IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

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RENDERED: May 20, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0218-WC DATE 6-10-04 ELIA GROVE, D.C.

BRANSTUTTER CONCRETE CONSTRUCTION — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-0886-WC & 2002-CA-1060-WC
WORKERS' COMPENSATION BOARD NO. 00-73504

HEATH JONES; HON. RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

AND

2003-SC-0227-WC

HEATH JONES — CROSS-APPELLANT

APPEAL FROM COURT OF APPEALS
2002-CA-0886-WC
WORKERS' COMPENSATION BOARD NO. 00-73504

BRANSTUTTER CONCRETE CONSTRUCTION;
HON. RONALD W MAY, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) awarded a partial disability for the claimant's work-related lower back injury, basing the award on a DRE-model impairment. This appeal and cross-appeal are taken from a decision of the Court of Appeals to reverse the Workers' Compensation Board (Board), in part, and remand the claim for further

analysis of whether the claimant's work-related disability was total. The Court affirmed the Board's decision to vacate the award and remand the claim for further findings concerning whether an impairment calculated under the Range of Motion Model should have been used. Furthermore, the Court reaffirmed decisions to permit the employer to amend its Form 111 at the Benefit Review Conference; to permit the employer to introduce a medical report out of proof time; and to permit the employer to introduce certain photographs at the hearing. We affirm.

The claimant was born in 1967. Although he quit school in the ninth grade, he later received a GED and two years of vocational training in mechanics. He had work experience as a tire changer and mechanic, restaurant maintenance worker, and laborer for a moving and storage company. In 1987, he underwent two surgeries for a herniated disc at L5-S1 following a non-work-related automobile accident. As a result, he was off work until the end of October, 1989.

In April, 2000, the claimant began working for the defendant-employer, pouring and finishing concrete. He alleged that he injured his back on Friday, June 20, 2000, while unhooking a trailer from a company truck. He testified that as he lifted the trailer off the hitch, he experienced sharp pain in his low back. Although he returned to work on the following Monday, he continued to experience low back pain that radiated into his leg. On June 26, 2000, the pain became intense and began to radiate into both legs while he was raking gravel. He stated that he sought medical attention from Dr. Reilly at Wellington Orthopaedic & Sports Medicine on the following day and was treated later by Dr. Portugal. He maintained that he was physically incapable of working after the incidents.

The claimant filed an application for benefits on May 7, 2001. On May 25, 2001, the Commissioner of the Department of Workers' Claims (Department) assigned the claim to an ALJ; directed the defendant to file a notice of claim denial or acceptance (Form 111) within 45 days; scheduled the Benefit Review Conference for September 11, 2001; and set forth the schedule for taking proof. On June 21, 2001, Wesley G. Gatlin entered an appearance as counsel for the employer and Gallagher Bassett Services, its insurance carrier.

On July 5, 2001, the employer filed a Form 111, admitting that the claimant's injury was covered by the Act; that it occurred or became disabling on June 20, 2000; and that the claimant gave timely notice. The employer stated, however, that there was a dispute over the amount of compensation owed. It asserted that the claimant had a prior, active disability and that the present injury was only a temporary exacerbation of his previous non-work-related back problems.

Dr. Portugal had treated the claimant before June 20, 2000, for non-work-related chronic knee pain. On June 27, 2000, the claimant returned for a follow-up visit and reported severe lower back pain that radiated into his legs. He gave a history of the previous back surgeries and indicated that he had done "relatively well" until he injured himself on June 20 while lifting a trailer hitch. X-rays revealed disc space narrowing and vertebral body spurring at L5-S1, leading Dr. Portugal to diagnose a recurrent lumbosacral sprain/strain, degenerative disc disease, and possible radiculopathy. Concerned that there were symptoms of nerve root compression on the left, Dr. Portugal took the claimant off work, ordered an MRI, and prescribed medication. The June 29, 2000, MRI revealed bi-level disc degeneration and non-compressive disc protrusions at L4-5 and L5-S1 without definite nerve root encroachment. When he last

saw the claimant on September 18, 2000, his opinion was that the claimant should be "out of work until further notice."

In a Form 107 report, dated January 2, 2001, Dr. Portugal diagnosed left leg radicular pain, discogenic pain at L5-S1, and lumbar disc disease. In his opinion, the diagnoses were consistent with the described June 20, 2000, injury. Dr. Portugal stated that the claimant had not yet reached maximum medical improvement (MMI) but that based on his history, there was no active impairment until the June 20, 2000, incident. In his opinion, the claimant did not retain the physical capacity to return to the type of work that he performed when he was injured.

