IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: March 20, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0191-WC

CRITTENDEN HOSPITAL SYSTEMS — APPELLANT

APPEAL FROM COURT OF APPEALS
V. 2001-CA-0132-WC
WORKERS' COMPENSATION BOARD NO. 98-93376

SAUNDRA HATTON; HON. LLOYD EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

AND 2002-SC-0206-WC

SAUNDRA HATTON — CROSS-APPELLANT

APPEAL FROM COURT OF APPEALS
V. 2001-CA-0132-WC
WORKERS' COMPENSATION BOARD NO. 98-93376

CRITTENDEN HOSPITAL SYSTEMS;
HON. LLOYD EDENS, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

Having determined that the Administrative Law Judge (ALJ) failed to state a sufficient reason for rejecting medical testimony that the claimant's correct AMA impairment was 30%, the Workers' Compensation Board (Board) reversed the award

and remanded the claim for further consideration. Furthermore, the Board determined that the Administrative Law Judge (ALJ) could not reasonably infer from Dr. Kolb's response to a questionnaire that he presently thought the 30% rating was more appropriate than the 17% rating he initially submitted. The Court of Appeals affirmed the decision, and this appeal and cross-appeal followed. Having reviewed both of Dr. Kolb's supplemental reports, we have concluded that the ALJ's finding was not unreasonable and, therefore, reinstate it. We affirm in all other respects.

The claimant was a registered nurse who provided care for patients in their homes. On January 13, 1998, she was involved in a work-related motor vehicle accident. Among her extensive injuries were: fractures of the right femur, fibula, distal tibia, and ankle joint; multiple fractures of the bones and joints in her right foot; dislocation of the right foot; an acetabular fracture of the left hip; and hemathrosis and an undisplaced tibial spine fracture of the left knee. She testified that after undergoing surgeries and extensive medical treatment, she returned to work on April 5, 1999. Her present duties involved collecting data for other nurses and entering it into a computer, work that did not require her to be on her feet. She continued to use a cane at times and sometimes had difficulty using her right foot to drive.

Dr. Kolb, an orthopedic surgeon, began treating the claimant in the emergency room on the day of her accident and later performed two surgeries. In his opinion, she did not reach maximum medical improvement until May 28, 1999, after her return to work. He indicated that she would continue to have difficulty with her left hip, would ultimately need a total hip replacement, and would experience difficulties with her right ankle and foot due to arthritis.

Mr. Pruden, a physical therapist who performed a functional capacity evaluation at Dr. Kolb's request, reported two alternative impairment ratings, a 15% impairment rating for gait derangement or a 17% impairment for the combined effects of muscle weakness and lost range of motion. With regard to the latter, he ascribed a 1% impairment to the right foot and ankle injuries and a 16% impairment to the left lower extremity. He gave no rating for arthritis, noting that Dr. Kolb had found none. Yet, when deposed in the related civil action, Dr. Kolb testified to severe arthritic changes from the hip fracture, severe osteoarthritic changes around the ankle, and severe osteoarthritic changes in the area of the Lisfranc's joint with considerable osteoporosis.

Dr. Gleis, also an orthopedic surgeon, examined the claimant on the employer's behalf, performed various tests, and reviewed her medical records. His report of May 10, 1999, stated that in instances where an individual's impairment may be calculated under alternative rating methods, the Fourth edition of the AMA Guides to the Evaluation of Permanent Impairment (Guides) indicates that the largest valid rating should be used. The report stated that there were three methods by which the claimant's AMA impairment could be calculated and set forth the figures that comprised each calculation. The impairments that resulted were as follows: 15%, using the gait method; 19%, using the range of motion method; or 30%, using the diagnostic tables for the interarticular fractures of the right foot and ankle but rating the left hip and knee impairments as in method #2.[1] The report then stated:

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[1]The hip and knee impairments were 14% under either method #2 or #3. The foot and ankle fractures merited a 5% impairment under method #2 but a 19% impairment under method #3. Using the combined values table, the 14% and 5% impairments yielded a 19% impairment (method #2); whereas, the 14% and 19% impairments yielded a 30% impairment (method #3).

> [T]he correct impairment rating of the three methods would be #3 with a 30% of the whole person. The method which produces the largest legitimate rating is the correct method.

