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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

2003-SC-0167-WC

FINAL

DATE 1-8-04 Paula Yeast CDC

MATTHEW BOYERS

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1724-WC
WORKERS' COMPENSATION BOARD NO. 99-65969

CITY OF FORT THOMAS; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

The claimant sustained a work-related fracture of his right arm and moved to reopen his award after re-fracturing the arm in a fall at home. Based upon a finding that the work-related accident was the proximate cause of the claimant's present condition, an Administrative Law Judge (ALJ) increased his award. The Workers' Compensation Board (Board) affirmed, but the Court of Appeals determined that because the second fracture did not occur within the course of the claimant's employment, it was immaterial that the fracture would not have occurred absent the work-related injury. We reverse.

The claimant was employed as a paramedic and firefighter. On September 13, 1999, he sustained a severe fracture to his right arm while attempting to reach an individual who was trapped inside a burning residence. He was taken to the hospital where he underwent surgery. After recovering, he returned to work without restrictions

and agreed to settle his claim. On November 12, 2000, he tripped and fell while playing ball with some children in his back yard, catching his weight on his right arm and re-fracturing it. He was taken to the hospital where Dr. Grefer performed surgery. The claimant returned to work without restrictions, and on February 14, 2001, he moved to reopen his claim upon allegations of a worsening of condition and increased disability.

The claimant's treating physicians were Dr. Grefer and his partner, Dr. O'Brien. Following the work-related accident, Dr. O'Brien performed an open reduction and internal fixation for a compound fracture of the ulna and a fracture and dislocation of the right elbow. When he last saw the claimant on November 10, 1999, the fracture appeared to have healed well, and he released the claimant to return to work without restrictions. Dr. O'Brien assigned a 6% impairment.

In November, 2000, Dr. Grefer treated a fracture that was distal to the initial fracture. The surgical procedure involved removing the old hardware and re-plating and reducing the new fracture. Dr. Grefer noted that the procedure was very difficult technically because the bone was deformed. In his opinion, the 1999 fracture made the arm more susceptible to injury, and the 2000 incident would most likely not have resulted in a fracture had the claimant's ulna not previously been fractured.

When deposed, Dr. Grefer repeated that if the claimant had not previously been injured, the 2000 incident would probably not have caused any problem, indicating that the second fracture occurred at a "stress riser." He explained that a stress riser is a condition that increases a bone's susceptibility to breaking and that the claimant's fracture occurred through the end screw of the plate in his bone, an area of increased susceptibility. Absent the prior fracture and bone plating, the claimant probably would not have broken his arm when he fell at home and definitely would not have broken it in

that location. Dr. Grefer admitted, however, that the claimant did sustain a new trauma in the fall at home. In his opinion, the claimant's present impairment was 10%.

Although acknowledging that the claimant sustained a non-work-related trauma in November, 2000, the ALJ determined that the 1999 injury was the proximate cause of his present condition and increased his award. The employer then appealed, maintaining that the ALJ failed to address the requirements of KRS 342.0011(1), which defines an injury as a "work-related traumatic event . . . arising out of or in the course of employment which is the proximate cause producing a harmful change in the human organism. . . ." Although noting that the second fracture might have arisen out of the work-related injury, the employer asserted that because the second injury did not occur within the course of the employment, its effects were not compensable. Rogers v. Vermont American Corp., Ky.App., 936 S.W.2d 775 (1997).

Since its inception, the Act has required a compensable injury to arise out of and in the course of the employment. 1916 Ky. Acts, ch. 33, § 1. Although the previous version of KRS 342.0011(1) defined an injury in terms of a harmful change in the human organism, since December 12, 1996, KRS 342.0011(1) has defined an injury as a traumatic event that arises out of and in the course of the employment and proximately causes such a change. Lexington-Fayette Urban County Government v. West, Ky., 52 S.W.3d 564 (2001). It is undisputed that, in September, 1999, the claimant sustained a traumatic event that arose out of and in the course of his employment. What is at issue is whether that particular traumatic event was the proximate cause of the harmful changes that occurred in November, 2000.