Dr. Owen evaluated the claimant on June 6, 2001, and prepared a Form 107 report. The claimant did not file the report into evidence, but he deposed Dr. Owen on June 19, 2001. The transcript indicates that before questioning Dr. Owen, counsel stated for the record that on May 31 he had "filed a notice to take deposition" and notified Gallagher Bassett. Yet, he had heard nothing from the carrier's attorney and did not know who was representing the carrier. Counsel also indicated that prior medical records had been submitted to Gallagher Bassett and that they would have received notice of the application for benefits. Having heard nothing from an attorney for the defense, counsel proceeded with the deposition.

Dr. Owen testified that he received an appropriate history that included the 1987 accident and surgeries. Using the Range of Motion Model in the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment (Guides), Dr. Owen assigned a 21% impairment. He attributed half of the impairment to the work-related injury and half to the 1987 accident and surgeries. Dr. Owen specified the tables and pages to which he referred when assigning the impairment. He testified that pages 379-80 of the Fifth

Edition require the use of the Range of Motion Model, rather than the DRE Model, where there is multi-level involvement or where there are prior surgeries or recurrent injuries. After explaining various differences in the two methods, he testified that if forced to use the DRE Model, he would have assigned a 14% impairment. He testified that, in any event, the claimant no longer retained the physical capacity to return to his previous work. Furthermore, he should avoid lifting, handling, or carrying objects that weigh more than ten pounds; should avoid bending or stooping; and should not walk, run, stand, or sit for more than one-half hour at a time.

Dr. Kelly began treating the claimant on June 21, 2001, on referral from Dr. Portugal. He ordered an MRI, which revealed evidence of a moderate central disc herniation at L4-5 that caused moderate central canal stenosis. In his opinion, the use of a dorsal column stimulator would help to reduce the intensity of the claimant's chronic pain. He agreed with the restrictions that Dr. Owen recommended and thought that the claimant was no longer capable of gainful employment due to chronic back pain. Dr. Kelly did not calculate an AMA impairment. Nonetheless, he agreed with Dr. Owen that the Fifth Edition of the Guides mandated use of the Range of Motion Model when assessing impairment in a case such as the claimant's. He admitted, however, that the Range of Motion Model is somewhat subjective and, in many instances, prone to either voluntary or involuntary manipulation by the patient.

Dr. Sheridan evaluated the claimant on November 30, 2000. He diagnosed a low back strain due to the June 20, 2000, accident but concluded that it had resolved. He assigned a 0% impairment, using the DRE Model and the Fourth Edition of the Guides. Furthermore, he thought that the claimant magnified his symptoms and explained the

basis for that conclusion. In his opinion, the claimant could return to work without restrictions.

Dr. Larkin evaluated the claimant on August 29, 2001. He diagnosed low back pain without evidence of a true discogenic or radicular component and also diagnosed a chronic neuralgia of the right thigh that medical records indicated had been present before June 20, 2000. Based upon Table 15-3, page 384 of the "current guidelines to evaluation," Dr. Larkin placed the claimant in DRE Category II, which equated to a 5-8% impairment. He noted, however, that there was evidence of symptom magnification and that non-verifiable complaints formed the basis of the impairment.

The only record submitted from Wellington Orthopaedic & Sports Medicine was Dr. Reilly's progress note from July 5, 2000. It indicates that the claimant was diagnosed with degenerative disc disease and lumbosacral sprain/strain with possible radiculopathy, and it notes the 1987 spinal surgery. It refers to a June 29, 2000, MRI, which revealed findings consistent with the previous surgery and as well as a protrusion at L4-5. Dr. Reilly recommended that the claimant remain off work and that he return to Dr. Portugal for follow-up if he failed to respond to physical therapy.

On August 20, 2001, the employer deposed the claimant's supervisor, Tony Belew. Belew testified that to the best of his knowledge, the claimant did not lift the trailer off the hitch on June 20, 2000, as he had alleged. He also testified that the claimant did not notify him of a work-related injury that occurred on that date. Based on that evidence, the ALJ permitted the employer to amend its Form 111 at the Benefit Review Conference in order to list causation as a contested issue.

At the September 25, 2001, hearing, the ALJ ruled upon four matters that are relevant to the present appeals. First, the employer complained that it was not notified

of Dr. Owen's deposition and, therefore, was unable to cross-examine him. The employer moved for leave to introduce the Form 107 report that Dr. Owen prepared when evaluating the claimant on June 6, 2001. Although the claimant objected on the ground that proof time had expired, the motion was granted.