Dr. Gleis restricted the claimant to limited stair climbing, to walking for short distances only, and to sedentary/light demand lifting. Finally, he noted the "significant difference" between his rating and Dr. Kolb's. He explained that the latter was based upon an evaluation that failed to rate the claimant for arthritis on the ground that Dr. Kolb had found none; whereas, in fact, Dr. Kolb's notes referred to a significant degree of arthritis and joint space narrowing. Noting that the claimant's right ankle and foot injuries were much more debilitating than the hip injury, Dr. Gleis stated that his own rating more accurately depicted the degree of impairment.

On March 6, 2000, Dr. Kolb reported that he had reviewed Dr. Gleis's evaluation and stated, "I do not disagree with his assessment." On March 7, 2000, he responded to the claimant's questionnaire as follows:

> 1. Dr. Kolb, in your letter of March 6, 2000, you indicate you have reviewed the information from Dr. Gleis. Specifically, was that information his May 10, 1999, report and the x-rays taken at the time of Dr. Gleis' examination?
>
> Answer: Yes
>
> 2. Having reviewed Dr. Gleis' report of May 10, 1999, do you agree or disagree that his whole body impairment assessment of 30% is the more accurate and appropriate impairment rating resulting from Saundra Hatton's injuries of January 13, 1998?
>
> Answer: Yes

On March 16, 2000, the employer deposed Dr. Gleis. He explained that Chapter 3 of the Guides provides multiple ways to calculate an impairment rating for a lower extremity injury. When questioned about method #2, he explained that he attributed a 10% impairment to weak hip abductors, a 4% impairment to the left knee, a 3%

impairment to the right ankle, a 2% impairment to the right hindfoot, resulting in a 19% impairment. Asked whether the claimant's decreased range of motion was due to arthritis, he responded that the interarticular fractures in the claimant's ankle and foot caused arthritis which, in turn, caused a decreased range of motion. When questioned about method #3, he stated that it relied on the diagnostic and x-ray tables (Tables 62 and 64) for the foot and ankle fractures but utilized the same knee and hip impairments as in method #2. He explained that Table 64 gives a higher rating to an interarticular (joint) fracture due to the probability that arthritis will develop but acknowledged that there is some crossover in the rating for such a fracture and the Table 62 rating for arthritis. Asked whether it could be said that the 30% rating was excessive, he responded that all three ratings were valid and that any rating between 15% and 30% was legitimate. Asked again whether it could be said that the 30% rating was somewhat excessive because it rated both cause (fracture) and effect (arthritis), he acknowledged that "I think it could be criticized for being higher than it should be."

When cross-examined by the claimant, Dr. Gleis stated that the claimant's ankle and foot injuries were likely to become the most problematic. He also observed that although Dr. Kolb's office notes referred to severe changes in the hip and severe osteoarthritic changes in the ankle and Lisfranc's joint, Mr. Pruden gave no rating for arthritis. When asked whether it was still his opinion that under the Guides only the largest valid impairment rating should be used, he responded in the affirmative. Likewise, when asked whether the largest valid impairment for the claimant's condition was 30%, he again responded in the affirmative.

When summarizing the evidence, the ALJ noted that after reviewing Dr. Gleis's report, Dr. Kolb was of the opinion that a 30% impairment rating was more appropriate.

Addressing the extent of the claimant's impairment rating, the ALJ stated as follows:

> Dr. Gleis testified that Ms. Hatton would have either a 15, 19 or 30% functional impairment rating depending upon which of three methods were selected for calculation. The functional capacity evaluation performed at the request of Dr. Kolb yielded a 17% functional impairment rating. In his deposition, Dr. Gleis testified that it was his opinion that the 30% functional impairment rating was high because it also included the cause and effect of the Claimant's injuries. Dr. Kolb subsequently stated in a report after reviewing the calculations of Dr. Gleis that it was his opinion that the 30% was the more appropriate rating. I am persuaded by the initial rating of 17%, which was utilized by Dr. Kolb to assess the Claimant's functional impairment and the subsequent rating of 19% made by Dr. Gleis, as well as his testimony that he believed the 30% rating to be somewhat high, that the Claimant has suffered a 19% functional impairment as the result of her injury of January 13, 1998.

Reversing the award, the Board determined that the ALJ could not reasonably infer from Dr. Kolb's confusing response to the March 7, 2000, questionnaire that he intended to agree with the 30% rating. Furthermore, the Board pointed out that the proper interpretation of the Guides is a matter for the medical experts. Turning to Dr. Gleis's statements that 30% was the correct AMA impairment, the Board determined that the ALJ failed to state a sufficient explanation for rejecting that opinion and remanded the claim for further consideration.

