IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

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RENDERED: March 18, 2004
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Supreme Court of Kentucky

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2003-SC-0081-WC

RONALD DALE BURDEN — APPELLANT

APPEAL FROM COURT OF APPEALS
V. 2002-CA-1521-WC
WORKERS' COMPENSATION BOARD NO. 99-99879

MALONE FREIGHT LINES, INC.; HON. ROGER D. RIGGS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND 2003-SC-0086-WC

MALONE FREIGHT LINES, INC. — APPELLANT

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RONALD DALE BURDEN; HON. ROGER D. RIGGS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Administrative Law Judge (ALJ) refused to exclude a portion of the claimant's impairment when calculating his partial disability award, a decision that was affirmed by the Workers' Compensation Board (Board) and the Court of Appeals. Having determined, however, that the ALJ failed to state a sufficient rationale for

choosing the date on which temporary total disability (TTD) ended, the Court vacated the TTD award and remanded the matter for further consideration. Appealing, the claimant maintains that the duration of the TTD award was supported by substantial evidence and, therefore, that the Court should not have vacated it. The employer continues to maintain that a portion of the claimant's impairment was active before the injury and should have been excluded when calculating his benefit. We affirm.

The claimant was born in 1970, was a high school graduate, and completed a year and a half at Owensboro Community College. He was employed as a truck dispatcher. He alleged that on November 9, 1998, he went to the restroom and noticed a sign indicating that the floor was wet. When exiting the room, he slipped and fell, struck a bench, and landed on the floor. He testified that he felt a sharp burning pain in his low back, pain and pressure down his right hip and leg, and tingling and numbness in his right foot. There were no witnesses to the incident.

Taken by ambulance to the emergency room, the claimant was treated and advised to see his family physician, Dr. Wilhite, who then referred him to Dr. Oexmann, a neurosurgeon. After about a month and a half of physical therapy yielded no improvement, Dr. Oexmann prescribed pain medication and bed rest. Although Dr. Oexmann permitted the claimant to return to work at his request, the defendant-employer would not allow him to return; therefore, he took a dispatching job with another company in March, 1999. When his pain prevented him from being able to sit long enough to work more than 36 hours over a three-week period, he stopped working altogether. He was then referred to Dr. Tibbs who performed a spinal fusion on October 13, 1999. The claimant testified that Dr. Tibbs had not released him to return to work.

With respect to previous back problems, the claimant testified that a back strain in 1994 caused him to miss a few days of work. He also testified that on November 1, 1998, he sprained his back while unloading firewood at home, causing him to miss a day of work. Shannon Feldpausch, who was also dispatcher for the defendant-employer, testified that the claimant limped after the incident, used a heating pad for his back, and walked with a cane. She testified that a dispatcher was required to answer phones, to provide drivers with loading and unloading information, and to give directions but not to do any lifting. The claimant maintained, however, that the November 9, 1998, incident caused symptoms that were much more severe than the November 1 incident, including a hot burning sensation in his back and numbness, tingling, and a loss of strength in his right leg. He asserted that although he was able to return to work after the November 1 incident, the November 9 incident prevented him from working at all.

Hospital records indicated that the claimant was treated twice for back pain before November 9, 1998. He was treated in October, 1994, for a work-related slip and fall injury, at which time he complained of low back pain and tingling in his right leg. X-rays that were taken at the time revealed Grade I spondylolisthesis at L4-5, mild degenerative changes, and minimal dextroscoliosis. He was taken off work for three days and advised to see his family physician. On November 2, 1998, the claimant sought treatment for back pain after lifting firewood at home on the previous day. He complained of pressure in his hip as well as tingling in his right foot and was diagnosed with a low back strain.

Dr. Oexmann saw the claimant on November 30, 1998, on referral from Dr. Wilhite, and treated him until May, 1999. He received a history of both the November 1

and November 9, 1998, incidents. In his opinion, the claimant had a developmental back condition that was exacerbated by both incidents.

Dr. Tibbs testified both by report and by deposition. He began treating the claimant on June 9, 1999, at which time he was given a history that included the November 9, 1998, incident. Although he also received a history of the incident while lifting firewood, his notes did not indicate that it occurred on November 1, 1998. Comparing earlier x-rays with those taken shortly after the work-related incident, he noted that spondylolisthesis was present as early as 1994 and persisted in 1998. A July, 1999, MRI revealed Grade I spondylolisthesis at L5-S1, with bilateral foraminal stenosis encroaching on the L5 nerve root, leading Dr. Tibbs to conclude that the claimant was a surgical candidate. The claimant continued to complain of back and right hip pain that radiated to the knee in September, 1999, and was eager to proceed with surgery. Therefore, on October 12, 1999, Dr. Tibbs performed a laminectomy at L4-5 and a fusion and diskectomy at L5-S1.

After reviewing the emergency room records from November 2, 1998, and noting that the claimant returned to work without restrictions after the firewood-lifting incident, Dr. Tibbs concluded that the effects of the incident were properly diagnosed as a back sprain. In his opinion, it was the November 9, 1998, fall at work that caused the severe back and leg pain that necessitated the surgery. His November 14, 2000, letter did not state that the claimant had reached MMI or specify any permanent work restrictions, but it did indicate that the claimant's AMA impairment was 25%, referring to Chapter 4 page 110, Table 72 from the Fourth Edition of the Guides.