Second, the claimant moved for leave to introduce as rebuttal evidence Dr. Kelly's deposition, which was taken outside proof time on September 19, 2001. The motion was granted over the employer's objection.

Third, over the claimant's objection, the employer was permitted to introduce photographs that a private investigator allegedly took on September 6, 2001. Counsel for the employer asserted that he had just received them. The photographs depicted the claimant pumping gas and loading a five-gallon gas container into the back of a pickup truck. Although the investigator was not present to authenticate the photographs, the claimant acknowledged that they were of him and described the activities that he was performing when photographed.

Fourth, the claimant was permitted to introduce records from Boone County Pre-trial Services, which documented the arrest of Tony Belew. Mr. Belew was not present at the hearing.

The ALJ determined that the claimant sustained a partially disabling work-related injury while lifting a trailer hitch on June 20, 2000; that it was exacerbated by the events of June 26, 2000; and that the subsequent period of temporary total disability ran until June 6, 2001. The ALJ acknowledged the 1987 injury and surgeries but determined that the claimant retained no prior, active disability. Addressing the extent of impairment, the ALJ stated as follows:

> 21. The ALJ is not persuaded by the evidence which would support making an impairment rating on some basis other

> than the DRE Model. Although there is medical evidence that the Range of Motion Model would be the preferred method in this instance, the ALJ was not persuaded by that evidence. Dr. James Owen testified that if he were to evaluate plaintiff's impairment using the DRE Model of the 5th Edition of the AMA Guidelines that the plaintiff would have a whole body impairment of 14%. The ALJ is more persuaded by that evidence and plaintiff's disability will be computed based upon Dr. Owen's DRE rating of 14%.

Convinced that the claimant did not retain the physical capacity to return to the work that he was performing at the time of the injury, the ALJ enhanced his income benefit under KRS 342.730(1)(c)1.

In a petition for reconsideration, the claimant asserted that in light of the testimony by Drs. Owen and Larkin concerning the proper application of the Guides, the ALJ failed to state a sufficient basis for relying upon a DRE impairment. He also asserted that the ALJ failed to provide sufficient findings to determine that the evidence concerning the extent of disability was properly analyzed under McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854 (2001); Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48 (2000). Finally, he complained about the ALJ's rulings on the procedural issues. The petition was denied summarily.

Appealing the decision by the Court of Appeals, the employer asserts that the ALJ's reliance on a DRE impairment was supported by substantial evidence, that the ALJ made sufficient findings of fact to support the choice, and that a DRE impairment must be relied upon on remand. The employer also asserts that the ALJ made sufficient findings to support the conclusion that the claimant was not totally disabled and relied upon substantial evidence when concluding that the claimant's disability was only partial. In a cross-appeal, the claimant asserts that the Court of Appeals' decision must be affirmed except with regard to the rulings that permitted the employer to amend

its Form 111, to submit Dr. Owen's Form 107 outside proof time, and to introduce previously unauthenticated photographs at the hearing.

With respect to the proper method for calculating the claimant's impairment, we begin by noting that this was not a case such as Caldwell Tanks v Roark, Ky., 104 S.W.3d 753, 757 (2003), which involved only the ALJ's authority to read a table that converted a binaural hearing impairment into an AMA whole-body impairment. The proper interpretation of the AMA Guides with regard to orthopedic injuries is a complex matter that requires medical expertise. When medical experts differ concerning an injured worker's impairment rating and/or the proper application of the Guides, it is the ALJ's function to weigh the conflicting evidence and to decide which is more persuasive. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). But where a question is properly within the province of medical experts, the ALJ may not disregard uncontroverted medical evidence without offering a legally sufficient reason for doing so. See Bullock v. Gay, 296 Ky. 489, 177 S.W.2d 883 (1944); Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., Ky. App., 618 S.W.2d 184 (1981).

Drs. Sheridan and Larkin testified to impairments that were calculated using the DRE Method but offered no testimony concerning why they chose that method. In contrast, Drs. Owen and Kelly clearly testified that the Guides favored using the Range of Motion Method in the present situation, and Dr. Owen cited to specific pages from the Guides in support of his testimony. The only basis the ALJ gave for rejecting the testimony was that he was not persuaded by it. We conclude, therefore, that the ALJ appears to have applied the standard for controverted evidence and that the matter must be reconsidered and findings made under the standard that governs uncontroverted medical evidence.

