

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

Supreme Court of Kentucky

2002-SC-0601-WC

**FINAL**

DATE June 12, 2003 J. R. G. COURT, D.C.  
APPELLANT

WILLIAM G. RAYE

V.

APPEAL FROM COURT OF APPEALS  
2000-CA-2266-SC & 2000-CA-2287-WC  
WORKERS' COMPENSATION BOARD NO. 96-85431

GOLF COMMISSION OF PADUCAH;  
ROBERT L. WHITTAKER, DIR. OF SPECIAL FUND;  
HON. DONALD G. SMITH, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING IN PART AND REVERSING IN PART**

The Court of Appeals determined that it was reversible error for an Administrative Law Judge (ALJ) to fail to give presumptive weight to a university evaluator's testimony without stating a reason for doing so. Thus, it reversed a decision of the Workers' Compensation Board (Board) and remanded the claim for the findings that are required by KRS 342.315(2). Appealing, the claimant maintains that the Board was correct in determining that any error was harmless. Although we reverse with regard to the findings of causation and total disability, we affirm with regard to the entry of an award of permanent income benefits.

In July, 1996, the claimant injured his lower back when he fell at work. He underwent surgery to repair a herniated disc at L5-S1 and settled his workers' compensation claim for a 21% permanent, partial disability. Although he attempted to

return to work, he was unable to maintain either of two subsequent employments due to back pain. In January, 1998, he returned to his treating physician with complaints of increasingly severe back pain which he did not associate with any recent trauma or activity. MRI revealed a probable recurrent herniation at L5-S1 and a small herniation at L4-5. Another severe increase in symptoms occurred in May, 1998. The symptoms continued to progress thereafter and, in April, 1999, surgery was performed at L4-5 and L5-S1.

Dr. Raque conducted a medical records review on the employer's behalf and reported that the claimant's current condition was the result of a new herniation that was unrelated to the 1996 injury. On that basis, the employer refused payment for the 1999 surgery and moved to reopen the claim for a finding concerning its liability. Alleging a change of occupational disability, the claimant also moved to reopen. At issue in the subsequent proceeding were: causation with respect to any increased disability, the compensability of unpaid medical expenses, and whether presumptive weight must be given to the university evaluator in this pre-December 12, 1996, claim.

The claimant testified that he continued to have back pain that radiated to his right groin and leg and that it was more severe than in the past. He required pain medication and had difficulty sleeping, standing, sitting, and lifting. Furthermore, he did not think that he was able to perform any of his past employment and had not looked for other work.

Dr. Meriwether, the claimant's treating neurosurgeon, testified that the work-related injury and the weakness that it caused in the claimant's back were substantial factors in causing the recurrent complaints of pain and the conditions found at L4-5 and L5-S1. Furthermore, the additional disc herniation and resulting surgery lessened the

claimant's ability to perform a number of physical activities and increased his impairment rating.

Dr. Prince performed a university evaluation as authorized by KRS 342.315(1) and reported his findings. He indicated that within a reasonable medical probability, the claimant's 1996 injury was the cause of his complaints, noting the persistent symptoms following the injury. He indicated that the claimant's condition was partially due to the arousal of pre-existing degenerative disc disease and attributed 30% of his impairment to the 1996 injury, 40% to the 1998 herniation, and 30% to the underlying degenerative changes. Furthermore, he stated:

In terms of causation, his worsening back pain in late 1997 and 1998 was associated with a recurrent disc herniation at the L5S1 and a new herniation at L4L5. While the majority of his worsened symptoms were due to the L4L5 right-sided lesion, there were increasing symptoms prior to this which were at least present at the time of the MRI showing the recurrence at L5S1.

Although I do not feel the L4L5 herniation was directly caused by the 1996 injury, I do feel the 1996 injury and subsequent surgery played some role in contributing its development through altered spine mechanics and reduced support.

Convinced that the claimant had not yet reached maximum medical improvement (MMI), he would not rate any permanent impairment.