When deposed on August 2, 2001, Dr. Tibbs testified that the November 1, 1998, incident caused no permanent injury. Instead, it was the November 9, 1998, fall at work

that aggravated the pre-existing spondylolisthesis and brought about the need for surgery. He stated that under either the Fourth or the Fifth Edition of the Guides, a single level segmental instability with radiculopathy warranted a 25% impairment. He attributed half of the impairment to the work-related incident, itself, and half to the incident's aggravation or arousal of the pre-existing spondylolisthesis. Although he later acknowledged that it would be reasonable to view part of the impairment from the spondylolisthesis as having been active before the work-related injury, he had no opinion concerning what portion might have been active. Asked by counsel what limitations or restrictions he would place on the claimant, Dr. Tibbs imposed a maximum lifting restriction of 30 pounds and a repetitive lifting restriction of 15-20 pounds. He also recommended that the claimant avoid prolonged sitting or standing and that he be able to change position as necessary.

Dr. Gleis, an orthopedic surgeon, also testified by report and by deposition. He found evidence of pre-existing spondylolisthesis at L4-5. He noted that the fusion was performed at L4-5 on October 12, 1999, and explained that unless there is a complication, maximum medical improvement (MMI) occurs sometime between 6 and 12 months postoperatively. Noting that Dr. Tibbs saw the claimant on October 17, 2000, and discharged him to follow up on an as-needed basis, his opinion was that the claimant reached MMI on October 17, 2000. Based upon the fusion surgery, he assigned a 10% impairment under the Fourth Edition of the Guides and a 20-23% impairment under the Fifth Edition. In his opinion, more than half of the impairment was due to the pre-existing spondylolisthesis. He noted that the complaints that led to the surgery were present after the November 1, 1998, incident and concluded, therefore, that the November 9, 1998, incident was not the precipitating event but was only

secondary. He indicated that the claimant could lift 20 pounds occasionally above knee level, but he should avoid lifting below knee level except infrequently. Maximum lifting should be limited to 31 pounds. He thought that the claimant could return to work as a dispatcher but should limit sitting to one hour at a time and alternate sitting with standing.

After reviewing the lay and medical evidence, the ALJ determined that the claimant did not fabricate the incident of November 9, 1998. Relying upon Dr. Tibbs, the ALJ determined that although the claimant experienced some episodic back pain following the November 1, 1998, incident, it was the November 9, 1998, fall at work that caused the severe problems that led to the surgery and resulted in the 25% impairment. Except for the three weeks when the claimant attempted to work, the ALJ awarded TTD benefits for the period from November 9, 1998, through August 2, 2001, the date on which Dr. Tibbs assigned permanent limitations and restrictions. Concluding from testimony by Ms. Feldpausch and Dr. Tibbs that the claimant was capable of returning to the type of work that he was performing when injured, the ALJ awarded income benefits for permanent partial disability.

In a petition for reconsideration, the employer maintained that because Dr. Tibbs testified that half of the claimant's 25% impairment was due to the injury and half to the pre-existing spondylolisthesis, the award should have been based only on a 12.5% impairment. The employer also maintained that the claimant's right to TTD benefits terminated when he reached MMI or reached a level of improvement that would allow him to return to work. Noting that an AMA impairment is not properly assigned under the Fifth Edition of the Guides until the worker reaches MMI and also noting that Dr. Tibbs assigned an AMA impairment on November 13, 2000, the employer asserted that

the period of TTD should have ended no later than that date. The petition was overruled, after which the employer appealed.

Until December 12, 1996, Chapter 342 did not define temporary total disability. Addressing the absence of a statutory definition, the court explained in W. L. Harper Construction Company v. Baker, Ky.App., 858 S.W.2d 202 (1993), that temporary benefits are appropriate until the worker's condition has stabilized and is not expected to improve with further treatment. At that time, any lingering disability may be viewed as being permanent. Noting that Kentucky did not recognize the concept of temporary partial disability, the court determined that TTD benefits are appropriate until further medical treatment will not improve the worker's condition or until the worker is able to return to some type of work.

As enacted effective December 12, 1996, KRS 342.0011(11)(a) governs the duration of a TTD award. It provides as follows:

> "Temporary total disability" means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

In Central Kentucky Steel v. Wise, Ky., 19 S.W.3d 657 (2000), the Court was called upon to interpret the statute when determining whether the duration of a worker's TTD award was proper under the evidence. The treating physician testified that the worker could return to work on July 11, 1997, with a five-pound lifting restriction. An August 8, 1997, report speculated that he would be able to return to work without restrictions in one month. The worker actually returned to work for a different employer at the end of September, 1997, and the treating physician testified that he reached MMI on October 28, 1997. Relying upon KRS 342.0011(11)(a) to challenge a TTD award that extended until September 30, 1997, the employer asserted, among other things,

that benefits should have terminated on July 11, 1997, because the worker was released to return to work, albeit with a five-pound lifting restriction. The Court determined, however, that "[i]t would not be reasonable to terminate the benefits of an employee when he was released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Id. at 659. Noting that Wise returned to work at the end of September and did not reach MMI until October 28, the Court concluded that substantial evidence supported the ALJ's refusal to terminate TTD benefits on July 11 and the decision to award them until September 30.

