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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: May 20, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0409-WC DATE 8-17-04 E.A.Gravitt, D.C.

CYPRUS MOUNTAIN COAL D/B/A STARFIRE MINES — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1815-WC
WORKERS' COMPENSATION BOARD NO. 98-81570

MARLOUS NAPIER; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The claimant alleged that he was totally disabled by injuries to his head, neck, back, legs, and arms and by depression, all of which resulted from a fall when he was descending a drag line. An Administrative Law Judge (ALJ) determined, however that the cervical condition was not work-related; that there was no work-related psychological condition; and that although the claimant was totally disabled by work-related lumbar injuries, 20% of his disability was pre-existing, active and, therefore, noncompensable. The Workers' Compensation Board (Board) later reversed the denial of medical benefits for the psychological condition; vacated the decisions concerning the exclusion of pre-existing active disability and the denial of medical benefits for the cervical injury; and remanded the claim for further consideration. The Court of Appeals affirmed. Likewise, we affirm.

The claimant was born in 1950 and has a high school education with no specialized or vocational training. He began working for the defendant-employer as a heavy equipment operator in 1971. He testified that he had injured his hip in a nonwork-related motor vehicle accident in the early 1980's but was able to return to full duty after an absence of several months. It was undisputed that, in 1985, the claimant injured his back in a work-related fall from a tree, although the Department of Workers' Claims had no record that the employer ever filed a First Report of Injury. After the incident, the claimant underwent surgery to fuse L1-3, but he was able to return to work after several months and did not file a claim. When deposed in July, 2001, the claimant stated that he had limped for the past 6-7 years, but he also testified that he often worked overtime, accumulating 801 hours of overtime in 1996, 610 hours in 1997, and 176 hours until his injury in 1998. His earnings statement for the period from April 19, 1998, through May 2, 1998, indicated that he worked 87 hours of overtime.

The injury that is the subject of this claim occurred on May 2, 1998, when the claimant fell while descending from a drag line, hitting his head against a handrail and twisting his back. He testified that he experienced immediate back pain and that he left work after reporting the incident. He returned to work the following day but left after a few hours due to severe neck and low back pain. His family doctor and Dr. Mortara, the neurosurgeon who had performed the 1985 surgery, treated him initially with pain medication and physical therapy. When ongoing problems with degenerative disease in his left hip interfered with physical therapy, Dr. Mortara suspended treatment until after the claimant's recovery from hip replacement surgery that was performed in October 1998. On May 13, 1999, Dr. Mortara performed lumbar surgery. The claimant testified that although the surgery brought some relief from his right leg pain, he continued to

experience pain in his low back, left leg, and neck and, therefore, was referred to Dr. Bosomworth for the treatment of chronic pain. He took various medications for his back problems, including Oxycontin, and also took medication for depression.

At the hearing, employer's handwritten incident report, dated May 2, 1998, was introduced into evidence. It indicated that the claimant fell when leaving the drag line at shift change, hit his head on the right side, and complained of pain in his lower back and neck. The claimant testified that he presently experienced constant pain in his neck, left leg, and lower back; that he was unable to sit or stand for over thirty minutes; and that he had severe headaches and trouble sleeping. He stated that he received treatment and counseling for depression at the pain clinic. He also stated that he had no physical restrictions after the 1985 injury; that until the 1998 injury he had routinely worked 11-40 hours of overtime per week; and that he worked as many as 84 hours per week in the months preceding the 1998 incident.

Dr. Mortara first saw the claimant on June 2, 1998, at which time he related a history that included the recent accident. He complained of leg pain, a worsening of his left hip pain and pain that extended from the base of his neck into his head. Dr. Mortara noted evidence of L3 and 4 radiculopathy on the left. In July, 1998, Dr. Mortara noted that the contemplated hip replacement surgery should be performed before the back treatment could proceed. In August, 1998, he noted continuing complaints of neck pain and weakness and numbness in the arms and recommended x-rays. When the complaints of back and left leg pain continued in February, 1999, following the claimant's recovery from the hip replacement surgery, Dr. Mortara recommended diagnostic tests that revealed various abnormalities. The hospital discharge summary indicated that on May 13, 1999, he performed a total laminectomy of L3 and partial

laminectomies of L2 and L4 with foraminotomies. As of June 10, 1999, Dr. Mortara recommended that the claimant avoid lifting more than 35 pounds for a period of six months and engage in limited pulling, tugging, twisting, and jerking. After six months, he should avoid lifting more than 50 pounds. At one year after the surgery, the restrictions would lapse. Dr. Mortara did not address the question of AMA impairment or of pre-existing impairment or disability. A nerve conduction study that he ordered to address the claimant's complaints of a burning sensation in his left foot was performed on August 31, 1999, and was normal.

