

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-000402-WC

FIRST CLASS SERVICES, INC..

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-13-93514

KEITH A. JORDAN; HONORABLE  
OTTO D. WOLFF, IV, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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

J. LAMBERT, JUDGE: First Class Services, Inc., (FCS) has petitioned this Court for review of the opinion of the Workers' Compensation Board (the Board) vacating in part the decision of the Administrative Law Judge (ALJ) related to the

lower extremity impairment and the award of permanent partial disability (PPD) benefits, and remanding for additional fact finding. We affirm.

Keith Jordan is a resident of Dexter, Missouri, was born on January 23, 1966, and completed the 6<sup>th</sup> grade. He is left-hand dominant. Jordan began working as a truck driver for FCS in October 2010. In the course and scope of his employment with FCS, Jordan was involved in an accident in Granbury, Texas, on February 9, 2013. His truck was hit head-on by a pickup truck. In describing the accident, Jordan stated:

It happened pretty fast. I was heading northbound on Highway 231. I had just pulled out of the fuel stop, had driven approximately 2 miles, and there was a line of traffic coming at me. There was a car, a pickup, a pickup, and then another semi truck. And then out of the – the third pickup back, all of a sudden he [Mr. Turner, the driver of the pickup] just darted over into my lane.

. . . .

. . . . When he cut into my lane, I went right, took the truck all the way over to the shoulder, was applying brake pressure, and at the last second, the next thing, he cut back to the left into me again. . . . And then it – a loud bang and a whole lot of noise and stuff flying around inside the truck, trees hitting, glass flying everywhere.

. . . . [A]t first I just thought he was attempting to pass. He did not have room to pass. There was no way he had room to pass. Right at point of impact, all I could hear was his motor wide open. And then there was an extremely loud bang, and the truck jerked to the right. I jerked the steering wheel back to the left, and it just spun in my hands. I was turning the steering wheel trying to come back up to the road, but it was just spinning in my hands.

And there was this humongous tree. The truck done a nosedive, sideswiped the tree and then buried into a tree – fence row of trees. And from then, I really – I couldn't see anything. I was pinned in the truck. My leg was pinned back behind the seat. . . . My left leg was pinned back under the – it's hard to describe. It was – I couldn't see my left leg. I could feel a throbbing. I reached down in the debris, because the driver's door was all pushed in. The dash was pushed in. I couldn't get my seatbelt to release, so I reached down with my left arm and felt my leg and kept following it as far as I could until the debris stopped it, because I thought it was gone. Because the only thing I could feel was the throbbing up here in my upper part of my leg.

And then I don't know, not a long – a matter of minutes went by, and I could hear people talking. I heard somebody saying something about two fatalities, and then I went to yelling that I'm alive. I'm trapped. I'm alive. And I couldn't see what was going on because of all the trees. That part of the truck was pushed down. . . . The top of the cab had been caved in, and I was just – I was just pinned in place. I couldn't move. . . . Rescue personnel come in, cut away what was left of the truck to remove me out.

The driver of the pickup died, and Jordan sustained several injuries, including breaking his left leg (femur) and right wrist. He was airlifted to a Texas hospital, and he underwent surgery to repair his leg and wrist. Jordan's past medical history included a non-work-related fall in November 2009, during which he shattered his heels. As a result of the 2013 incident, Jordan applied for social security disability benefits, and his application was granted. He began receiving benefits in November 2013. Jordan also received \$100,000.00 from Mr. Turner's estate in settlement of a civil insurance claim.

Jordan instituted his workers' compensation claim with the filing of a Form 101 Application for Resolution of Injury Claim on February 5, 2014, seeking benefits due to the accident. We shall only focus on the evidence related to the issue raised on appeal.

In support of his claim, Jordan filed the records of Rudy R. Rodriguez, M.D., an orthopedic surgeon in Missouri. Dr. Rodriguez saw Jordan for post-surgery treatment, and he issued two reports following Jordan's November 20, 2013, visit. In the first, dated December 10, 2013, Dr. Rodriguez diagnosed a healed left femur fracture and a left calcaneus fracture with the development of post-traumatic subtalar osteoarthritis; right distal radius fracture, which had healed with right hand weakness; and weakness of his left lower extremity, post-traumatic. Dr. Rodriguez calculated a 48% whole person impairment as follows:

Weakness of left hip flexion, extension, abduction (rating 2, 7, 10 respectively whole person impairment based on table 17.8 of the AMA 5<sup>th</sup> edition of the guide to the evaluation of permanent impairment).

