

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: December 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0034-WC

DATE 1-8-04 ELLA GRAY, D.C.

HOMES OF THE INNOCENTS, INC.

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1168-WC
WORKERS' COMPENSATION BOARD NO. 01-0473

WILLIAM D. BEAUCHAMP, SR.; HON. DONALD
G. SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In a decision that was later affirmed by the Workers' Compensation Board (Board) and the Court of Appeals, the claimant was awarded permanent partial disability benefits. Appealing, the employer maintains that the claimant failed to show that the organic brain injury he alleged was an injury as defined by KRS 342.0011(1). We affirm.

The claimant alleged that on July 28, 1999, he sustained an organic brain injury from exposure to unknown toxic substances while helping remove about 400 paint cans that had been dumped on his employer's property. The claimant testified that the temperature was 100 degrees or more and that at about 3:00, p.m., he began to experience dizziness, nausea, vomiting, and visual problems. After reporting the symptoms to his supervisor, he was sent home. The incident occurred on a

Wednesday. His symptoms had not resolved by the following Monday, so he sought treatment from Dr. Zoeller. Eventually, the claimant began to experience severe migraine headaches and chronic fatigue in addition to the other symptoms. In an attempt to diagnose the problem, Dr. Zoeller referred him to Dr. Balcombe, an ear, nose, and throat specialist; Dr. Garcia, a neurologist; Dr. Corwin, a neurologist; and Dr. Iyer, a specialist in sleep disorders. Dr. Corwin also referred him to Dr. Edelson, a neuropsychologist. Based upon sleep studies, Dr. Iyer diagnosed periodic leg movement syndrome and also diagnosed obstructive sleep apnea, for which he recommended that the claimant lose weight. Medical records indicated that MRI, CT scan, EEG, and a thyroid profile and various other blood studies all were normal.

At the time his claim was heard, the claimant stated that he continued to experience migraine headaches; sensitivity to light; dizziness; a tremor; memory problems; fatigue; and diminished sensations of taste, hearing, and touch. He also experienced psychological problems from attempting to cope with his symptoms. He had not worked since July 28, 1999, and continued to be under medical care and to take various prescription medications.

Dr. Corwin examined the claimant on May 15, 2000, on referral from Dr. Zoeller. He reported his findings and was deposed on cross-examination by the employer. Dr. Corwin's initial assessment was possible vascular headache secondary to chemical exposure; a question of dizziness and cognitive change due to chemical exposure; and a history of sleep apnea with possible narcolepsy. A standard neurologic examination and EEG study that he conducted revealed no neurologic deficit. Dr. Corwin testified that he thought the claimant's symptoms of daytime sleepiness and headaches were secondary to the sleep apnea, and he indicated that the finding of mild hypoxia during

sleep could explain the cognitive symptoms. He stated that from a neurological standpoint, there was no objective evidence of organic brain damage and no reason why the claimant could not return to work. He indicated that the only correlation between the objective findings and the claimant's symptoms was with respect to the sleep apnea, but he did not think that the July, 1999, incident was the cause of the condition.

Dr. Corwin testified that when neurological testing failed to reveal the cause of the claimant's symptoms, he referred the claimant to Dr. Edelson for a neuropsychological consultation. At the time, there was no indication that there would be a workers' compensation claim. He indicated that he found Dr. Edelson's reports to be reliable and that the referral was part of his attempt to make a diagnosis. Dr. Corwin testified that a typical neurological exam is too crude to detect deficits such as mild memory problems. He explained that the more specialized neuropsychological testing involves 20-30 tests that assess areas of the brain involved with memory, speech, and thinking. For example, memory has many aspects, some of which are visual memory, memory for what is heard, memory for what is read, short-term and long-term memory, and memory for constructing things. Memory is affected by nonorganic illness (such as depression or anxiety) and also by organic brain damage (from diseases such as Alzheimer's, drug use, alcoholism, stroke, and head trauma), but each condition causes a different pattern of cognitive deficits. Dr. Corwin explained that neuropsychological testing reveals a pattern of deficits and enables a diagnosis of the cause.

Dr. Corwin noted that neuropsychological testing revealed particular deficits in the claimant's cognitive functioning that led to the diagnosis of an organic brain injury. He explained that just as neurologists view tests of walking, balance, and reflexes as

objective testing, neuropsychologists view the testing they perform as being objective even though it requires responses from the patient. He explained that backup measures to detect factors such as malingering and degree of effort are included in the neuropsychological battery.

Dr. Edelson testified that he holds a PhD in neuropsychology and is board-certified in that field. He explained that clinical neuropsychologists work with patients who have documented or suspected brain damage and attempt to diagnose the problem and determine its cause. Like Dr. Corwin, he explained that neuropsychological testing is standardized and measures the validity of the subject's responses. He indicated that he was asked to perform a routine neuropsychological evaluation of the claimant rather than a forensic evaluation and, therefore, did not have all of the claimant's medical records. However, he was aware that the claimant had seen a number of physicians and was frustrated by the lack of a definitive diagnosis. After conducting an interview and extensive neuropsychological testing over a three-day period, he determined that the cognitive deficits the claimant exhibited were attributable to organic brain damage and to depression, both of which resulted from the work-related chemical exposure on July 28, 1999. He assigned a 10% mental status impairment and a 25% behavioral impairment, which combined to yield a 29% AMA impairment. In his opinion, any prior problems with depression were a dormant condition that was aroused into disability by the work injury.