In a wide-ranging argument, the employer maintains that the ALJ's choice of the 19% rating was supported by substantial evidence, that it was a reasonable exercise of the ALJ's prerogative to pick and choose among the valid AMA impairments in evidence, and that it should not have been disturbed on appeal. Noting that Dr. Kolb did not specify the portion of Dr. Gleis's evaluation with which he agreed, the employer asserts that he did not clearly indicate whether he agreed or disagreed with the 30% rating. Although Dr. Gleis made no such direct statement, the employer characterizes his testimony as indicating that the 30% rating was excessive and that the 19%

impairment was most appropriate. Cross-appealing, the claimant maintains that the evidence compelled a finding of a 30% impairment and that Mr. Pruden's impairment rating must be disregarded.

Although the formula that is employed in KRS 342.730(1)(b) and (c) may imperfectly measure a particular worker's occupational disability, a disability rating is based upon a statutory factor and the extent of the worker's permanent impairment "as determined by" the latest edition of the Guides. See Adkins v. R & S Body Co., Ky., 58 S.W.3d 428 (2001). As the Board recognized, the proper interpretation of the Guides and the assessment of an impairment rating under the Guides are medical questions. For that reason, medical testimony concerning the proper use of the Guides limits the ALJ's authority to pick and choose among impairment ratings that are in evidence.

Testifying for the employer, Dr. Gleis explained that all three impairment ratings that he calculated were valid under the Guides but that the Guides also indicated that the highest valid rating should be used. He stated consistently that the "correct" AMA impairment under the Guides was 30%. Furthermore, he stated that Mr. Pruden's 17% rating failed to take into account the presence of severe arthritis despite the fact that the condition was noted in Dr. Kolb's treatment records. Exercising the authority to draw reasonable inferences from Dr. Kolb's supplemental reports, the ALJ determined that, after reviewing Dr. Gleis's report, Dr. Kolb had concluded that a 30% impairment rating was more appropriate than the 17% that he had initially submitted. Yet, based upon Dr. Gleis's acknowledgment that the 30% "could be criticized," the ALJ determined that the 17% and 19% ratings were more persuasive, and that the claimant's impairment was 19%.

In Thomas v. United Parcel Service, Ky., 58 S.W.3d 455 (2001), the ALJ

determined that the Guides required use of the DRE model rather than the range of motion model for determining the impairment from a transverse process fracture. The DRE model assigned a 5% impairment to one transverse process fracture but did not appear to contemplate that an individual might sustain more than one such fracture. Furthermore, the only medical expert was a university evaluator who testified that the DRE model inadequately assessed the impairment that would result from four such fractures and that the range of motion model would do so more accurately. The university evaluator also testified that four 5% impairments would combine to produce a 19% impairment under the combined values table and that the actual effect of four transverse process fractures was probably even greater. We concluded that in the absence of countervailing evidence, it was not unreasonable for the ALJ to apply KRS 342.315(2), to exercise a limited prerogative as the finder of fact, and to conclude from the available evidence that the four fractures caused a combined impairment of 19%.

As the Board recognized, the correct interpretation of the Guides is a medical question. Unlike the situation in Thomas v. United Parcel Service, supra, the claimant did not sustain injuries that the Guides failed to contemplate. Furthermore, Dr. Gleis clearly testified that the greatest valid impairment (30%) was the "correct" impairment under the Guides. He also noted that Mr. Pruden failed to include a rating for arthritis on the mistaken belief that Dr. Kolb found none; whereas, Dr. Kolb's notes showed a significant degree of arthritis and joint space narrowing. Unlike the Board, we are persuaded that the ALJ reasonably inferred from Dr. Kolb's statements of March 6 and 7, 2000, that, having considered Dr. Gleis's report, he concurred with it. It is only to that extent that we reverse. Like the Board and the Court of Appeals, we have concluded that Dr. Gleis's belief that the 30% rating could be criticized as being excessive was not

a sufficient basis for rejecting it and for relying on the 19% rating instead.

The decision of the Court of Appeals is affirmed in part and reversed in part, and the claim is remanded to the ALJ for further consideration.

All concur.

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Supreme Court of Kentucky

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ORDER DENYING PETITION FOR EXTENSION

The Petition for Extension filed by Appellee/Cross-Appellant Saundra Hatton is hereby DENIED.

All concur.

Entered: June 12, 2003.

CHIEF JUSTICE