The longstanding rule in Kentucky has been that a worker may be compensated for all of the harmful changes that flow from a work-related injury and that are not

attributable to an independent, intervening cause. See Beech Creek Coal Co. v. Cox, Ky., 237 S.W.2d 56 (1951); Elizabethtown Sportswear v. Stice, Ky.App., 720 S.W.2d 732 (1986). Thus, where a work-related back injury caused a degenerative condition that resulted in an injury to the adjacent level of the spine, the injury to the adjacent level was compensable even though it did not occur at work. Addington Resources, Inc. v. Perkins, Ky.App., 947 S.W.2d 421 (1997). But absent a previous work-related injury, such as occurred in Haycraft v. Corhart Refractories Co., Ky., 544 S.W.2d 222 (1976), work-related wear and tear that is aroused into disability by a non-work-related incident is not compensable. Rogers v. Vermont American Corp., supra.

Based upon Dr. Grefer's testimony, the ALJ determined that although the fall in the claimant's yard was a traumatic event, the harmful changes that occurred in his arm were proximately caused by the previous, work-related injury and, therefore, were compensable. There was no evidence that Dr. O'Brien instructed the claimant to refrain from any particular type of physical activity after the September, 1999, injury, and it is undisputed that he returned to work as a firefighter and paramedic without restrictions. Dr. Grefer testified that the subsequent fall probably would not have caused the claimant to break his arm had the bone not previously been weakened by the work-related injury, and he explained the basis for his conclusion. There was no medical evidence to the contrary.

KRS 342.285 gives the ALJ the sole authority to judge the credibility of witnesses and to weigh the evidence. Where a finding favors the party with the burden of proof, it may not be reversed on appeal unless the evidence to the contrary is so overwhelming that the finding must be viewed as being unreasonable. See Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). That is not the case here.

The decision of the Court of Appeals is hereby reversed, and the award is reinstated.

Lambert, C.J., and Graves, Johnstone, Keller, Stumbo and Wintersheimer, JJ. concur. Cooper, J., dissents by separate opinion.

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DISSENTING OPINION BY JUSTICE COOPER

On September 13, 1999, Appellant fractured his right arm in a work-related accident. The fracture was surgically repaired, and he returned to work two months later without restrictions. He filed a workers' compensation claim that was settled based upon a six percent (6%) permanent partial disability. On November 12, 2000, he fractured the same arm in a different place ("distal to the previous fracture") while playing football at his home. This second non-work-related injury caused his permanent partial disability to increase to ten percent (10%). The majority of this Court now holds that the increase in disability caused by the football injury is also compensable.

KRS 342.0011(1) defines a compensable injury as follows:

> any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of **AND** in the course of employment which

> is the proximate cause producing a harmful change in the human organism. . . . .

(Emphasis added.)

In Rogers v. Vermont American Corp., Ky. App., 936 S.W.2d 775 (1997), the claimant had worked for eighteen years doing hard manual labor involving extensive use of his arms. He subsequently tore the tendon and muscle of his right biceps while loading pallets on a pickup truck at his home. The ALJ found that the work-related stress had so weakened the claimant's biceps that the lifting accident at home was "the straw that broke the camel's back" and awarded benefits. The Board and the Court of Appeals disagreed. "Any change in the law that would allow compensation for an underlying condition caused by work which is brought into disabling reality by a non-work-related incident is within the purview of the Legislature." Id. at 777-78.

The majority opinion's reliance on Beech Creek Coal Co. v. Cox, Ky., 237 S.W.2d 56 (1951), Elizabethtown Sportswear v. Stice, Ky. App., 720 S.W.2d 732 (1986), and Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421 (1997), is misplaced. In Cox, the worker reinjured a work-related compound fracture of his leg at home while following medical advice to exercise the leg by walking. Cox, supra, at 56. The second injury required surgery which resulted in his death. Id. Unlike the case sub judice, it was the following of medical advice with respect to the previous injury that caused the claimant to fall and reinjure his leg. In Stice, the worker died as a result of an allergic reaction to dye inserted in her spinal cord during a myelogram performed to diagnose her work-related injury. It is well settled that aggravation of a work-related injury by medical treatment is compensable. See generally Stice, supra, at 734. Perkins involved the question of whether the employer was required to pay medical expenses incurred after a non-work-related injury aggravated a prior work-related injury. In that

case, the Court of Appeals was construing the language of KRS 342.020, not KRS 342.0011(1).

As in Rogers, supra, Appellant's prior work-related injury did not cause him to fall and reinjure himself while playing football. It only caused the consequences of the football injury to be more severe. While it is arguable that the increased severity of the football injury arose out of the employment, KRS 342.0011(1) requires that a compensable injury also occur "in the course of employment." Manifestly, Appellant's football injury did not occur in the course of his employment.

Accordingly, I dissent.