Appealing the decision to vacate his TTD award, the claimant maintains that the duration of the award was supported by the evidence and was consistent with KRS 342.0011(11)(a). He notes the ALJ's authority as the finder of fact and the ALJ's decision to rely upon Dr. Tibbs. Pointing to the absence of any evidence that Dr. Tibbs assigned restrictions or released him to return to any type of work until August 2, 2001, the claimant asserts that the finding was supported by substantial evidence.

As defined by KRS 342.0011(11)(a), there are two requirements for TTD: first, the worker must not have reached MMI and, second, the worker must not have reached a level of improvement that would permit a return to employment. Absent either requirement, a worker is not entitled to TTD benefits. Central Kentucky Steel v. Wise, supra, does not alter the requirement of KRS 342.0011(11)(a) that a recipient of TTD benefits must not have reached MMI. It addresses the second requirement and stands for the principle that where a worker has not reached MMI, a release to perform minimal work does not constitute "a level of improvement that would permit a return to employment" for the purposes of KRS 342.0011(11)(a). As construed in Central Kentucky Steel v. Wise, the statute takes into account the reality that even if a worker

has not reached MMI, his temporary disability can no longer be total if he is able to return to the type of work that he performed when injured or to other customary work.

Unlike the situation in Central Kentucky Steel v. Wise, supra, there was substantial evidence that the claimant reached MMI before August 2, 2001, and no substantial evidence to the contrary. Dr. Gleis testified that the claimant reached MMI on October 17, 2000. Dr. Tibbs was not asked when the claimant reached MMI and did not testify directly concerning the matter, but he did see fit to assign an AMA impairment on November 13, 2000. Although he first assigned work restrictions at the request of the claimant's counsel during his August 2, 2001, deposition, there is no indication that he would have failed to do so earlier had he been asked. We conclude, therefore, that the Court of Appeals correctly remanded the claim for additional findings concerning the duration of TTD.

The employer's appeal is based on the assertion that a portion of the claimant's 25% impairment was pre-existing and active and, therefore, must be excluded when calculating his partial disability award. In support of its argument, the employer relies on Ms. Feldpausch's testimony concerning the claimant's behavior after the firewood lifting incident, Dr. Tibbs's testimony attributing half of the impairment to the pre-existing spondylolisthesis, and Dr. Gleis's testimony attributing the need for surgery to the firewood lifting incident. Furthermore, the employer maintains that the decisions below misconstrued McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854 (2001), when determining that an exclusion was not compelled.

In McNutt Construction v. Scott, supra, a pathology report indicated the presence of some pre-existing degenerative changes in the worker's back. Although the treating physician apportioned the worker's impairment equally to the injury and the arousal of

the age-related degenerative changes, he testified that the worker had no symptoms before sustaining the work-related back injury. Seizing on the testimony, the employer asserted that impairment attributable to age-related degenerative changes must be excluded when determining the extent to which an individual's disability is compensable under the 1996 Act. KRS 342.730 (1)(a) and (e). We determined, however, that where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma has proximately caused the harmful change. Therefore, the harmful change comes within the definition of "injury."

There was medical evidence that the claimant had spondylolisthesis and degenerative changes as early as 1994, and it was undisputed that he had two prior instances of back pain, an episode following a 1994 slip and fall incident and an episode after lifting firewood on November 1, 1998. Dr. Gleis assigned an impairment rating based upon the fusion surgery. He was of the opinion that the November 1, 1998, incident was the primary cause of the claimant's problems and that the subsequent work-related incident was only secondary. Dr. Tibbs noted, however, that the claimant was able to return to work after both of the previous incidents and characterized any injury due to the November 1, 1998, incident as being only temporary. He apportioned the claimant's impairment equally to the November 9, 1998, work-related injury and to its aggravation of the pre-existing spondylolisthesis. Although he acknowledged that it would be "reasonable" to conclude that part of the claimant's impairment was active before the work-related injury, he stated that he had "no opinion about what magnitude" might have been active.

The claimant had the burden of proving every element of his claim, including the extent to which the harmful change in his back was work-related. Exercising the

prerogative of the finder of fact, the ALJ chose to rely upon Dr. Tibbs and determined that the 25% impairment resulted from the work-related fall of November 9, 1998. A finding of fact that favors the party with the burden of proof may be reversed only if it is unreasonable under the evidence. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Having reviewed the evidence, we are persuaded that it was not unreasonable for the ALJ to conclude that the previous back problems were only temporary and that it was the November 9, 1998, incident that resulted in the need for surgery and a 25% impairment. We conclude, therefore, that the ALJ was not compelled to exclude a portion of the claimant's impairment when calculating his partial disability award. See McNutt Construction v. Scott, supra.

The decision of the Court of Appeals is affirmed.

All concur.

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