Dr. Travis examined the claimant on October 16, 2000. In his opinion, the claimant magnified his symptoms, and the complaints of chronic headaches, neck pain, and low back pain were not supported by objective findings. He thought that the claimant had reached maximum medical improvement, required no further treatment, and could return to work on November 1, 2000. Based upon the 1985 fusion and subsequent spinal stenosis, Dr. Travis would impose permanent restrictions including light work involving mostly sitting, occasional standing and walking, and lifting/carrying a maximum of 20 pounds. He thought that the need for the 1999 surgery was unrelated to the May, 1998, incident, explaining his opinion that the claimant developed significant degenerative stenosis below the L1-2 and L2-3 levels of the 1985 fusion due to "adjacent segment syndrome," a condition that is seen frequently in individuals who have had a previous fusion. Dr. Travis assigned a 10% whole person impairment as a result of the 1999 surgery.

Dr. Templin evaluated the claimant on March 23, 2001. Among other things, he diagnosed degenerative lumbar disc disease, lumbar spondylolysis, chronic cervical pain syndrome, left leg radiculopathy, chronic left hip pain, depression, and post-

operative scar tissue/adhesions. He assigned a 16% AMA impairment but noted that the rating was conditional because he did not think that the claimant had reached maximum medical improvement and because further testing and evaluation of the cervical condition were required. He thought that the claimant's condition was caused by the May, 1998, incident and that he had no pre-existing active impairment.

Dr. Hieronymous evaluated the claimant on July 27, 2001, and diagnosed chronic low back pain with radiculopathy and atrophy, chronic cervical pain with radiculopathy and atrophy, chronic pain syndrome, degenerative disc disease, and status post lumbar laminectomy L3-L4 with partial L2 and L4 bilateral medical facectomies. He assigned a 31% impairment. In his opinion, the May, 1998, injury caused the claimant's present complaints, and he had no active impairment before the injury.

Following an August 15, 2001, benefit review conference, the ALJ ordered a university evaluation as provided by KRS 342.315, explaining that there was a difference of opinion concerning the extent of the claimant's impairment due to the injury. The order directed the physician to evaluate the claimant's neck, low back, and left leg; to determine the extent of impairment both before and after the May 2, 1998, incident; and to determine whether it was the May 2, 1998, incident or non-work-related conditions that necessitated the subsequent surgery.

Dr. Goldman, an orthopedic surgeon, performed a university evaluation on September 20, 2001, and submitted a Form 107 report. His diagnoses included: status post lumbar decompressive laminectomy, mild degenerative joint disease of the cervical and dorsal spine, and narrowing at L3-4 with retrolisthesis of L3 on L4. He stated that the 1998 injury was at least partially responsible for the claimant's present condition because he had worked for the previous 12 years without any apparent back problems.

Dr. Goldman noted, however, that the 1998 incident probably would not have resulted in persistent symptoms had there been no previous fusion of L1-3. He stated that the changes in the cervical and dorsal spine were due to the natural aging process and, noting that the cervical changes were not unusual given the claimant's age, he also stated that the claimant's work did not aggravate or accelerate the effects of the natural aging process. He attributed half of the claimant's impairment to the arousal of the previous L1-3 fusion, which he characterized as a pre-existing dormant non-disabling condition. Furthermore, although he acknowledged that the claimant would have had an impairment rating based upon the L1-3 fusion, he found nothing to indicate that the impairment was active before the 1998 injury. Dr. Goldman did not think that the claimant retained the physical capacity to return to the type of work that he performed in May,1998. He restricted the claimant from bending forward with the knees straight, lifting more than 10 pounds, climbing on machinery, and operating heavy equipment. In his opinion, the claimant had reached MMI. He assigned a 13% impairment to the 1998 injury, a 20% impairment to the 1985 injury, and a 30% impairment for the combined effects of the injuries. He stated that the 1985 injury accounted for two-thirds of the combined impairment.

When deposed, Dr. Goldman testified that he would have restricted a similar patient from bending forward with the knees straight and from lifting more than 25-35 pounds after the 1985 injury and resulting fusion. He stated that the AMA Guides to the Evaluation of Permanent Impairment (Guides) distinguish between impairment and disability. Under the Fifth Edition, the term "impairment" refers to "the loss of function to do activities of daily living, exclusive of work."