Left ankle Weakness of ankle flexion, extension, inversion and eversion (rating 10, 5, 2, 2 respectively whole person impairment based on table 17.8 of the AMA 5<sup>th</sup> edition of the guide to the evaluation of permanent impairment).

Combining these two values with the "combined values chart[]" page 604 gives the value of 34.

Subtalar joint arthritis impairment (xrays show no subtalar space left, severe arthritis) Whole person impairment based on table 17-31 is 10. Combining this value with the ankle and hip weakness combined value of 34. Utilizing the combined values chart from page 604

one arrives at the value of 41 for whole person impairment based on his left lower extremity.

Right upper extremity impairment based on hand pinch weakness (right hand (affected hand) 8.11 lbs, Left hand (baseline) is 12 lbs.[]] He has 33% loss of right hand pinch which utilizing table 16-34 translates to a whole person impairment rating of 20 [sic].

Combiling [sic] the left lower extremity whole person impairment (41) value with the right upper extremity whole person impairment (12) utilizing the combined values chart from page 604 one arrives at the value of 48% impairment rating of the whole person.

In the addendum, dated January 6, 2014, Dr. Rodriguez stated:

This is an addendum to a note from 11/20/2013 in regards to maximal medical improvement related to an injury that he sustained on 02/09/2013. We received a note from Workman's Compensation Office indicating that his calcaneus injury was not related to this injury from 02/09/2013, but it was a previous injury that the patient had experienced. As a result, should not be part of the MMI, so this note is to correct this and give him a new impairment rating related to his left femur fracture, right distal radius fracture as well as related to his new injury, hip motor weakness as well as weakness of his left ankle. Combining the weakness of the left hip flexion, extension, abduction, whole person impairment with the left ankle weakness of ankle flexion, extension, inversion and eversion utilizing the chart on page 604 of the AMA Guide to Impairment Rating one arrives at the value of 34. In regards to the right upper extremity impairment based on hand pinch/weakness, he has a 33% loss of right hand pinch. Utilizing table 16.34 translates to a whole person impairment rating of 12. Utilizing the combined values chart from page 604 of the AMA Guide to the Evaluation of Permanent impairment one arrives at a value of 42% impairment rating of the whole person.

FCS filed the report of Dr. Thomas J. O'Brien's March 10, 2014, independent medical evaluation. Dr. O'Brien obtained Jordan's history, reviewed his medical records, and performed a physical examination. His impression was that Jordan had sustained a right closed distal radius fracture and a left midshaft femoral fracture as a result of the work-related accident the previous February. These injuries were appropriately treated by open reduction internal fixation. His wrist injury would have healed by August 9, 2013, and his leg injury would have healed by November 9, 2013. Dr. O'Brien assigned a 3% permanent partial impairment to the upper extremity, which equated to a 2% whole person impairment. As to his left femur fracture, Dr. O'Brien did not assign any impairment, noting that it had healed with no angulation and was anatomically aligned. He stated that Jordan had normal strength and normal motion of the hip and knee. Dr. O'Brien went on to state that Jordan had significant pre-existing bilateral extremity conditions, which included severe traumatic injuries to both of his heels in 2009. Jordan underwent open reduction internal fixation of both calcaneus fractures. Dr. O'Brien assigned a 21% whole person permanent partial impairment due to Jordan's prior non-work-related injury.

FCS filed Dr. O'Brien's supplemental report dated April 6, 2014, in which he answered specific interrogatories. Dr. O'Brien discussed Jordan's left femur fracture, again stating that his fracture had "healed with anatomic alignment with no residual angulation due to the placement of straight intramedullary rod" and that he would not have a permanent impairment related to this fracture. He

went on to discuss Dr. Rodriguez's findings, noting that during his own examination, Jordan was walking without a limp and his knee showed a full range of motion. Dr. O'Brien stated that Jordan's limp "would be much more likely associated with his non-work-related bilateral foot and ankle pain."

