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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: June 17, 2004
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2003-SC-0504-WC DATE 7-8-04 Ella Grady D.C.

CITY OF HENDERSON FIRE DEPARTMENT APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-2238-WC
WORKERS' COMPENSATION BOARD NO. 01-69403

NATHAN E. STONE; HON. KEVIN KING, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant sustained a 10% impairment due to a work-related lower back injury. The employer asserted that uncontradicted medical evidence compelled characterizing a portion of the impairment as pre-existing active impairment and excluding it from the income benefit calculation, but the ALJ determined that the evidence was not credible and refused to do so. Having failed to convince the Workers' Compensation Board (Board) or the Court of Appeals that the ALJ engaged in an improper review of the AMA Guides to the Evaluation of Permanent Impairment (Guides) when evaluating the medical evidence, the employer now appeals to this Court. We affirm.

The claimant was employed as a firefighter. His claim alleged that on October 28, 2001, he injured his back while lifting an extremely heavy individual onto a backboard. He stated that he felt a twinge in his back at the time and that he could

barely walk the next morning. He described severe pain in his back that radiated into his left leg. Although he sought treatment the next day, he did not report the injury until after undergoing an MRI. The claimant underwent back surgery on November 13, 2001. He stated that his health insurance carrier paid his medical expenses and that he received income benefits from a personal disability policy. After recovering, he was released to return to work without restrictions.

At the hearing, Josh Farris testified that he saw the claimant on Saturday, October 27, 2001, at the Fire Prevention Show and again on Sunday morning, when relieving him at the end of his shift. At the show, the claimant was holding his five and seven-year-old daughters and appeared fine. At about 6:45 the next morning, he was pale and shook his head when asked if he was alright. Farris then took the claimant's gear from the fire truck and helped him walk to his own vehicle. He had never heard the claimant complain of back pain before the incident.

With respect to his pre-injury condition, the claimant testified that the back problems he experienced through March 20, 2001, mainly involved stiffness. He stated that he had no problems after that and that he worked out daily with the other firefighters on his shift. On cross-examination, he stated that although he did not think the twinge he felt during the lifting incident was significant at the time it occurred, he was unable to lift his gear out of the truck at the end of the shift. He did not remember telling Dr. Kern that he had been developing leg pain over the past couple of weeks but indicated that he was in the hospital and heavily medicated when he spoke to Dr. Kern. Testifying to his present condition, the claimant stated that he had an occasional twinge in his back with tenderness in his thigh.

Records from Henderson Community Hospital indicated that, on November 5, 2001, the claimant presented with severe leg pain that had become progressively worse in the preceding "couple of weeks." He was admitted to the hospital and underwent an MRI that revealed a large herniated disc at L5-S1.

Dr. Cannon evaluated the claimant on November 12, 2001. At that time, he complained of severe left leg pain that began a day after he lifted a patient onto a gurney. Dr. Cannon diagnosed a left L5-S1 disc herniation for which he recommended surgery. On November 13, 2001, he performed a microlumbar diskectomy at L5-S1. On November 20, 2001 Dr. Cannon completed a form in which he indicated that the claimant's condition was "due to sickness," with symptoms beginning on October 28, 2001. A letter dated November 27, 2001, stated that the claimant's "illness did appear to start with a lifting incident regarding a patient . . . this is documented in [the] history and physical." On December 7, 2001, he completed another form in which he indicated that the claimant's condition was due to an accident. In the area pertaining to workers' compensation, he placed a question mark. He noted on December 10, 2001, that the claimant's leg pain had improved and released him to return to work but restricted him to lifting no more than 20 pounds. On January 22, 2002, he released the claimant to return to work without restrictions.

Dr. Stewart examined the claimant on February 20, 2002, and took a history of low back pain that radiated into the left leg and that began while the claimant was lifting a patient on October 28, 2001. The claimant reported that after the surgery, his pain improved by 99%. Noting the continued presence of radicular symptoms, Dr. Stewart classified the claimant in DRE Category III and assigned a 13% impairment, using Table

15-3 of the Fifth Edition of the Guides. He agreed with Dr. Cannon concerning restrictions.

Dr. Goldman evaluated the claimant for the employer on April 22, 2002, and noted the complaints of back and left leg pain from late 2000 and early 2001. He also noted that the symptoms later resolved and that they had involved mainly low back pain rather than leg pain. Dr. Goldman indicated that if he had rated the claimant's back condition at that time, "at the very most he would have fallen into a Lumbar DRE Category II based on non-verifiable radicular complaints and would have had a 5% whole-person impairment rating." Following the comments, Dr. Goldman listed the criteria upon which the rating was based. They were as follows:

> **DRE LUMBAR CATEGORY II**
> **5% - 8% Impairment of the Whole Person**
>
> Clinical history and examination findings are compatible with a specific injury; findings may include significant muscle guarding or spasm observed at the time of the examination, asymmetric loss of range of motion, or nonverifiable radicular complaints, defined as complaints of radicular pain without objective findings; no alteration of the structural integrity and no significant radiculopathy.
>
> **or**
>
> Individual had a clinically significant radiculopathy and has an imaging study that demonstrates a herniated disk at the level and on the side that would be expected based on the previous radiculopathy, but no longer has the radiculopathy following conservative treatment.
>
> **or**
>
> Fractures: (1) less than 25% compression of one vertebral body; (2) posterior element fracture without dislocation (not developmental spondylolysis) that has healed without alteration of motion segment integrity; (3) a spinous or transverse process fracture with displacement without a vertebral body fracture, which does not disrupt the spinal canal.

