff has a 5% impairment rating due to both injuries.** (Emphasis added).

*McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854 (Ky. 2001) held that "[w]here 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." *Id.* at 859. Though the testimony of Drs. Renda and Sheridan raised the issue that the 2002 injury bought a prior dormant condition into a disabling reality, the ALJ failed to address this aspect of the case in his assessment of impairment (contained in paragraph 10 of his opinion and award). The Board remanded the cause to the ALJ for this aspect of the case to be reconsidered, reasoning as follows:

> Since the 1996 amendments to the Workers' Compensation Act, what was once Special Fund liability has been shifted to the employer, *See McNutt Construction/First General Services v. Scott*, [40 S.W.3d 854 (Ky. 2001)]; *Commonwealth Transportation Cabinet v. Guffey*, [42 S.W.3d 618 (Ky. 2001)]. In *McNutt*, the court found that where work-related trauma caused a dormant degenerative condition to be disabling and result in functional impairment, the trauma is the proximate cause of a harmful change and, hence, the harmful change comes within the definition of injury. KRS 342.0011(1). As the court stated in *McNutt*, "[w]e 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 in a worker's body which is caused by work is an 'injury' for the purposes of Chapter 342." *Id.* at 859. In other words, when a work-related injury makes an underlying

dormant condition symptomatic, the totality of the impact of the injury is compensable.

Here, both Dr. Renda and Dr. Loeb clearly stated Blankenbaker's impairment was caused by the work injury, either directly or as aroused into disability reality. Under the court's holding in *McNutt*, the medical testimony of Dr. Renda and Dr. Loeb compels a finding of compensabilty.

Dr. Sheridan, however, assessed a portion of Blankenbaker's impairment to the prior 1991 injury. Dr. Sheridan made it clear that Blankenbaker's previous operative knee condition was a preexisting condition that warranted an impairment rating. Thus, the medical evidence supporting the finding of compensability of the entire impairment is not uncontradicted.

The Kentucky Supreme Court, in *Roberts Brothers Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky. 2003), addressed the issue of active disability pursuant to the 1996 Workers' Compensation Act. The court explained that impairment and disability are not synonymous. Since the amendment to the Act in 1996, in cases of permanent partial occupational disability, awards are based solely on a worker's impairment. For that reason, when there is an issue of a preexisting condition in permanent partial disability awards, the ALJ is to determine the worker's preexisting impairment. What is more, authority clearly holds the proper interpretation of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("Guides") and the proper assessment of an impairment rating are medical questions reserved for the medical testifiers. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206 (Ky. 2003).

Here, the ALJ relied on Dr. Renda's 40/60 apportionment to exclude 8% of a `4% impairment rating as non-compensable. However, Dr. Renda's and Dr. Loeb's opinions do not provide an evidentiary basis for a carve out for preexisting impairment if the ALJ accepts that portion of their testimony addressing arousal of a dormant condition. Dr. Sheridan, on the other hand, assessed an impairment rating specifically targeted at Blankenbaker's preexisting knee impairment as a

> result of a prior injury and surgery. Inasmuch as the ALJ failed to address the issue of arousal of a preexisting dormant condition into disability reality by the work injury, this matter must be remanded. On remand, the ALJ is directed to consider the totality of the medical evidence and determine what, if any, portion of the 14% impairment rating assessed by Dr. Renda and Dr. Loeb is properly characterized as preexisting impairment and excludable.

United Parcel argues that there is substantial evidence in the record to support the ALJ's determination of a carve-out and, hence, remand to the ALJ is inappropriate. However, the fact remains that the ALJ did not directly address the issue of whether a prior condition was brought to a disabling reality by the February 2002 injury, and rather than speculate regarding the unstated, remand for specific findings on the issue is the better course.

As previously noted, our function in reviewing the Board's decision "is to correct the Board only where the [ ] Court perceives the Board 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*, 827 S.W.2d 685, 687-88 (Ky.1992). We agree with the Board that the ALJ failed to address the issues surrounding the medical opinions that Blankenbaker's 2002 injury bought into a disabling reality a prior dormant condition. We accordingly will not disturb its determination that the cause should be remanded for additional consideration of the issue.

## CONCLUSION

For the foregoing reasons the judgment of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Christopher G. Newell
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BRIEF FOR APPELLEE:

Ched Jennings
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