Addressing causation, the ALJ noted that Dr. Meriwether clearly related the claimant's present condition to the July, 1996, injury and, furthermore, that Dr. Prince attributed at least part of the condition to the injury. Whereas, Dr. Raque's testimony was not persuasive. Based upon the evidence from Drs. Meriwether and Prince, the ALJ determined that the cause of any increased disability related back to the work-related injury. Turning to the applicability of the "presumptive weight" provision, the ALJ noted that the claimant's injury occurred before December 12, 1996, and concluded

that because the legislature did not designate KRS 342.315(2) as being retroactive, it was inapplicable to this pre-1996-Act claim. Finally, the ALJ determined that the contested medical expenses were compensable, that the claimant's actual disability at settlement was 21%, and that his present disability was total. Awarding income benefits for permanent, total disability, the ALJ relied upon the claimant's testimony concerning his pain and restrictions, Dr. Meriwether's testimony, and Dr. Prince's testimony concerning the claimant's present restrictions. As stipulated, the defendants were held equally liable for the award.

Each defendant filed a petition for reconsideration pursuant to which the ALJ gave them credit for overlapping benefits under the settlement. However, the ALJ rejected the employer's request for a finding "that the medical evidence in this case does not establish a legal proximate cause between Plaintiff's current medical problems and his work-related injury." The order did not address an assertion by the Special Fund that the failure to apply KRS 342.315(2) was erroneous.

Appealing, the defendants maintained that the ALJ was required to give presumptive weight to Dr. Prince's clinical findings and opinions. The employer also maintained that in the absence of evidence that the claimant's degenerative disc disease resulted from the 1996 injury, neither Dr. Prince's report nor Dr. Meriwether's constituted an adequate basis for a finding that all of the increased disability and medical expenses were compensable.

Noting that Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000), was rendered shortly after the ALJ's decision, the Board determined that the ALJ did err by failing to give Dr. Prince's testimony presumptive weight. Concluding, however, that the error was harmless, the Board determined that Dr. Meriwether's and Dr. Prince's testimonies

both supported a finding of proximate causation. Noting that a proximate cause did not have to be the exclusive cause but rather that it must be a substantial factor in bringing about a particular result, the Board concluded that the chain of events between the 1996 injury and the claimant's present condition appeared to be unbroken. Thus, the arguments that part of the claim was not compensable were rejected. Convinced that the essence of Dr. Prince's testimony supported the finding of causation and that the ALJ had granted the testimony the appropriate weight despite finding that KRS 342.315(2) did not apply, the Board affirmed.

As the Board pointed out, if the evidence establishes that a compensable injury is a substantial factor in causing a medical condition, the condition is viewed as being a result of the injury and, therefore, is compensable. See Newberg v. Reynolds, Ky., 831 S.W.2d 170 (1992); Wemyss v. Coleman, Ky., 729 S.W.2d 174 (1987). In Magic Coal Co. v. Fox, supra, we determined that KRS 342.315(2) applied to all claims pending before an ALJ on or after December 12, 1996. Furthermore, we construed the provision as shifting the burden of going forward with proof to the party that opposes the evaluator's testimony but as having no effect on the burden of persuasion. We explained that the clinical findings and opinions of a university evaluator constituted substantial evidence of a worker's medical condition that could not be disregarded unless it was rebutted. We also explained that the fact-finder retained the authority to weigh conflicting medical evidence and that KRS 342.315(2) permitted an ALJ to reject a university evaluator's testimony if a reasonable basis for doing so were stated. Until our decision, the prevailing view was that KRS 342.315(2) did not apply retroactively because it could serve to shift the burden of proof.

When considering this reopening, the ALJ was not persuaded that KRS

342.315(2) governed a pre-December 12, 1996, claim. The fact remains, however, that he did not reject Dr. Prince's clinical findings and opinions when determining that the claimant met his burden of proving causation and total disability. Instead, the decision expresses a reliance on both Dr. Prince and Dr. Meriwether, and the ultimate findings on those issues are consistent with both testimonies. Therefore, to the extent that the Court of Appeals' decision might be read to imply that further consideration of those particular issues is required, we reverse.

Permanent income benefits are not authorized until a worker's condition is sufficiently stable for the extent of any permanent impairment and disability to be determined. W. L. Harper Construction Co. v. Baker, Ky.App., 858 S.W.2d 202 (1993). In other words, they are not authorized until the worker reaches MMI. Dr. Prince was of the opinion that the claimant had not reached MMI when he was evaluated; therefore, the ALJ erred by failing to state a reasonable basis for disregarding the opinion and awarding permanent income benefits. To that extent, we affirm the Court of Appeals.

The decision of the Court of Appeals is affirmed with regard to the question of permanent disability and reversed with regard to causation and the extent of disability. The claim must be remanded to the ALJ for further proceedings that are consistent with KRS 342.315(2).

All concur.

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