Dr. Goldman determined that the claimant's present condition placed him in DRE Category III. He listed the following criteria for the category:

> **DRE LUMBAR CATEGORY III**
> **10%-13% Impairment of the Whole Person**
>
> Significant signs of radiculopathy, such as dermatomal pain and/or in a dermatomal distribution, sensory loss, loss of relevant reflex(es), loss of muscle strength or measured unilateral atrophy above or below the knee compared to measurements on the contralateral side at the same location; impairment may be verified by electrodiagnostic findings.
>
> **or**
>
> History of a herniated disk at the level and on the side that would be expected from objective clinical findings, associated with radiculopathy, or individuals who had surgery for radiculopathy but are now symptomatic.
>
> **or**
>
> Fractures: (1) 25% to 50% compression of one vertebral body; (2) posterior element fracture with displacement disrupting the spinal canal; in both cases, the fracture has healed without alteration of structural integrity.

Noting that the claimant had done very well following the surgery, Dr. Goldman stated that he felt only a 10% impairment was warranted. Based on the assumption that Dr. Bloss' physical examinations were accurate in December, 2000, and in January and February, 2001, he subtracted the 5% impairment "based on non-verifiable radicular complaints" from the 10% impairment that existed presently. He determined that the remaining 5% was due to the work-related incident. Summarizing his previous conclusions, he stated that the claimant was presently at MMI, that his overall impairment was 10%, of which half was due to the pre-existing lumbar problem and half was due to the injury. Dr. Goldman did not specify the edition of the Guides upon which the impairment ratings were based.

The employer introduced records from Minor Outpatient Medicine. They indicated that the claimant received treatment for respiratory conditions on February 5, March 21, and October 1, 2001. On December 20, 2000, he was treated for low back pain that began 5-6 days earlier. There was no mention of an injury.

Records from Dr. Bloss indicated that on December 27, 2000, the claimant complained of low back pain and paresthesia in his legs that had occurred insidiously in the previous three weeks. X-rays revealed mild thinning of the L5 disc space, and a nerve conduction study revealed an increase in left tibial and peroneal latency times. The tentative diagnosis was lumbar facet syndrome and degenerative disc disease. Based on the diagnosis, Dr. Bloss prescribed a form of treatment known as vertebral axial decompression, indicating that it was known to produce significant relief of facet syndrome. His notes indicated that among the clinical goals of the treatment were normal latency times for the tibial and peroneal nerve of the left leg. Dr. Bloss and/or his physical therapy aide saw the claimant 28 times in the period between the initial visit and March 20, 2001. Treatment notes indicate that there were intervals in which the claimant's condition improved and in which it regressed. They refer to complaints of radicular pain and/or paresthesia in his legs on only five occasions, the last of which occurred in February, 2001. Treatment continued through March 20, 2001.

The employer also introduced medical records from Dr. Moore. The ALJ characterized them as being "essentially illegible" but noted that the claimant was treated for back pain that radiated into his left hip on October 29 and 30, 2001. The October 29 note appeared to indicate that the complaints were ongoing.

Lt. Strader, the claimant's supervisor, worked the Saturday/Sunday shift on which the injury occurred. He stated the claimant appeared to be fine but that he had

mentioned that his back hurt. This occurred early in the shift, before the lifting incident. Lt. Strader stated that the claimant had complained about back pain on a regular basis before October 28, 2001. The claimant said nothing about feeling a twinge in his back at the time of the lifting incident, but he called in sick with a hurt back for his next shift, on October 30, 2001. Lt. Strader first learned of the injury from the assistant chief on November 2, 2001. When cross-examined, he testified that the claimant had missed five days of work and left work early once in the previous year. He also stated that the claimant never spoke directly with him about the injury but had informed the assistant fire chief, who helped Lt. Strader complete the accident report. On re-direct, he indicated that the investigation report listed the cause of the injury as undetermined because the claimant could not explain exactly how he had been hurt.

Causation, AMA impairment, and the extent of pre-existing disability were among the contested issues. The ALJ noted the claimant's testimony that he was essentially symptom-free before the injury but in significant pain several hours after the injury and also noted that his testimony was supported by that of Mr. Farris. Turning to the medical evidence, the ALJ noted that although the claimant was treated for back problems in the winter of 2000-2001, he had received no treatment for several months before the injury. Furthermore, the physician who had treated him at the time did not refer him for an MRI or CT scan, something the ALJ thought would have been done had his condition been as serious as it was after the injury.