Dr. Harston, a rehabilitation specialist, performed an independent medical evaluation on December 21, 2000, on the claimant's behalf. She reviewed various medical records and performed a mini mental status exam which she interpreted as revealing a mild cognitive impairment. She assigned a 14% impairment to a

disturbance of mental status and integrated functioning and a 10% emotional and behavioral impairment secondary to depression and anxiety, both of which she attributed to the chemical exposure at work. Combined, they yielded a 23% impairment.

Dr. Shraberg, a board-certified psychiatrist, evaluated the claimant on July 31, 2001, and testified on the employer's behalf. The neurologic exam he performed was normal. In his opinion, the neurological, psychiatric, and psychological testing that he performed revealed no objective evidence of a neuropsychiatric impairment. In his opinion, the claimant exhibited the classic signs of heat exhaustion on July 28, 1999, and may have suffered either heat exhaustion or a very mild heat stroke.

The employer argued that although the claimant complained of various symptoms, there was no objective medical evidence of a psychological, psychiatric or stress-related change as a direct result of a physical injury. Gibbs v. Premier Scale Company/Indiana Scale Company, Ky., 50 S.W.3d 754 (2001). Diagnostic testing that the various physicians performed all was normal; whereas, Dr. Edelson was not a physician and did not have all of the claimant's medical records. The employer maintained that he relied on an inaccurate history given by the claimant and his wife and that the neuropsychological tests he performed were based upon the claimant's subjective responses. The employer asserted, therefore, that the claimant failed to introduce objective medical evidence of organic brain damage and that Dr. Edelson's conclusions concerning work-related causation were based upon a defective and incomplete medical history. Osborne v. Pepsi-Cola, Ky., 816 S.W.2d 643 (1991).

After reviewing the lay and medical evidence, the ALJ determined that the claimant's symptoms were caused by brain damage, a physical injury. The ALJ noted

that although neuropsychological testing was subjective insofar as it required responses from the claimant, it complied with KRS 342.0011(1). Relying upon Dr. Edelson, the ALJ determined that the claimant's symptoms were due to a toxic exposure at work on July 28, 1999. Noting that the claimant kept the employer informed throughout his treatment and notified the employer when he learned that his symptoms were work-related, the ALJ determined that he complied with the notice requirement. Convinced that the claimant could not return to his prior work but that he was not totally disabled, the ALJ determined that his impairment rating was 29% and calculated his income benefit under KRS 342.730(1)(b) and (1)(c)1. Finally, the ALJ determined that the employer did not commit an intentional safety violation and refused to award a penalty under KRS 342.165.

The employer is correct in noting that the term "injury" now refers to a traumatic event rather than to the harm that results. Nonetheless, there was substantial evidence that the claimant's symptoms resulted from a physical injury as defined by KRS 342.0011(1). For the purposes of KRS 342.0011(1), a physical injury involves some sort of work-related physical trauma, influence, or cause that affects the body and causes a harmful change to it. See, Ryan's Family Steakhouse v. Thomasson, Ky., 82 S.W.3d 889 (2002); Lexington-Fayette Urban County Government v. West, Ky., 52 S.W.3d 564 (2001). Contrary to the employer's assertion, we are persuaded that exposure to or inhalation of a noxious substance is a physically traumatic event. See, Great Atlantic & Pacific Tea Co. v. Sexton, 242 Ky. 266, 46 S.W.2d 87, 89 (1932). Furthermore, if such an event causes a harmful change in the human organism as evidenced by objective medical findings, an injury has occurred. KRS 342.0011(1) and

(33); Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 512 (2001); and Gibbs v. Premier Scale Co., supra.

KRS 342.0011(33) defines objective medical findings as being "information gained through direct observation and testing of the patient applying objective or standardized methods." Although CT, MRI, EEG, and similar tests were incapable of detecting harmful changes in the claimant's brain, the ALJ was convinced by the neuropsychological test results, which indicated that such changes did exist. Dr. Corwin clearly testified that neuropsychological testing can detect brain damage that a neurological evaluation cannot, and he explained that this was the reason he referred the claimant to Dr. Edelson. Contrary to the employer's assertion, KRS 342.0011(33) permits a harmful change to be documented by testing that requires a subjective response by the patient so long as standardized methods are used. An example of such testing is spirometry, which measures respiratory impairment. Because spirometric test results are affected by the degree of the patient's cooperation, standardized methods are used to help assure that test results accurately reflect the individual's impairment. See KRS 342.316(3)(b)2; Newberg v. Wright, Ky., 824 S.W.2d 843, 845 (1992). Both Dr. Corwin and Dr. Edelson described the standardized methods that are employed to ensure that a battery of neuropsychological testing yields results that are valid and reliable.

Having considered the evidence and the arguments of the parties, we are persuaded that there was substantial evidence that on July 28, 1999, the claimant experienced a physically traumatic event when exposed to noxious substances; that the exposure caused harmful changes to his brain that produced both cognitive and emotional symptoms; and that the existence of the changes was documented by

information gained from direct observation and testing using objective or standardized methods. The employer has failed to demonstrate that the decision was erroneous as a matter of law.

The decision of the Court of Appeals is affirmed.

All concur.

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