Also on September 20, 2001, Dr. Harpring, a neurosurgeon, conducted a university evaluation. He received a history that included the 1985 injury and subsequent fusion surgery; the claimant's statement that he returned to work thereafter at approximately 90% of his previous capacity; and his statement that he worked with no problem except some left hip pain until the 1998 incident. Dr. Harpring diagnosed lumbar stenosis and neck pain, both of which he attributed to the 1998 injury. In his opinion, the claimant did not have a pre-existing active impairment. Dr. Harpring did not assign an impairment rating but did indicate that the claimant had no active impairment before the 1998 injury. He noted that the lumbar stenosis and previous lumbar fracture obviously were present before the 1998 incident. Nonetheless, noting that the claimant was asymptomatic at the time of the 1998 accident and that the low back and leg pain followed the accident, his opinion was that the surgery performed after the 1998 injury was required by the effects of the injury. When deposed, Dr. Harpring noted that some individuals have impairments but overcome them.

Phillip Pack, a certified clinical psychologist, evaluated the claimant on June 15, 2001, and concluded that he suffered from major depression that was mild and without psychotic symptoms. He assigned a Class 2 impairment, stating that it corresponded with a 10% impairment under the latest edition of the AMA Guides in which numerical impairments were used. He found no evidence of malingering and thought that the claimant would benefit from treatment.

Dr. David Shraberg, a psychiatrist, evaluated the claimant on August 30, 2001, at the request of the employer. In his opinion, the claimant exhibited a high degree of symptom magnification, and any physical problems were due to natural aging and arthritis. He was depressed and distraught, with anger and anxiety over his present

circumstances and emotional instability. Furthermore, his personality predisposed him to developing physical symptoms under stress. Dr. Shraberg diagnosed a psychophysiological adjustment disorder associated with multiple surgeries and a passive/dependent personality but indicated that the condition had resolved. He found no active psychiatric impairment related to the May 1998 injury. He thought that the claimant's primary psychological problem was an addiction to Oxycontin and that the depression was situational. He suggested that detoxification from the drug would relieve the depression and allow the claimant to return to work.

Resisting the claim, the employer asserted that the claimant's current impairments were solely the result of pre-existing conditions and not attributable to the 1998 incident. The employer also asserted that because 1996 Act awards are based upon impairment, pre-existing impairment rather than pre-existing disability must be excluded. Other arguments were that the cervical condition was not related to the 1998 injury, that the psychological condition was not work-related, and that the claimant was not totally occupationally disabled.

After reviewing all of the medical testimony, the ALJ determined that Dr. Goldman's was the most credible. Noting his statement that the claimant would have retained a 20% impairment following the 1985 injury and subsequent surgery but was able to return to work until May 2, 1998, albeit with some low back pain, the ALJ determined that the claimant's pre-existing disability equaled his pre-existing impairment. Relying on testimony by the claimant, Dr. Goldman, and Mr. Pack, the ALJ determined that the claimant was totally disabled following the 1998 injury and awarded income benefits for 80% of a permanent total disability. Based upon Dr. Goldman's

opinion that any cervical changes were age-related rather than due to the injury, the ALJ determined that the cervical condition was not compensable.

In a petition for reconsideration, the claimant asserted that the exclusion of a 20% disability was clearly erroneous since he was working substantial amounts of overtime and had no restrictions until after the injury. He requested additional findings concerning the basis for the 20% exclusion, the psychological injury, and the denial of medical as well as income benefits for his cervical problems. He also requested findings concerning the compensability of the psychological component of the claim.

The ALJ's order reaffirmed the decision, explaining that the finding of a 20% pre-existing active disability was based not only on the 20% impairment but also on the physical restrictions that Dr. Goldman would have imposed after the 1985 injury. The ALJ viewed the impairment and restrictions as indicating that the claimant had an active disability at that time despite his full-time employment. Noting, erroneously, that the claimant's cervical problems did not arise for several months after the 1998 incident and also noting that Dr. Goldman had attributed them to the natural aging process, the ALJ was not persuaded that the condition was caused by the incident. Finally, the ALJ found Dr. Shraberg to be more persuasive than Mr. Pack and determined that the claimant's psychological condition was not work-related.

The employer's first argument on appeal is that the Board erred by vacating the ALJ's decision concerning pre-existing active disability after acknowledging that there was substantial evidence to support it. Noting that it is unclear precisely what Drs. Goldman and Harpring meant by stating that the claimant's pre-existing impairment was not active, the employer maintains that it would not be inconsistent to state that the 1985 injury resulted in an impairment but that it was not disabling. It maintains,

however, that since awards are "based solely on the impairment caused by a work-related injury, it only makes sense to exclude from compensability pre-existing conditions that produce an impairment without regard to actual disability."

