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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 21, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9-11-03 ELA Grad'd D.C.

2002-SC-0815-WC

FRITO LAY (RSK Co) — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-0235-WC
WORKERS' COMPENSATION BOARD NO.99-00924;
98-80322; 95-11954; 89-30116

JAMES RATLIFF; HON. ROBERT WHITTAKER, DIRECTOR OF SPECIAL FUND; ADMINISTRATIVE LAW JUDGE JOHN B. COLEMAN; FRITO LAY (TRAVELERS INSURANCE); FRITO LAY (CRAWFORD & COMPANY) AND KENTUCKY WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Frito Lay (RSK Co.) contests an opinion affirming by the Court of Appeals, which unanimously upheld the Workers' Compensation Board's adoption of a finding of the Administrative Law Judge of permanent total disability for the claimant.

The employer presents two questions for the court to consider on appeal. Whether the ALJ and the later reviewers failed to answer how the injury in 1998 was the proximate cause of the claimant's total occupational disability. Or in the alternative,

whether there was substantial evidence to support the finding of total occupational disability for the claimant.

Ratliff started work for his employer in 1985. In 1987, Ratliff experienced back and leg pain after moving chips, a normal part of his employment with Frito Lay. Dr. Tutt, his treating physician, diagnosed an instable segment at L5-S1, and performed a discectomy. He received an award for 16% occupational disability, while his employer was underwritten by Crawford and Company. Ratliff returned to work.

In 1995, Ratliff slipped on some ice during the course of his duties. Dr. Tutt performed another discectomy. Ratliff filed and received 5% occupational disability for a total of 21%, while his employer was underwritten by Travelers' Insurance Company. He returned to work.

In 1998, Ratliff experienced pain after moving chips on the job. Dr. Tutt brought in Dr. Lockstadt and performed a discectomy followed by a fusion operation. Ratliff did not return to work after this operation and filed for disability.

The ALJ conducted his hearings and found Ratliff to have total occupational disability of which 21% was prior, active. The ALJ also found the proximate cause of this present condition to be the injury incurred at work in 1998. Based on the findings, the ALJ did not increase the percentage disability allotted to the previous underwriters, and assigned the appellant 79% of Ratliff's disability.

I. Proximate Cause

Regarding proximate cause, the employer asserts that either there was not substantial evidence to support the ALJ's finding that the injury of 1998 was the proximate cause of Ratliff's new condition, or that the ALJ, the Board and the Court of Appeals misinterpreted "proximate cause" as used in KRS 342.011(1).

If the decision of the ALJ is supported by any substantial evidence of probative value, it may not be reversed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986); Newberg v. Armour Food Co., Ky., 834 S.W.2d 172 (1992); Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925 (2002). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971). Further review intends to correct the Board only where the Board has overlooked or misconstrued statutes or precedent, or committed an error in assessing the evidence as to create gross injustice. Western Baptist Hosp. V. Kelly, Ky., 827 S.W.2d 685 (1992); Phoenix Manufacturing Co. v. Johnson, Ky., 69 S.W.3d 64, 67 (2001).

The ALJ had relied on Dr. Primm, a consulting physician, who assigned 50% of Ratliff's impairment to the arousal of pre-existing degenerative conditions by the injury of 1998. The ALJ considered this assignment indicative of proximate causation. Further, the ALJ gave weight to the fact that this injury in 1998 caused Ratliff not to go to work, in contrast to the previous two. The ALJ found this fact indicative of proximate causation as well. The Board affirmed the ALJ's decision, also giving weight to the same evidence. The Court of Appeals found that the ALJ and the Board relied on credible sources of substantial evidence, and we agree.

II.

The second of the contentions, that the previous bodies of review have misinterpreted the meaning of "proximate cause" in KRS 342.011(1) is highly unpersuasive. In fact, the employer cites authority that to the normal reader

undermines its contention that the previous injuries and condition of claimant are the proximate cause of the injury.

"[W]here no danger exists in a condition that merely makes it possible for an injury to happen through some independent, unrelated and efficient cause, the existing condition cannot later be held to be the proximate cause of the injury." Collins Co. v. Rowe, Ky., 428 S.W.2d 194, 199 (1968). With regard to the requirements of the 1996 Act, we have determined that when a work related trauma causes a dormant degenerative condition to become disabling, the trauma is the proximate cause of the harmful change. McNutt Construction/First General Services v. Scott, Ky., 40 S.W. 3d 354 (2001).

However, relating to Collins Co. v. Rowe, the employer argues that the word "work" could be interchanged for "condition" in the previous rule, while his previous injuries and 21% permanent condition of disability are an "independent, unrelated and efficient cause" upon the "condition" of work. The employer's contention is without merit. Dr. Primm testified that Ratliff had a pre-existing degenerative condition and that the injury in 1998 was the cause of its arousal, leading to Ratliff's total incapacity. This injury of 1998 was the first to cause Ratliff not to return to work. The injury of 1998 was a trauma and proximate cause of Ratliff's present condition.

III. Substantial Evidence

On the issue of total occupational disability, the employer contends there was not substantial evidence to support the ALJ's finding. The employer asserts that only the claimant's own testimony supports the theory that he is now totally disabled. The employer also seems to assert that Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968)

has been completely overruled by the new 342.011(11)(c). This Court has stated the contrary three times in the past three years.

Some of the principles of Osborne v. Johnson remain viable when determining whether a worker's occupational disability is partial or total. Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48 (2000); McNutt Construction/First General Services v. Scott, Ky., 40 S.W. 3d 854, 860 (2001); Transportation Cabinet v. Poe, Ky., 69 S.W.3d 60, 63 (2002). A worker's testimony is competent evidence of the extent of disability and of his ability to perform various activities both before and after being injured. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979). Though consideration of medical evidence is necessary to establish injury, the ALJ is not compelled to rely upon the vocational opinions of either the medical experts or the vocational experts when determining extent of injury. Eaxton Axle Corp. v. Nally, Ky., 688 S.W.2d 334, 337 (1985). Under the 1996 Act, the ALJ may consider factors such as intellectual and vocational status when determining total or partial disability. Ira A. Watson Dept. Store v. Hamilton, supra.

The ALJ relied upon the testimony of the claimant, Ratliff, as to his capabilities for work. The ALJ noted his prior actions supported his credibility. The ALJ considered the testimony of the doctors as to medical impairment. Combined with Ratliff's age, education, and past work experience, the ALJ determined Ratliff to have a permanent total disability. The ALJ relied on substantial and credible evidence in concluding that Ratliff had a total permanent disability.

The opinion of the Court of Appeals is affirmed.

All concur.

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