

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: April 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0320-WC

DATE 5-13-04 ELLAGraw.H.D.C.

UNITED PARCEL SERVICE

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2002-CA-1439-WC
WORKERS' COMPENSATION BOARD NO. 98-64252

KENNETH L. HOWARD; HON. ROGER D. RIGGS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) calculated the claimant's award using an impairment rating that was based upon the Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (Guides). Although the decision has been affirmed by the Workers' Compensation Board (Board) and the Court of Appeals, the employer continues to maintain that the Fifth Edition of the Guides cannot be applied retroactively to an injury that occurred in 1998. The employer also asserts that the ALJ erred by failing to find a pre-existing active impairment. We affirm.

On September 28, 1998, the claimant injured his lower back. After undergoing surgery, he filed an application for benefits. It is undisputed that at the time of the injury the Fourth Edition of the Guides was the latest edition available. On March 1, 2001, the Commissioner of the Department of Workers' Claims certified that the Fifth Edition was generally available.

Several physicians testified concerning the extent of the claimant's impairment. Testimony from Dr. Bryson, his family physician, indicated that his impairment was 65-75%. Dr. Bryson did not explain how he arrived at the rating.

Dr. Tibbs was the treating neurosurgeon. In August, 2001, he indicated that the Fifth Edition of the Guides authorized an impairment in the range of 20-23% for DRE Lumbar Category IV and determined that the claimant's impairment was 22%. He also assigned a number of work restrictions. In his opinion, none of the impairment was due to the arousal of a pre-existing dormant non-disabling condition, and there was no pre-existing active impairment. He reported some evidence that natural aging contributed to the claimant's condition, but he also stated that the nature of the claimant's work aggravated or accelerated the effects of the natural aging process.

Dr. Ballard examined the claimant on the employer's behalf in June, 1999, which was before the surgery. She examined him again in August, 2001. Her 1999 report indicates that in addition to the 1998 injury the claimant gave a history of three previous episodes of work-related back pain, the first of which occurred in 1987. He also reported that he underwent monthly chiropractic treatment and took Vicodin for back pain before the 1998 injury. In 1999, Dr. Ballard assigned a 10% impairment under the Fourth Edition of the Guides, attributing half to the injury and half to "pre-existing conditions and the natural aging process." In 2001, she assigned a 25% impairment under the Fifth Edition, indicating that the increase was due to the fusion surgery. She attributed half of the impairment to the injury and half to the natural aging process.

Dr. Ensalada reviewed the medical records but did not examine the claimant. In an August 8, 2001, report, he assigned a 10% impairment based upon the Fourth Edition of the Guides. He took issue with Dr. Tibbs' methodology, but his rationale was

based on the Fourth Edition of the Guides. Dr. Tibbs had used the Fifth Edition. In his opinion, half of the impairment was due to the previous back sprains and strains, so he characterized it as pre-existing active impairment. He attributed the remaining half to the 1998 injury.

The employer maintained that under Maggard v. International Harvester Co., Ky., 508 S.W.2d 777 (1974), any award must be based on an impairment that was assigned under the Fourth Edition of the Guides because that was the latest edition available on the date of injury. The ALJ determined, however, that because the Fifth Edition became generally available before the close of proof time and was based upon the best medical knowledge that was available, an impairment that was assigned under the Fifth Edition must be used. Finding Dr. Tibbs' testimony to be the most persuasive, the ALJ awarded a permanent partial disability based upon the 22% impairment rating that he assigned using the Fifth Edition. Furthermore, the ALJ rejected the employer's argument that a portion of the impairment was prior, active, and non-compensable. This appeal follows decisions affirming the award.

In George Humfleet Mobile Homes v. Christman, Ky., ___ S.W.3d ___ (2004), we construed the phrase "latest edition available" as referring to the latest edition certified as being generally available as of the date that proof time closes. We explained that the methods used in the latest edition were likely to be the most accurate and, therefore, could be used without regard to the date of injury. See Stovall v. Great Flame Coal Co., Ky.App., 684 S.W.2d 3 (1984). Furthermore, the impairment from which a permanent partial disability benefit was calculated must be based on those methods.

In the present claim, the Fifth Edition of the Guides was certified as being generally available before proof time closed. The ALJ relied on Dr. Tibbs, who assigned

a 22% impairment using the Fifth Edition. Although Dr. Ensalada took issue with the impairment that Dr. Tibbs assigned, we are not persuaded that the ALJ was compelled to rely upon his testimony. First, his criticism was based upon the methods used in Fourth Edition of the Guides, while Dr. Tibbs' testimony was based on the Fifth Edition. Furthermore, Dr. Tibbs treated the claimant and examined him many times; whereas, Dr. Ensalada reviewed the medical records but did not examine him.

Contrary to the employer's assertion, we do not view Dr. Ensalada's testimony attributing half of the claimant's impairment to the natural aging process as requiring an exclusion of half of his impairment when applying KRS 342.730(1)(b). The employer asserts that only Dr. Ensalada knew of the claimant's previous back sprains or strains, but page 2 of his report clearly indicates that he learned of them from Dr. Ballard's 1999 report. Although she attributed half of the impairment to the "previous conditions and natural aging process" in 1999, her 2001 report attributed half of the impairment to the natural aging process alone. Although Dr. Tibbs' report did not mention previous incidents of back pain, he was not asked to testify if he was informed of such incidents. He did acknowledge the presence of pre-existing changes that may have been due to the natural aging process but indicated that, in his opinion, the claimant's work accelerated or aggravated those changes. Under the circumstances, they were compensable. McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854 (2001).

The decision of the Court of Appeals is affirmed.

All concur.

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