Both lay and medical evidence may be considered when determining whether the disability that results from work-related impairment is total. See Ira A. Watson Department Stores v. Hamilton, Ky., 34 S.W.3d 48 (2000). Even under the 1996 Act, the Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), factors remain central to the determination. Id. Having decided that work-related impairment has caused an individual to be totally disabled, the ALJ must then determine the extent of any pre-existing disability. See Wells v. Bunch, Ky., 692 S.W.2d 806 (1985); Griffin v. Booth Memorial Hospital, Ky., 467 S.W.2d 789 (1971). Although the degree of impairment that results from an injury affects the extent of the injured worker's disability, the words "impairment" and "disability" are not synonymous. The 1996 Act bases an exclusion from a partial disability award upon pre-existing impairment, but an exclusion from a total disability award continues to be based upon pre-existing occupational disability. Roberts Brothers Coal v. Robinson, Ky., 113 S.W.3d 181 (2003).

Although the claimant had a pre-existing non-work-related hip condition, there is no dispute that work-related lumbar impairment, by itself, caused the claimant to be totally disabled. KRS 342.730(1)(a); Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503, 508-09 (2001). Since the finding of total disability was based solely on the claimant's lumbar condition, only pre-existing disability that is due to the lumbar condition must be excluded. The Board acknowledged that there was substantial evidence to support the ALJ's decision with respect to pre-existing active disability but noted that the bulk of the evidence was to the contrary. It also pointed to contradictions in the two university

evaluations and to internal inconsistencies in Dr. Goldman's report. Noting that the ALJ failed to address either the contradictions or inconsistencies and failed to state a reasonable basis for choosing to rely upon Dr. Goldman rather than Dr. Harpring, the Board concluded that the ALJ did not comply with KRS 342.315(2). Therefore, it vacated the decision to exclude 20% of the award and remanded the matter for further consideration.

Dr. Harpring acknowledged that the lumbar stenosis and fracture were pre-existing conditions but stated that the claimant did not have an active impairment before his injury because he was able to perform his usual work without a problem. He later testified that some individuals who have an impairment are able to overcome it. Dr. Goldman characterized the 1985 L1-3 fusion as a pre-existing dormant non-disabling condition. He attributed 50% of the claimant's impairment to the arousal of the fusion and stated that although the fusion warranted an impairment rating, there was no indication that the impairment was active until after the 1998 injury. Later in the report, he assigned a 20% impairment to the fusion, a 13% impairment to the 1998 injury, and attributed two-thirds of the combined 30% impairment to the fusion. He testified subsequently that he would have imposed some restrictions after the fusion.

As the Board acknowledged, there was substantial evidence from which the ALJ could have reasonably concluded that the 1985 injury resulted in a 20% permanent occupational disability despite the claimant's return to work. On the other hand, the claimant's physician released him to return to work without restrictions; he continued to perform his pre-injury job and to work extensive amounts of overtime until the May 2, 1998, accident; and he did not appear to have any significant problems performing his work before the 1998 accident. Therefore, it is equally clear that there was substantial

evidence from which the ALJ could have determined that the 1985 injury caused little or no permanent occupational disability. The evidence did not compel a particular conclusion as a matter of law. Roberts Brothers Coal v. Robinson, supra.

KRS 342.285 vests the ALJ with the sole authority to make findings of fact. An ALJ is required to make sufficient findings to support the conclusion of law that is reached but is not required to provide a detailed interpretation of the evidence or a detailed legal analysis. Although a finding for which there is substantial evidence may not normally be disturbed on appeal, the parties are entitled to be certain that the decision was the product of a correct understanding of the evidence. See Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985).

Dr. Goldman stated that the L1-3 fusion warranted a 20% impairment and accounted for two-thirds of the claimant's ultimate impairment, but he also testified that the claimant's pre-existing condition was dormant and non-disabling; that it was aroused by the 1998 injury; that half of the claimant's impairment was due to the arousal of the pre-existing condition by the injury; and that the claimant had no active impairment until the 1998 injury. The ALJ "particularly [found] Dr. Goldman's testimony to be credible" and chose to rely upon his statements that the pre-existing impairment was 20% and that a similar patient would have had some restrictions after the L1-3 fusion as the basis for excluding a 20% lumbar disability. Yet, the decision failed to address Dr. Goldman's other statements, including his characterization of the pre-existing condition as being dormant and non-disabling and the pre-existing impairment as not being active. Thus, it was unclear from the decision that the ALJ understood the testimony. For that reason, it was appropriate for the Board to vacate the award and require a further explanation in

order to clarify that the ALJ based the decision on a correct understanding of Dr. Goldman's testimony.

