

RENDERED: JULY 3, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001190-WC

RUSSELL COUNTY HOSPITAL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-66296

ANITA C. PRICE; HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: KELLER AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Russell County Hospital appeals from the opinion of

the Workers' Compensation Board affirming the decision of Administrative Law

Judge John B. Coleman awarding permanent partial disability benefits to Anita

Price, who was employed at the Hospital as a Licensed Practical Nurse. Here, as at

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the Board, the Hospital argues that the ALJ erred in finding that Price gave timely notice and that she sustained a work-related injury, and in basing his decision on the opinions of Drs. Jules Barefoot and Phillip A. Tibbs. Finding no error, we affirm. Price suffered a series of strains and injuries to her lower back while working as a nurse in various facilities prior to becoming employed with Russell County Hospital. During this time she was treated by Dr. Mack Jackson and Dr. John Horn. After her prior injuries Price received physical therapy, then returned to work with no restrictions. There is no proof in the record to indicate that Price was under any work restrictions or suffering from back pain when she first began work at Russell County Hospital. No apportionment issue is raised in this appeal.

The evidence concerning Price's injury at Russell County Hospital is conflicting. In a deposition in April, 2006, Price testified that she suffered a severe onset of low back pain on May 25, 2005, while pulling a patient up in bed. She testified that this injury occurred at the end of her shift and she did not tell anyone because she thought her condition would improve if she could go home and lie down. Her testimony was that by the time she got home she needed help getting out of the car, and her condition continued to worsen. She stated that she was unable to get out of bed to go to the doctor's office until June 1, 2005, when she saw Dr. Horn. According to Price she informed her supervisor Lori Antle, who was new at her position, that she had been injured at work and that it would be

necessary for Antle to file an accident report. Later, when Price learned that no report had been filed she contacted Zurich Insurance Company, which had paid benefits for a previous back injury she had suffered while working at Lake Cumberland Medical Center in October 2002, and advised Zurich that her claim was still open. Zurich was at first unaware that Price had changed employers and suffered a new injury. Zurich paid some TTD benefits before discovering the mistake. Price was then notified that Zurich was not the proper carrier. According to Price during this time she was confused about whether she needed to file a new claim with Russell County Hospital because she believed that the claim with Zurich was still open. She said she did not tell Antle specifically what she was doing when she was injured because Antle did not ask her.

Antle, on the other hand, testified that while Price notified her that she would be unable to work for a few days after May 25, 2005, due to back pain, Price told her that she did not know how she had injured her back. According to Antle she specifically asked Price if she injured her back at work and Price said she did not know. Antle said she told Price that if she had been injured at work she should come in and fill out a workers' compensation form. Even when Price told Antle on June 9, 2005, that she had been diagnosed with several ruptured disks and might be off work indefinitely, she still didn't tell Antle that she had suffered a work-related injury. Price was still in a probationary period with Russell County Hospital, and her employment with the Hospital was terminated on June 13, 2005. A workers' compensation follow-up form filed by the Hospital as an exhibit to

Antle's deposition indicates that Price called on September 13, 2005, and stated she was injured while working at the Hospital on May 25, 2005. Price signed the first report of injury form on September 23, 2005.

Price's medical records disclose a history of lower back problems and associated pain dating back to at least 2000. She had been diagnosed with degenerative disk disease and had undergone recurrent treatment for back pain prior to her employment at Russell County Hospital. She saw her treating physician, Dr. John Horn, on June 1, 2005, as a result of an acute lumbar strain.

Medical proof was obtained from Dr. Horn, Dr. Phillip Tibbs, Dr. Jules Barefoot and Dr. Timothy Kriss. Dr. Horn referred Price to Dr. Tibbs, a neurologist, for evaluation for treatment. Drs. Barefoot and Kriss conducted independent medical evaluations.

Dr. Horn's notes after seeing Price on June 1, 2005 stated that "[s]he was at work on the 25th & she doesn't really know exactly what she did. The following morning she could not get up out of bed." Dr. Horn later clarified this note in a letter to an insurance carrier, stating that she definitely had given him a history of having injured her back on May 25, 2005, while lifting a patient at work. Dr. Horn prescribed pain medication and a muscle relaxant and scheduled an MRI. When Price returned on June 8, Dr. Horn noted the findings of the MRI showing disk herniations at L3-L4 and L4-L5 with no apparent encroachment on the neural foramina, and a right lateral disk herniation at L5-S1 with extension into the right neural foramina. He referred her to Dr. Tibbs.

