

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-001474-WC

FLUOR FACILITY & PLANT SERVICES.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-11-69615

TERRY WILSON,  
HON. CHRIS DAVIS, ALJ, AND  
KENTUCKY WORKERS  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, J. LAMBERT, AND MAZE, JUDGES.

COMBS, JUDGE: Fluor Facility & Plant Services, Inc., headquartered in California, petitions for review of an opinion of the Workers' Compensation Board that affirmed the decision of the Administrative Law Judge. The ALJ awarded

Terry Wilson temporary total disability benefits, permanent partial disability benefits, and medical benefits for a work-related injury. After our review, we affirm.

Wilson began working for Fluor in 2008. In November 2011, while he was performing shutdown maintenance at Logan Aluminum in Russellville, Kentucky, Wilson sustained a work-related injury as a result of a fall from a ladder some fourteen feet onto a concrete floor. Based upon the results of a CT scan and x-rays, Wilson was diagnosed by Dr. Lynn D. Olson with an L-1 compression fracture with a complete loss of L5-S1 disc space. Dr. Olson treated Wilson with medication and physical therapy. Dr. Olson's office notes reflected Wilson's continuing complaints of numbness and tingling down his left leg. Nonetheless, Dr. Olson did not order an MRI. Instead, he released Wilson to work with instructions to work as he was able. Consequently, Wilson's income benefits were terminated as of January 2012.

In his testimony, Wilson indicated that he could not return to work with Fluor in January 2012 and that he remained mostly incapacitated by pain. When he was finally permitted by the insurance adjuster to see Dr. Olson again in May 2012, Dr. Olson ordered an MRI. The results of the MRI indicated that Wilson was suffering with a lumbar disc herniation at L5-S1 with nerve compression. He recommended surgery and referred Wilson to Dr. Phillip Singer. Dr. Olson's release to work was immediately rescinded.

After his examination, Dr. Singer confirmed that Wilson was suffering excruciating pain as a result of nerve element compression. He recommended that Wilson undergo surgery as soon as possible. Dr. Singer performed a hemilaminectomy and discectomy on September 19, 2012. Because the Workers' Compensation carrier refused payment, Medicaid covered the costs of the surgery. The denial for coverage of his surgery was a continuing pattern of resistance to Wilson's ability to seek treatment for his injury.

According to Dr. Singer, Wilson reached maximum medical improvement in March 2013. Singer assessed a ten-percent (10%) impairment rating relative to Wilson's lumbar compression fracture. He assessed a twenty-five percent (25%) impairment rating relative to Wilson's disc herniation coupled with the radiculopathy that remained unresolved after surgery. According to Dr. Singer, these combined values resulted in a thirty-three percent (33%) whole person impairment. As of the date of his deposition in May 2013, Singer had not released Wilson to return to work.

At Fluro's request, Wilson was seen by Dr. Calvin Dyer in July 2012 and again on June 4, 2013, for independent medical evaluations. Dr. Dyer assessed a ten-percent (10%) impairment rating with respect to Wilson's compression fracture. He assessed an additional ten-percent (10%) impairment rating with respect to Wilson's L5-S1 surgery. These combined values resulted in a nineteen-percent (19%) whole person impairment according to Dr. Dyer. As for the discrepancy in the impairment ratings of Dr. Singer and Dr. Dyer, it was Dr.

Dyer's opinion that Dr. Singer had misinterpreted and misapplied the statutorily-mandated AMA *Guides to the Evaluation of Permanent Impairment* when he (Singer) placed Wilson within the parameters of a "Category V" disability with respect to the L5-S1 injury.

An evidentiary hearing was conducted before the ALJ on November 13, 2013. After analyzing the evidence, the ALJ was persuaded by Dr. Singer's testimony. He concluded that Wilson was entitled to an award of temporary total disability from November 1, 2011, through March 5, 2013, as well as permanent benefits based upon an impairment rating of 33% (thirty-three percent). Due to his residual symptoms, the ALJ concluded that Wilson lacked the capacity to return to the type of work that he had performed on the date of his injury. He was awarded all reasonable and necessary work-related medical expenses for the L1 compression fracture and the L5-S1 herniated disc.

Fluor filed a petition for reconsideration based primarily on the finding of the ALJ that Dr. Singer's opinions were more persuasive. Fluor contended that Dr. Singer had improperly categorized Wilson's impairment according to the AMA *Guides*. It argued that any assessment that disregards the express terms of the AMA *Guides* cannot constitute substantial evidence to support an award of Workers' Compensation benefits. Concluding that the proper interpretation of the AMA *Guides* is within the purview of expert medical witnesses, the ALJ denied the petition.

On appeal to the Workers' Compensation Board, Fluor again contested the award of permanent partial disability based, in part, upon the twenty-five percent (25%) whole body impairment rating assessed by Dr. Singer. It also challenged the award of temporary total disability benefits from January 29, 2012, through May 11, 2012, since Wilson had been released to work during this period. The Board affirmed the ALJ's decision. This petition for review followed.

Fluor contends that the Board erred by concluding that the decision of the ALJ was supported by the evidence. We disagree.

The ALJ has sole discretion to determine the quality, character, and substance of the evidence and may reject any testimony. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky.1985). As the claimant, Wilson had the burden of proving each of the essential elements of his claim. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). Since Wilson was successful in sustaining that burden, the question on appeal was whether there was substantial evidence of record to support the decision of the ALJ. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984).

The Board is charged with deciding whether the ALJ's finding "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." KRS 342.285; *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky.2000). When reviewing a decision of the Board, we reverse only where the Board has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that gross injustice has resulted. *Western Baptist Hosp. v.*

*Kelly*, 827 S.W.2d 685 (Ky.1992). In this case, the Board carefully evaluated the evidence and properly considered the controlling law.