It is undisputed that both Dr. Goldman and Dr. Harpring testified as university evaluators under KRS 342.315. As construed in Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000), KRS 342.315 (2) provides that the clinical findings and opinions of a university evaluator constitute substantial evidence of the worker's condition and may not be disregarded unless they are rebutted by other medical evidence. In instances where they are rebutted, the ALJ remains free to weigh the conflicting medical evidence and to choose the expert upon whom to rely. Nonetheless, an ALJ who chooses to disregard the clinical findings and opinions of a university evaluator must state a reasonable basis for doing so. Therefore, in instances where multiple evaluators testify and express different opinions, the ALJ must state a reasonable basis for choosing to rely upon one evaluator and disregard the other. Likewise, although an ALJ may ordinarily pick and choose among an expert's opinions, a reasonable basis must be stated for choosing to rely upon some of a university evaluator's opinions but to disregard others.

The ALJ failed to state a reasonable basis for choosing to rely upon some of Dr. Goldman's opinions concerning the claimant's lumbar condition but to disregard others. Likewise, the ALJ failed to state a reasonable basis for disregarding Dr. Harpring's opinions. For that reason, KRS 342.315(2) required that the claim be remanded for further findings.

In vacating the decision concerning the cervical injury and remanding the claim for further consideration, the Board pointed to several matters that will need to be addressed by the ALJ on remand. First, the ALJ stated that the cervical complaints first

occurred several months after the injury, but the record clearly indicates that they began immediately. Therefore, the decision appears to have been based on an incorrect understanding of the facts. Furthermore, as with the lumbar injury, the ALJ failed to address differences in the university evaluators' opinions with respect to causation or to state a reasonable basis for choosing to rely upon one rather than the other.

Dr. Harpring thought that the cervical complaints were due to the 1998 injury based on the lack of previous complaints of cervical pain, weakness, or numbness, or of pain involving the upper extremities. Although Dr. Goldman thought that the claimant's work did not aggravate or accelerate the natural aging process because the claimant's cervical spine was not unusual for a 50-year-old male, he did not address whether the 1998 accident aroused the age-related changes and caused them to become symptomatic. Yet, when non-work-related degenerative changes become symptomatic due to work-related trauma, that harmful change is an injury even if it is transient. KRS 342.0011(1); See Hill v. Sextet Mining Corp., supra; Robertson v. United Parcel Service, Ky., 64 S.W.3d 284, 286 (2001); McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854, 859 (2001). Therefore, if the claimant's cervical complaints are found to be work-related, some of the medical treatment may be compensable even if there was no permanent harm. Robertson v. United Parcel Service, supra; Cavin v. Lake Construction Co., Ky., 451 S.W.2d 159 (1970).

The Board reversed the finding that the claimant had no work-related psychological condition, noting that Dr. Shraberg's report compelled an award for the treatment of psychological conditions. It is undisputed that Oxycontin was prescribed to treat the claimant's back pain. Contrary to the employer's present argument that the use of Oxycontin was unreasonable or unnecessary, the compensability of the

Oxycontin is not what is presently at issue. Furthermore, that issue was never raised before the ALJ. In Dr. Shraberg's opinion, the claimant's primary psychological problem was an addiction to Oxycontin, and detoxification would not only relieve his depression but release energy and motivation so that he could return to work. Therefore, the evidence compelled a finding that the depression and addiction were work-related psychological conditions, and any reasonable and necessary medical treatment for the conditions was compensable without regard to whether they caused a permanent impairment or disability. Robertson v. United Parcel Service, supra; Cavin v. Lake Construction Co., supra. Consistent with Dr. Shraberg's recommendations, reasonable treatment would include both a psychopharmacological evaluation and therapy to help the claimant reduce his somatic preoccupation and to control his anxiety, anger, and self-defeating negative thoughts.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Bonnie Jo Hoskins
Carl Martin Brashear
Hoskins Law Offices, PLLC
P.O. Box 24564
Lexington, KY 40524-4564

COUNSEL FOR APPELLEE:

Thomas W. Moak
Stumbo, Moak & Nunnery
P.O. Box 511
Prestonsburg, KY 41653