The ALJ held a benefit review conference (BRC), where the parties stipulated to various facts, and the contested issues were listed as benefits per Kentucky Revised Statutes (KRS) 342.730, causation, future medical expenses, any exclusion for pre-existing disability or impairment, and injuries other than those to Jordan's right wrist and left leg. A final hearing was held, during which Jordan updated his deposition testimony.

In his brief, Jordan argued that the ALJ should rely upon Dr. Rodriguez's impairment rating in his award. He stated that Dr. Rodriguez had "inadvertently incorporate[d] left ankle 'weakness' into his combined values which should be disregarded by the ALJ[,]” and that he instead had incurred an 18% whole person impairment due to his left femur fracture. In contrast to Dr. O'Brien's 0% impairment rating for the leg injury, Jordan stated that “[i]t is not logical that Mr. Jordan would have an impairment for one body part [the right wrist] but not the other body part that was similarly affected and treated. It is also hard to fathom that such low impairment ratings could be given based on Mr. Jordan's complaints, which were obviously not taken into consideration at all by Dr. O'Brien.”

It its brief, FCS argued that Jordan's permanent partial disability rating should be based upon the rating offered by Dr. O'Brien because it was focused on Jordan's work-related injuries to his left leg and right wrist, rather than the rating by Dr. Rodriguez, which was based upon conditions not related to his work accident. Specifically related to the left leg, FCS urged the ALJ to find that it was inappropriate to relate the left hip and left ankle impairment to the work-related accident because there was not any expert testimony to tie these conditions to his left leg injury. FCS also pointed out that Jordan had incurred a significant left lower extremity injury in November 2009.

The ALJ entered an opinion, order, and award on September 19, 2014, awarding Jordan permanent partial disability benefits based on findings that he had sustained a 0% impairment for his left leg injury and a 2% whole body impairment for his right wrist injury. The ALJ recognized that it was in his discretion to determine whether a physician's AMA rating was properly assessed and that while an ALJ may consult the AMA *Guides* in order to decide upon which medical expert to rely, an "ALJ does not have the authority to independently arrive at an impairment rating utilizing the Guides[" However, an ALJ "does have the authority to consult the Guides when determining the weight to be assigned [to] the evidence." Specifically related to Jordan's left lower extremity impairment, the ALJ stated:

Dr. Rodriguez' January 6, 2014 addendum to his November 20, 2013 [sic] report indicates Plaintiff had a 42% WPI; of this percentage 34% was attributable to



Plaintiff's left lower extremity symptoms. When making his left lower extremity impairment assessment, Dr. Rodriguez evaluated Plaintiff's "left femur fracture, right distal radius fracture as well [as] related to his new injury, [hip] motor weakness as well as weakness of his left ankle. Combining the weakness of the left hip flexion, extension, abduction, whole person impairment with the left ankle weakness of ankle flexion, extension, inversion and eversion utilizing the chart on page 604 of the AMA Guides to Impairment Rating one arrives at the value of 34."

As previously noted, the compensable injuries resulting from Plaintiff's February 9, 2013 work incident do not include injuries to his left ankle or left hip. It would seem that an injured worker who went through two surgical procedures to repair a work-related femur fracture would incur some type of permanent impairment, but, unfortunately, at least for Plaintiff, Dr. Rodriguez does not break down the specific percentages he combined to reach a total impairment rating for Plaintiff's left leg. Consequently, based upon Dr. Rodriguez' input, it is impossible to determine his impairment rating for Plaintiff's left femur fracture; and, therefore, Dr. Rodriguez' 34% impairment rating cannot be utilized when attempting to determine Plaintiff's WPI.

With Dr. Rodriguez' impairment rating for Plaintiff's left lower extremity being discarded, the only remaining WPI rating is the 0% given by Defendant's IME physician, Dr. O'Brien. Consequently it is determined Plaintiff sustained a 0% impairment rating for the work-related left leg injury sustained in the February 9, 2013 work incident.