In McNutt Construction/First General Services v. Scott, supra at 860, we pointed out that the 1996 version of KRS 342.0011(11) requires a weighing of the evidence concerning whether the injured worker will be able to provide services on a regular and sustained basis in a competitive economy. This involves an individualized determination of what the worker is and is not able to do after recovering from his injury, including a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how they interact. Also relevant are the likelihood that the worker would be able to find work consistently under normal employment conditions and the extent to which his physical restrictions will prevent him from using his vocational skills. Citing Osborne v. Johnson, Ky., 432 S.W.2d 800, 803 (1968), we noted that the definition of "work" contemplates that a worker need not be homebound to be totally occupationally disabled.

When considering a claim, an ALJ is not required to provide a detailed analysis of the facts and the law. Big Sandy Community Action Program v. Chaffins, Ky., 502 S.W.2d 526 (1973). But, the ALJ is required to set forth sufficient facts to support the conclusions that are reached and to permit a meaningful appellate review. Shields v. Pittsburg and Midway Coal Mining Co., Ky. App., 634 S.W.2d 440, 444 (1982). Although the recitation of the evidence referred to some of the relevant factors, the ALJ made no findings that explained the rationale for concluding that the claimant was partially rather than totally disabled. Furthermore, no findings made it clear that the correct legal standard was applied when reaching the conclusion. The claimant asserted in both his petition for reconsideration and in his appeal to the Board that the ALJ failed to conduct the individualized analysis that McNutt Construction/First General Services v. Scott, supra, prescribed. Therefore, the question on appeal is not whether

there was substantial evidence in the record to support the conclusion. It is whether the decision contained sufficient findings of fact to explain the basis for the conclusion. We agree with the Court of Appeals that the ALJ's decision did not and that the claim must be remanded for additional findings of fact.

The claimant asserts that the ALJ erred by permitting the employer to amend its Form 111 at the Benefit Review Conference in order to contest causation and timely notice. We note, however, that at the time the claim was considered, 803 KAR 25:010E, §14(2) permitted a party to be relieved of a stipulation provided that a motion for relief was made at least ten days before the hearing and as soon as practicable after the party discovered that the stipulation was erroneous. On August 20, 2001, Tony Belew testified that to the best of his knowledge the claimant did not lift the trailer off the trailer hitch on June 20, 2000, as he had alleged. He also stated that the claimant never informed him of such an injury. It was on that basis that the employer moved to amend its Form 111 at the September 11, 2001, Benefit Review Conference. The hearing was held more than ten days later, on September 25, 2001. Although it could be argued that the employer did not move to amend as soon as practicable after Belew's deposition, the ALJ decided the issues of causation and notice in the claimant's favor, rendering moot any error in permitting the amendment.

Contrary to the claimant's assertion, we find no error in the decision to admit Dr. Owen's Form 107 report outside proof time. The claimant deposed Dr. Owen before counsel for the employer entered an appearance, and no representative of the employer was present. An employer bears primary liability for a workers' compensation claim, regardless of whether it has insurance coverage; therefore, it is the employer who is the real party in interest and who is entitled to notice until such time as it designates a

representative for the service of process. American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission, Ky., 379 S.W.2d 450 (1964); Browns, Bell & Cowgill v. Soper, 287 Ky. 17, 152 S.W.2d 278 (1941); Wilcox v. Board of Education of Warren County, Ky. App., 779 S.W.2d 221 (1989). Although 803 KAR 25:010E, § 3(3) requires that parties be served with notice of depositions, it provides that notice shall not be filed with the Commissioner. Therefore, although counsel for the claimant stated at the deposition that the employer's carrier was notified, the record contains nothing to indicate whether the employer was notified. Dr. Owen was the claimant's witness, and he referred to the disputed Form 107 when testifying. Furthermore, the ALJ was authorized to control the taking and presentation of proof. Under the circumstances, the claimant has pointed to nothing that indicates the decision to admit the report was an abuse of the ALJ's discretion.

KRE 901(a) requires evidence to be identified and authenticated before it is admitted. KRS 901(b)(1) provides that the requirement may be satisfied with testimony by a witness who has knowledge of the document in question and who testifies that it is what it claims to be. See Mollette v. Kentucky Personnel Board, Ky. App., 997 S.W.2d 492, 495 (1999). Tangible evidence is admissible if the offering party's evidence reasonably identifies the item and, furthermore, the ALJ has wide discretion over the admissibility of such evidence. Grundy v. Commonwealth, Ky., 25 S.W.3d 76, 80 (2000).

At the hearing, the employer produced surveillance photographs, asserting that they had just been received from the investigator. The claimant testified that the pictures showing him walking without a cane and showing him filling and lifting cans of gas were authentic, after which they were admitted into evidence. Under the

circumstances, he has failed to show that the decision to admit the photographs was an abuse of discretion.

The decision of the Court of Appeals is affirmed.

All concur.

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