Dr. Tibbs evaluated Price on January 4, 2006. He reviewed her most recent MRI scans. He noted her degenerative disk disease and noted a small paramedian disk herniation at L5-S1. He expressed doubts that she would benefit from surgery. Price also gave Dr. Tibbs a history of her pain having developed after moving a patient at work on May 25, 2005. Because she was working without restrictions prior to that date Dr. Tibbs felt it was probable that she had recovered from her earlier injury prior to the May 25 incident.

Dr. Barefoot performed his independent medical evaluation on May 19, 2006. He noted changes in MRI scans of Price's lumbar spine from 2003 and 2005, and noted 2 cm of muscle atrophy in Price's left calf. Although the 2003 scan showed evidence of disk disease, it was Dr. Barefoot's opinion that the condition was dormant, non-disabling and inactive at the time of Price's May, 2005 injury. He evaluated Price's condition to be within Diagnosis Related Estimate (DRE) lumbar Category III using the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition. He assigned her a 12% whole person impairment. He apportioned 100% of her current impairment to the May 25, 2005 work injury.

Dr. Kriss conducted his independent medical evaluation on June 6, 2006. He performed a physical exam and reviewed Price's medical records. He found no evidence of radiculopathy, neurologic deficit or work-related harmful change, and would assign a 0% whole person impairment. He noted that although Price's records indicated instances of treatment for low back pain, her prior

episodes had always resolved completely, and she was asymptomatic immediately prior to May 25, 2005. He felt that it was more likely that Price suffered no work injury on May 25, 2005, and that any impairment she reported would instead be naturally occurring and consistent with her long history of low back pain. He recommended that the atrophy found by Dr. Barefoot should be evaluated further to determine whether or not it resulted from radiculopathy. If that proved to be the case Dr. Kriss agreed that Dr. Barefoot's rating of DRE Category III would be appropriate and the 12% impairment rating would be accurate.

As Price was successful before the ALJ and the Board, the question before us is whether the decision of the Board is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). "The function of further review of the [Workers' Compensation Board] in the Court of Appeals 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, 687-688 (Ky. 1992).

The ALJ has 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, citing *Paramount Foods, Inc., v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985), and also to judge the weight, credibility and inferences to be taken therefrom. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). The ALJ may reject any testimony, and may believe or disbelieve various parts of

the evidence. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000), citing *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). The same is true of medical evidence, including conflicting testimony by physicians. *Pruitt v. Bugg Bros.*, 547 S.W.2d 123, 125 (Ky. 1977).

The Hospital's first argument is that the ALJ erred in finding that Price gave sufficient notice under the provisions of KRS 342.185(1). Pursuant to the statute notice must be given "as soon as practicable." The ALJ correctly noted that the determination of whether or not sufficient notice has been given depends upon the facts and circumstances of each case. *Marc Blackburn Brick Co. v. Yates*, 424 S.W.2d 814, 816 (Ky. 1968). We find substantial evidence in the record to support the ALJ's finding that notice was given in this case on or before June 13, 2005, approximately three weeks after the accident, and that in the circumstances of this case the notice given was sufficient. We find no error in the ALJ's findings in this regard or in the inferences taken from those findings. *See Miller v. East Kentucky Beverage/Pepsico, Inc.*

Similarly, substantial evidence supports the ALJ's findings with regard to whether or not Price sustained an "injury" as defined in the Workers' Compensation Act. Again we note that such determinations are the particular province of the ALJ, and we may not meddle in them so long as there is substantial evidence in the record to support them, as we find there is here. *See Miller; see also Western Baptist Hospital v. Kelly*. The fact that there may have been a

divergence of opinion in the medical evidence is not sufficient to overturn the result. *See Pruitt v. Bugg Bros.*

Finally, the Hospital urges us to reverse the Board because the ALJ relied upon the findings of Drs. Barefoot and Tibbs while rejecting other medical evidence of record. The Hospital argues that the history Price gave those physicians was inaccurate. Again we must note that sifting conflicting evidence and judging the credibility of witnesses is the particular province of the ALJ. *See Miller; see also Pruitt.* The ALJ specifically related in his written decision that “a review of the entire evidence in the file indicates that the plaintiff is more credible than the defendant-employer desires the Administrative Law Judge to believe.” Likewise, our review of this record convinces us that the ALJ took the review of this case seriously and that the decision is supported by substantial evidence. *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004), in which a claimant gave a deposition flatly contradicting a previous statement to a physician, is factually different from this case, and therefore is not persuasive authority. This case contains no errors of the magnitude we are required to address under the holding of *Western Baptist Hospital v. Kelly*.

The opinion of the Workers’ Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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