Jordan filed a petition for reconsideration related to the ALJ's decision to assign a 0% impairment rating to his left leg condition. While "Dr. Rodriguez's narrative was a bit convoluted," Jordan stated that Dr. Rodriguez broke down how he arrived at the impairment rating. Furthermore, Jordan argued in his brief that

the ALJ should have considered an 18% impairment rating based upon his left hip because it was adjoined and connected to the femur. He also argued that an impairment rating for the left hip was appropriate for a left femur fracture, referencing the example given in the *AMA Guides* to assigning an impairment rating to the adjoining ankle for a healed tibia fracture. The ALJ denied Jordan's petition because it was based upon the continuation of an argument already decided.

Jordan filed a notice of appeal to the Board, continuing to argue in his brief that the ALJ improperly failed to consider the impairment rating assessed by Dr. Rodriguez. The ALJ did not consider the 18% impairment rating, as Jordan urged in his brief. In its brief, FCS continued to argue that the award of PPD benefits was supported by substantial evidence and that a different result was not compelled. On February 13, 2015, the Board, in a split decision, vacated the ALJ's award and remanded the case for additional fact finding, stating "we are not convinced that the ALJ properly understood Dr. Rodriguez' opinion concerning the lower extremity impairment rating[.]" The Board recognized that "the ALJ's authority to use the *AMA Guides* is limited to essentially mechanical applications[.]" such as using the combined values chart, selecting an impairment rating based upon a class of impairment indicated by a physician, and where medical expertise was not required. The Board concluded:

We agree the ALJ could properly exclude any impairment rating for a condition unrelated to the work injury and use the combined values chart to award

benefits based upon a rating less than the 34% Dr. Rodriguez assigned for the lower extremity. . . . In the November 20, 2013 report, Dr. Rodriguez gave specific whole person impairment ratings pursuant to Table 17.8 of the AMA Guides for each type of muscle weakness he found on examination of the hip and ankle. Based on this evidence, the ALJ could have arrived at several different conclusions regarding impairment.

The Board did not preclude the ALJ from reaching the same conclusion on remand as he did in the original opinion. This petition for review now follows.

This Court's standard of review in workers' compensation appeals is well-settled in the Commonwealth. "The function of further review of the [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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Kentucky law establishes that "[t]he claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in his favor." *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979) (citations omitted). "When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). However, "[i]f the board finds against a claimant who had the burden of proof and the risk of persuasion, the court upon review is confined to determining

whether or not the total evidence was so strong as to compel a finding in claimant's favor." *Snawder*, 576 S.W.2d at 280 (citations omitted). The *Francis* Court went on to explain:

If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.

Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

*Francis*, 708 S.W.2d at 643 (Ky. 1986).

KRS 342.285(2) sets forth the authority of the Board in an appeal from an ALJ's award or order:

No new or additional evidence may be introduced before the board except as to the fraud or misconduct of some person engaged in the administration of this chapter and affecting the order, ruling, or award, but the board shall otherwise hear the appeal upon the record as certified by the administrative law judge and shall dispose of the appeal in summary manner. The board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact, its review being limited to determining whether or not:

(a) The administrative law judge acted without or in excess of his powers;

- (b) The order, decision, or award was procured by fraud;
- (c) The order, decision, or award is not in conformity to the provisions of this chapter;
- (d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or
- (e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993), the Supreme Court of Kentucky emphasized the ALJ's role as the fact finder:

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. *Paramount Foods, Inc. v. Burkhardt*, Ky., 695 S.W.2d 418 (1985). Where, as here, the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. *Pruitt v. Bugg Brothers*, Ky., 547 S.W.2d 123 (1977).

In its petition, FCS argues that the Board erred in requiring the ALJ to make an independent determination of Jordan's impairment rating pursuant to the AMA *Guides* because this required the ALJ to impermissibly undertake the role of a physician or medical expert. Jordan, on the other hand, frames the issue as whether the Board correctly ordered the ALJ to review evidence Jordan presented that the ALJ either did not understand or did not consider.

"The proper interpretation of the *Guides* and the proper assessment of impairment are medical questions." *Lanter v. Kentucky State Police*, 171 S.W.3d

45, 52 (Ky. 2005), as corrected (Aug. 29, 2005). *See also Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003). The *Lanter* Court went on to explain:

In the present case, no physician testified regarding the proper application of the *Guides* when evaluating impairment from a traumatic brain injury that causes both neurological and behavioral symptoms. Faced with impairment ratings that were assigned under Chapters 13 and 14 and the task of selecting an impairment rating that was a reasonable estimation of the claimant's condition, the ALJ appropriately consulted the *Guides* when considering the medical evidence and deciding upon which experts to rely.

