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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: March 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 4-8-04 ELIA GRAWITH, D.C.

2003-SC-0204-WC

CYNTHIA NAPIER — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1558-WC
WORKERS' COMPENSATION BOARD NO. 99-60129

MIDDLESBORO APPALACHIAN
REGIONAL HOSPITAL; HON. DONALD
G. SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) has determined that the claimant failed to meet her burden of proving a permanent impairment rating under the American Medical Association's Guides to the Evaluation of Permanent Impairment (Guides) and also determined that the 2000 amendment to KRS 342.730(1)(b) did not apply to an injury that occurred in 1999. Following unsuccessful appeals to the Workers' Compensation Board and the Court of Appeals, the claimant now appeals to this Court. We affirm with respect to the first issue; therefore, the second issue is moot.

On October 22, 1999, the claimant injured her right shoulder and back while working for the defendant-employer. She complained of right shoulder pain that radiated into the upper arm with weakness and tingling in the right hand. Dr. Muffly diagnosed an impingement syndrome with weakness in the rotator cuff muscle and mild

carpal tunnel syndrome. With respect to the extent of her permanent impairment, Dr. Muffly reported that she suffered from a 10% impairment "to the whole body" but did not relate the impairment to a particular condition or specify that the rating was based upon the Guides. Dr. Wagner testified on the employer's behalf. In his opinion, the claimant was at maximum medical improvement and had a 0% impairment under the Guides.

Relying upon Dr. Muffly, the ALJ determined that the claimant sustained a work-related injury and awarded temporary total disability and medical benefits. Finding, however, that there was no indication Dr. Muffly assigned the 10% impairment under the Guides, the ALJ also determined that there was insufficient evidence to award permanent partial disability benefits under KRS 342.730(1)(b). Furthermore, the ALJ rejected the claimant's assertion that the 2000 amendments to KRS 342.730(1)(b) governed the claim.

Since December 12, 1996, KRS 342.730 has required a recipient of permanent income benefits to have an AMA impairment rating. In fact, the formula for calculating permanent partial disability awards takes into account the extent of the worker's AMA impairment. KRS 342.730(1)(b). The claimant maintains that because Dr. Muffly regularly testifies in workers' compensation claims, the ALJ should have taken judicial notice that he would have reported an impairment using the most current rating required by law. As support for the argument, the claimant notes that neither the statutes nor administrative regulations explicitly require a physician to state that an impairment rating was made under the most current edition of the Guides. She maintains that the reason they do not is that all parties, including physicians who perform IME exams, understand that any impairment rating must be stated under the most current edition of the Guides.

The burden was on the claimant to prove every element of her claim, including the extent of her AMA impairment. Contrary to her assertion, physicians who assign impairment ratings do not necessarily do so under the latest available edition of the Guides. See George Humfleet Mobile Homes v. Christman, 2003-SC-0047-WC, rendered January 22, 2004. Furthermore, because Dr. Muffly's practice with respect to assigning impairment ratings is not an adjudicative fact in this claim, it would have been inappropriate for the ALJ to take judicial notice concerning his practice even if the other requirements of KRE 201 were met. It may well be that Dr. Muffly assigned the 10% impairment under the Fifth Edition of the Guides as the claimant asserts. The fact remains, however, that his report made no reference to the Guides or even to a chapter, section, page, chart, or table from which the ALJ could have reasonably inferred that it was. Under the circumstances, his report was not substantial evidence to support a partial disability award.

The claimant's reliance on Transportation Cabinet v. Poe, Ky., 69 S.W.3d 60 (2002), is misplaced. There, the worker proved an AMA impairment due to the physical effects of the injury. At issue was whether, in light of the fact that the Guides no longer provided impairment ratings for psychological conditions, the ALJ properly considered a psychological condition that was also due to the injury when determining that the worker was totally disabled. The Court determined that because the psychological condition produced restrictions, was work-related, and was a direct result of the same traumatic event for which an AMA impairment was assigned, it was within the ALJ's discretion to consider the condition when awarding a total disability. It is apparent that the claimant has not alleged a psychological injury; therefore, Transportation Cabinet v. Poe does not apply to the present facts.

Although the 2000 amendments to KRS 342.730(1)(b) changed the method by which a partial disability award was calculated, they retained the use of an AMA impairment as the basis for calculating a partial disability award. In view of our conclusion that the claimant failed to meet her burden of proving an AMA impairment, her question concerning the retroactive application of the amendments is moot. Therefore, we will address it no further.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Johnnie Turner
Johnnie L. Turner, PSC
114 S. First Street
P.O. Box 351
Harlan, KY 40831

COUNSEL FOR APPELLEE:

Mark Edward Hammond
1500 Starks Building
455 S. Fourth Avenue
Louisville, KY 40202