The AMA *Guides* describe lumbosacral spine impairments as “diagnosis-related estimates (DRE’s).” They are classified into categories designated I through VIII. In his deposition, Dr. Dyer testified that the disability associated with Wilson’s L5-S1 condition fell within the parameters of a DRE Category III impairment. Dr. Dyer also testified that Wilson’s impairment could not come under DRE Category V pursuant to the AMA *Guides* since he had not undergone an arthrodesis (surgical fusion).

In his deposition, Dr. Singer indicated that it was his opinion that Wilson fell within the parameters of a DRE Category V impairment. While he conceded that Wilson had not undergone a surgical fusion, Dr. Singer testified that he fit within the category since he suffered both from radiculopathy and loss of motion segment integrity following surgery.

Fluor contends that Dr. Singer’s twenty-five percent (25%) whole body impairment rating under DRE Category V was not admissible since it was not assessed in accordance with the AMA *Guides*. Fluor argues that Table 15-3 of the *Guides* clearly provides that an injured worker cannot be placed into Category V unless there is a sufficient degree of lost motion segment integrity resulting from a fusion or surgical arthrodesis. Fluor characterizes Dr. Singer’s classification as a “purposeful refusal to follow the *Guides*.” Brief at 9.

With respect to DRE Category V, Table 15-3 provides that the criteria of both DRE Category III and DRE Category IV must be present -- as well as “significant lower extremity impairment” as indicated by “atrophy or loss of reflex(es), pain, and/or sensory changes within an anatomic distribution . . . .” In this case, the difference of expert opinion arises from the doctors’ interpretation of the Category IV criteria.

Table 15-3 describes the Category IV criteria as follows:

Loss of motion segment integrity defined from flexion and extension radiographs as at least 4.5 mm of translation of one vertebra on another or angular motion greater than 15 degrees at L12, L2-3, and L3-4 greater than 20 degrees at L4-5, and greater than 25 degrees at L5-S1 (Figure 15-3); may have complete or near complete loss of motion of a motion segment due to developmental fusion or successful or unsuccessful attempt at surgical arthrodesis.

As the Board observed, Dr. Dyer interpreted the portion of Table 15-3 relating to DRE Category IV that begins with “may have” as *requiring* a fusion or surgical arthrodesis for placement in that category. Dr. Singer did not agree. Instead, Dr. Singer interpreted the provision to include classification resulting from loss of motion segment integrity based upon the measurements specified or, *in the alternative*, classification resulting from loss of motion segment integrity based upon a developmental fusion or surgical arthrodesis.

In *Kentucky River Enterprises, Inc., v. Elkins*, 107 S.W.3d 206, 210 (Ky.2003), the Supreme Court of Kentucky explained that “the proper interpretation of the *Guides* and the proper assessment of an impairment rating are

medical questions.” Contrary to the employer’s contention, this is not a case akin to *Jones v. Brasch-Barry General Contractors*, 189 S.W.3d 149 (Ky.App.2006), in which a physician acknowledged that the injured worker fell within the “strict definition” of one category of impairment but placed him in the next higher category, explaining that he was not strictly bound by the provisions of the *Guides*.

In the case before us, Dr. Singer explained on cross-examination that loss of motion segment integrity did not have to be secondary to an arthrodesis according to his interpretation of the *Guides*. He indicated that loss of motion segment integrity might also result from loss of disc space -- as was very clearly evident from his observations and treatment of Wilson. Dr. Singer appears to have given both a grammatically and a medically sound reason for rejecting Dr. Dyer’s contention that Wilson could qualify for nothing higher than a Category III impairment. Fluor did not demonstrate that Dr. Singer erred in his interpretation of the AMA *Guides* either through its cross-examination of him or through its introduction of opposing expert medical testimony. Under these circumstances, the ALJ was at liberty to choose to rely upon the expertise of Dr. Singer.

In the alternative, Fluor argues that Dr. Singer’s rating is “fatally infirm” since no flexion and extension radiographs were taken to indicate that Wilson satisfied the loss of motion segment integrity criteria of Category IV. Not only do we disagree with the substance of this argument, but we also note that this argument was never presented either to the ALJ or to the Board. As a



consequence, it cannot be addressed here. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky.2000).

Finally, Fluor contends that the Board erred by affirming the ALJ's determination that Wilson was entitled to temporary total disability benefits uninterrupted from November 1, 2011, through March 5, 2013. Fluor argues that the medical evidence does not support a finding that Wilson was totally disabled from January 29, 2012, through May 11, 2012. Additionally, it argues that the ALJ was not at liberty to *infer* from the circumstances that Wilson was temporarily and totally disabled. We disagree.

The provisions of Kentucky Revised Statute[s] (KRS) 342.0011(11)(a) provide that a worker is temporarily totally disabled where he has not reached a level of improvement that would permit a return to employment. As the Board observed, a "return to employment" means that the claimant is capable of returning to his "customary" work or work that he was "performing at the time of [the] injury." *Central Kentucky Steel v. Wise*, 19 S.W.3d 657, 659 (Ky.2000).

While Dr. Olson treated Wilson for the compression fracture, he did not order an MRI. Consequently, Wilson's herniated disc and nerve compression remained undiagnosed until May 2012, when Wilson was at long last permitted by the insurance carrier to see Dr. Olson again. Although the compression fracture had healed, the irritation of the spinal nerves apparently increased over time, contributing to Wilson's worsening lower back pain and inability to perform the work that he had been performing at the time of his injury. The medical evidence

indicates that Wilson did not experience improvement of the disc-related injury during the contested period. Consequently, the Board did not err by concluding that the ALJ's award of temporary total disability benefits was adequately supported by the evidence.

We affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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