Noting that the claimant was nearly pain-free at present and performing his regular duties without restrictions, the ALJ determined that the 10% impairment assigned by Dr. Goldman was more persuasive than the 13% impairment assigned by Dr. Cannon. The ALJ acknowledged the employer's argument that only Dr. Goldman

addressed the question of pre-existing impairment, and he stated that it was 5%. Likewise, the ALJ acknowledged the claimant's argument that the Guides did not provide for pre-existing impairment and that page 383 of the Guides indicated that "the impairment rating is based on the condition once MMI is reached, not on prior symptoms or signs." Finding Dr. Goldman's assignment of a 5% impairment not to be credible, the ALJ noted that a Category II impairment requires findings "compatible with a specific injury" and that there was nothing in the lay or medical evidence to indicate that there had been a previous injury. Instead, the medical records indicated that the onset of symptoms was gradual. Noting that page 379 of the Guides required use of the Range of Motion Model when an impairment is not caused by an injury, the ALJ determined that Dr. Goldman's use of the DRE Model to determine a pre-existing impairment was inappropriate. Finally, the ALJ determined that the work-related injury would have resulted in a 10% impairment, regardless of whether there had been a previous impairment, and concluded that the entire amount was compensable. See Schneider v. Putnam, Ky., 579 S.W.2d 370 (1979); International Harvester v. Poff, Ky., 331 S.W.2d 712 (1959).

As the court explained in Schneider v. Putnam, supra at 372, pre-existing disability is excluded if it contributes to the degree of disability that remains when the worker reaches MMI following a work-related injury. If the disability from an injury would have been no less had the pre-existing condition not been present, pre-existing disability is not excluded, and the entire disability is compensable. Id. In a claim for partial disability under the 1996 Act, the extent of occupational disability is based upon the worker's impairment, and the exclusion of pre-existing disability is based upon pre-existing impairment. Nonetheless, the same principles remain valid.

The claimant introduced evidence that his impairment at MMI was 13%, but the employer maintained that his impairment at MMI was only 10%, that half of the impairment must be characterized as pre-existing, and that pre-existing impairment must be deducted from the total. Therefore, the employer had the burden of proving that it was entitled to the exclusion. The extent of a worker's impairment at particular points in time and the proper interpretation of the AMA Guides are matters to be established by expert medical testimony. Kentucky River Enterprises, Inc. v. Elkins, Ky., 107 S.W.3d 206 (2003). The ALJ must then decide the legal significance of the testimony under Chapter 342.

An ALJ must generally rely upon uncontradicted medical testimony regarding a matter that requires medical expertise. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., Ky., 618 S.W.2d 184 (1981). Nonetheless, it is the ALJ's function to consider all of the relevant evidence, to determine the character, quality, and substance of a physician's statements and to draw reasonable inferences from them. Therefore, an ALJ may choose to reject even uncontradicted medical testimony if the choice is supported by a reasonable explanation. Commonwealth v. Workers' Compensation Board of Kentucky, Ky. App., 697 S.W.2d 540 (1985); Collins v. Castleton Farms, Inc., Ky. App., 560 S.W.2d 830 (1977). Given the ALJ's responsibility under KRS 342.285 to base a finding of fact upon substantial evidence, we are persuaded that an ALJ may consult the Guides when evaluating medical evidence.

Having failed to meet its burden of proving that an exclusion of pre-existing impairment was required, the employer asserts that the ALJ erred by consulting the AMA Guides and also that the evidence compelled a favorable finding. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). We disagree on both counts. Dr. Goldman

did not rate the claimant's impairment until after he reached MMI following surgery to repair a herniated disc, at which time he assigned a 10% impairment. He testified, however, that if he had rated the claimant in January and February, 2001, he would have assigned a 5% impairment "at most." He did so based upon complaints of back and left leg pain, noting that the complaints had involved mostly back pain and that they later resolved. He did not testify regarding what the claimant's impairment would have been immediately before the October, 2001, injury, i.e., after the symptoms resolved. Likewise, he did not testify that the claimant's present impairment under the Guides would have been less than 10% had there been no pre-existing impairment. His report indicates that he subtracted the previous impairment from the present, attributing only the remainder to the October, 2001, injury, but he did not support that methodology by a citation to the Guides. Furthermore, the criteria for a Category II impairment that he provided were not consistent with the claimant's medical history.

Under the circumstances, we are persuaded that it was not an abuse of the ALJ's discretion to consult the Guides when deciding whether to rely upon Dr. Goldman's testimony and, if so, to what extent. Furthermore, we are convinced that the ALJ stated a reasonable basis for refusing to rely on Dr. Goldman's testimony concerning pre-existing impairment. The claimant's medical history was not consistent with any set of criteria for DRE Category II that was stated in Dr. Goldman's report. Yet, he provided no explanation for why the category applied despite the inconsistency. Furthermore, testimony that "at most" the claimant had a 5% impairment in January and February, 2001, that was based upon symptoms of which he had not complained since February, 2001, could not reasonably be viewed as compelling a finding that part of the claimant's

present impairment was due to a pre-existing condition rather than the work-related injury, itself.

The decision of the Court of Appeals is affirmed.

All concur.

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