*Lanter*, 171 S.W.3d at 52. *See also George Humfleet Mobile Homes v. Christman*, 125 S.W.3d 288, 294 (Ky. 2004) (“An ALJ is not authorized to interpret the *Guides*.”) While there are situations where it would be appropriate for the ALJ to consult the AMA *Guides*, FCS contends that this was not the case in the present action. *See Caldwell Tanks v. Roark*, 104 S.W.3d 753, 757 (Ky. 2003) (“Although medical expertise is required to perform audiometric testing, it is apparent that no medical expertise is required to read this conversion table. For that reason, we are of the opinion that when faced with unrefuted evidence of increased hearing impairment in the relevant period, the ALJ was both authorized and required to consult the appropriate edition of the *Guides* and to convert the 1998 hearing impairment into an AMA whole-body impairment.”).

Rather, FCS contends that the Board’s directive that the ALJ consult with the AMA *Guides* represented something more than a mechanical function within

his authority. The ALJ would have to interpret the findings of Dr. Rodriguez; reach a decision regarding work-relatedness, which FCS says Dr. Rodriguez did not address; and apply the *AMA Guides* using medical expertise. In support of its argument, FCS relies upon the unpublished decision of this Court in *RCS Transp. v. Malin*, No. 2010-CA-001229-WC, 2011 WL 4537903, at \*5-6 (Ky. App. Sept. 23, 2011).<sup>1</sup> FCS asserts that this Court rejected the very result reached by the Board in the present case:

This precedent leads us to conclude that an ALJ does not have the discretion to arrive at a separate and distinct impairment rating from that offered by a physician in those cases where medical witnesses specifically assess such ratings. As noted by the Board, this is not a case in which the ALJ was required to pick from an impairment range or to determine an impairment after being provided a classification in the *AMA Guides* within which Malin fell. Instead, the parties provided the ALJ with impairment ratings assessed by physicians based upon their interpretations of the *Guides*. **Under these circumstances, we do not believe that an ALJ may take on the role of the physician and make an independent determination regarding an impairment rating where such ratings have been provided by medical witnesses. Instead, the ALJ may only consider the *AMA Guides* in determining the weight to be accorded conflicting opinions.**

*Malin*, 2011 WL 4537903 at \*5 (footnote omitted, emphasis added).

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<sup>1</sup> FCS cites to this unpublished opinion pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c), which provides as follows: “Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court.”

Jordan counters that *Malin* is not analogous to the present case because the ALJ would not have to calculate Dr. Rodriguez's impairment rating based upon measurements. Rather, the ALJ in this case had the whole person impairment ratings that Dr. Rodriguez assigned regarding Jordan's left hip flexion, extension, and abduction measurements. While his addendum did not include these measurements, Dr. Rodriguez's original November 20, 2013, report did include this information.

We agree with Jordan and the Board that the ALJ did not properly consider the medical evidence of Dr. Rodriguez when he rejected his impairment rating for the left femur injury. Referencing only the addendum in this portion of the analysis, the ALJ specifically stated that "it is impossible to determine his impairment rating for Plaintiff's left femur fracture" because "Dr. Rodriguez does not break down the specific percentages he combined to reach a total impairment rating for Plaintiff's leg." These separate percentages were in fact included in the original report from November 20, 2013, and the ALJ had the authority to mechanically use the combined values chart of the *AMA Guides* to arrive at an appropriate impairment rating.

Therefore, the ALJ did not properly consider the medical evidence from Dr. Rodriguez that Jordan submitted below, and the Board properly remanded the matter for further fact finding. We note that the Board did not compel a certain result and permitted the ALJ to reach the same conclusion on remand, once he properly considered the entirety of the evidence. We do not believe this is a



situation where the fact-finder picked and chose between conflicting medical evidence; the ALJ specifically rejected Dr. Rodriguez's impairment rating for an improper reason, leaving him to assign the only other impairment rating assessed; namely, Dr. O'Brien's 0% impairment rating.

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

ALL CONCUR.

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