

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MAY 22, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0521-WC

FINAL

DATE June 12, 2003 UAG Group 4, D.C.

DAVIS CONSTRUCTION

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2001-CA-2589-WC
WORKERS' COMPENSATION BOARD NO. 00-95997

RAMON GARCIA; HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Court of Appeals has determined that the Workers' Compensation Board (Board) properly affirmed the claimant's total disability award. Appealing, the employer asserts that there were no objective medical findings of a harmful change in the human organism and no substantial evidence of the requisite AMA impairment. It maintains, therefore, that the claimant failed to meet his burden of proving that he was permanently and totally disabled. We have concluded, however, that the finding of permanent, total disability was reasonable under the evidence and that it was properly affirmed on appeal.

The claimant was born in 1969, and the parties stipulated that he had a third-grade education. He spoke very poor English and testified through an interpreter. His work history included various jobs within the construction industry, heavy manual labor,

and farm work. On February 2, 2000, while working as a construction laborer, he tripped on some bars and fell backwards. He was carrying a heavy mold that was used to form concrete. The mold fell on top of him, and he began to experience neck, back, and stomach pain for which he was sent to the hospital. Treatment was conservative, including medication and physical therapy. The claimant did not return to work after the accident and testified that he continued to have headaches, back pain, and pain and numbness on the right side. He did not think that he could return to any of his previous work or that his education, training, or experience qualified him for anything other than heavy manual labor.

The sole medical testimony was offered in the form of several reports from Dr. Davies, the claimant's treating neurosurgeon. He diagnosed a cervical and lumbar strain that he related to the incident at work. MRI and CT testing revealed no significant pathology. Although testing did reveal minimal degenerative changes, Dr. Davies did not think that they accounted for any of the claimant's symptoms. On physical examination, he observed some limitation on range of motion in the neck and back, positive straight leg raising, and evidence of mild muscle spasm, although he found no evidence of weakness in the upper or lower extremities.

When the claimant's condition did not improve as rapidly as expected, Dr. Davies ordered a course of physical therapy which, like his own examination, revealed some limitation in range of motion. The therapist also reported equal and reactive reflexes and consistent muscle testing. The therapy report of June 23, 2000, noted that although the claimant complained of continued symptoms, the complaints were "vague and inconsistent from treatment to treatment." Dr. Davies determined that the claimant reached maximum medical improvement (MMI) on August 15, 2000. In subsequent

reports, he assigned a 5% whole-body impairment, indicating that the rating was performed under the AMA Guides to the Evaluation of Permanent Impairment (Guides), and he recommended that the claimant avoid heavy bending, lifting, twisting of the neck or lower back, and overhead activities. In his opinion, the claimant could not return to the type of work that he had done previously, was capable of only sedentary work, and might benefit from vocational rehabilitation.

When the claim came before the Administrative Law Judge (ALJ), the only matter at issue was the extent and duration of disability, including the duration of temporary total disability (TTD). After reviewing the lay and medical evidence, the ALJ determined that the claimant had a 5% AMA impairment and lacked the ability to perform work in a competitive economy. Thus, he was found to be totally disabled. In reaching this conclusion, the ALJ noted that the claimant was a very credible witness with regard to his pain and restrictions and that his testimony was supported by that of Dr. Davies. In view of the finding of permanent, total disability, any question concerning the duration of TTD was found to be moot. Finally, noting that the claimant had only a third-grade education and no specialized training, the ALJ ordered an evaluation for the purposes of vocational rehabilitation.

Although the parties stipulated to a work-related injury on February 2, 2000, the employer has maintained on appeal that there were no objective medical findings of a harmful change in the human organism. Furthermore, the employer has asserted that Dr. Davies's testimony was insufficient to support a finding that the claimant has a 5% impairment under the latest edition of the Guides because it does not specify the basis for assigning the impairment or the edition under which it was assigned.

For the purposes of Chapter 342, the word "injury" is a term of art. Under the

version of KRS 342.0011(1) that was effective on February 2, 2000, an "injury" is "any work-related traumatic event . . . which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." Thus, having stipulated to an injury, the employer may not now argue that the claimant failed to prove an injury. Furthermore, even had there been no such stipulation, we are persuaded that Dr. Davies' uncontroverted testimony provided substantial evidence that the work-related incident proximately caused a harmful change in the human organism as shown by objective medical findings. See Staples v. Konvelski, Ky., 56 S.W.3d 412 (2001).

Workers' compensation proceedings are adversarial. The claimant had the burden of proving every element of his claim, including the extent and duration of disability; whereas, the employer had the opportunity to go forward with its own medical evidence and to cross-examine the claimant and Dr. Davies. As the finder of fact, the ALJ had the sole authority to draw reasonable inferences from the evidence, to weigh conflicting evidence, and to judge the credibility of witnesses. KRS 342.285(1).

The sole evidence in this claim was given by the claimant and Dr. Davies, and the ALJ was persuaded that their testimonies were credible. A finding of permanent, total disability under KRS 342.0011(11)(c) requires a permanent disability rating which, according to KRS 342.0011(35) and (36), requires a whole-body impairment under the latest edition of the Guides. No percentage is specified.

Dr. Davies testified that the claimant had a 5% whole-body impairment under the Guides, and there was no medical evidence that the claimant would not have an impairment under the latest edition of the Guides. We are persuaded, therefore, that it was reasonable for the ALJ to rely upon Dr. Davies and to conclude that the claimant had met his burden of proof. Furthermore, the credible testimonies of the claimant and

Dr. Davies provided substantial evidence from which the ALJ could reasonably conclude that the claimant was permanently and totally disabled by his injury because he had reached MMI, had the requisite AMA impairment, and had a complete and permanent inability to perform any type of work as a result of his injury. Ira A. Watson Dept. Stores v. Hamilton, Ky., 34 S.W.3d 48 (2000); Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Under those circumstances, the findings were properly affirmed on appeal.

The decision of the Court of Appeals is affirmed.

All concur.

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