

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: August 26, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0705-WC

DATE 9-16-04 EJA/Grouitt, D.G.

LISA GAIL REINBOLD

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2003-CA-0471-WC
WORKERS' COMPENSATION BOARD NO. 99-64366

FORD MOTOR COMPANY; HON. DONALD G.
SMITH, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant's work-related injury caused no permanent impairment and, therefore, that she was entitled to medical benefits but not to income benefits. The decision was affirmed by the Workers' Compensation Board (Board), and the Court of Appeals affirmed the Board. Appealing, the claimant maintains that the evidence in her favor was overwhelming and compelled an award of income benefits. We affirm.

The claimant began working on the defendant-employer's assembly line in 1995. On October 25, 1996, she injured her cervical spine in a non-work-related motor vehicle accident. She returned to work in December, 1996, but quit again in January, 1997, due to neck pain. In March, 1997, she underwent a two-level cervical fusion at C5-6 and C6-7 but returned to work in July of that year. She testified that she performed her

usual work and required no medication or medical treatment for two years thereafter. In July, 1999, however, her workload doubled, and she was required to use an overhead gun to attach and tighten sway bars and shock brackets. She testified that she began to experience pain in her neck and low back and asked to be reassigned to other duties. On August 20, 1999, her entire back went into spasm, and she could hardly walk. She notified her employer and saw Dr. Farmer, the plant physician.

After an unsuccessful, two-week attempt at light-duty work, the claimant returned to Dr. Farmer, who ordered a CT scan. She remained off work and received temporary total disability (TTD) benefits until January 23, 2000. At that time, she returned to a light duty job, stocking the rear axle deck. She continued in that capacity for about 1 ½ years. More duties were added to the job at that time, so she was assigned to a lighter job that she could perform. She testified that she was active in sports and played volleyball before August 20, 1999, but that she was no longer able to do so. She could only ride her bicycle or drive for short distances before her back became painful.

Dr. Fadel testified that the claimant sustained a work-related injury in 1999, noting that there was degenerative discopathy and damage at C4-5, the level above the previously-fused area, and also that there was a small disc rupture at L5-S1. Relying on the DRE Model of the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment (Guides), he testified that the injury caused a 16% AMA impairment. He explained that he attributed an 8% impairment to the cervical spine, not including the impairment from any previous pathology, and an 8% impairment to the lumbar spine. Also, he imposed restrictions against repetitive extension and flexion of the cervical spine and against occasional lifting of more than ten pounds.

In contrast, although Dr. Wolens assigned a 20% impairment to the cervical spine, he used the Range of Motion Model and testified that the entire impairment was due to the non-work-related motor vehicle accident and cervical fusion. Dr. Wolens acknowledged that the claimant had a small right paracentric disc herniation at C4-5 that was not previously evident. He noted, however, that her symptoms and the physical findings indicated that it was not clinically significant. In his opinion, the work-related incident had only aggravated the cervical condition and caused no permanent impairment. Furthermore, he assigned a 0% impairment to the lumbar spine. In his opinion, the lower back complaints were not related to her work. He stated that although he would restrict the claimant from extreme cervical motion and from heavy lifting, he would have imposed those restrictions after the fusion surgery.

In a second deposition, taken April 22, 2002, Dr. Wolens explained in detail how impairment is assessed under the Guides. After reviewing Dr. Fadel's deposition, Dr. Wolens took issue with his methodology, explaining numerous reasons why it was erroneous. He testified that the Range of Motion Model should have been used due to the previous cervical fusion and that even had use of the DRE Model been appropriate, the claimant would have fallen into category IV rather than category II. With respect to the back injury, he testified that Dr. Fadel placed the claimant in DRE lumbar spine category II but that she did not meet any of the criteria for that category, explaining the reasons why she did not. Furthermore, he testified that Dr. Fadel had added the cervical and lumbar impairments rather than combining them using the Combined Values Table. Using what he contended was the proper method for assessing the cervical impairment under the Range of Motion Model, he explained why the claimant

had a 20% cervical impairment that was wholly attributable to the two-level cervical fusion. He characterized the fusion as an active condition rather than a dormant one and stated that it was only aggravated by the claimant's work.

Don Anderson, the employer's labor relations representative, testified that the claimant returned to work under restrictions after the 1997 cervical fusion. He stated that she was placed on restrictions in January, 1999, and they remained in effect as of August 20, 1999. They were changed after the August, 1999, incident.

Noting that the medical evidence was conflicting, the ALJ relied upon testimony from the claimant and Dr. Fadel that the back condition was work-related but relied upon testimony from Dr. Wolens that it caused no permanent impairment. Thus, the claimant received only medical benefits for the condition. Again relying on Dr. Wolens, the ALJ determined that the claimant's work caused an injury insofar as it aggravated her pre-existing cervical condition but also determined that it caused no permanent impairment. Therefore, she received medical benefits for the condition, including massage therapy that provided pain relief, but no income benefits.

Appealing, the claimant asserts that in the face of a September, 1999, CT scan that revealed a herniation at L5-S1, the ALJ erred in relying upon Dr. Wolens and refusing to award income benefits for the back injury. She argues that her medical history before the August 20, 1999, incident contained no complaints of low back pain. Emphasizing that Dr. Fadel attributed both the condition and an 8% lumbar impairment to the incident, she concludes that reliance on Dr. Wolens was patently unreasonable under the circumstances. She maintains that the evidence compelled findings that she

had an 8% lumbar impairment under the AMA Guides and that it was due to the August, 1999, incident.

The ALJ determined that the claimant was not totally disabled, and that finding is not disputed. Since December 12, 1996, a finding of partial disability is no longer based on the Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), factors. Although income benefits continue to be awarded for occupational disability, KRS 342.730(1)(b) bases the amount of a partial disability award on the impairment caused by a work-related injury. Adkins v. R & S Body Co., Ky., 58 S.W.3d 428 (2001). KRS 342.0011(36) makes it clear that an ALJ may select the impairment rating upon which to rely.

The extent of a worker's impairment and the proper interpretation of the Guides are medical questions. Kentucky River Enterprises, Inc. v. Elkins, Ky., 107 S.W.3d 206 (2003). Where medical experts differ in their interpretation of the Guides, it is the ALJ's function to weigh the conflicting testimonies and decide which expert to rely upon. In this instance, the ALJ determined that Dr. Wolens' testimony was more credible than Dr. Fadel's and chose to rely upon it. Contrary to the claimant's assertion, we are convinced that the findings with respect to the lumbar condition were reasonable and conclude, therefore, that the Court of Appeals was correct in refusing to disturb them. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The claimant also argues that the ALJ erred in relying upon Dr. Wolens with respect to the cervical injury. She asserts that she was able to perform her job, without restrictions or complaints of cervical pain after the fusion surgery. She maintains, therefore, that the exclusion of pre-existing disability was erroneous.

Pre-existing disability is excluded from an award if it contributes to the degree of permanent disability that remains after the compensable injury. See Schneider v. Putnam, Ky., 579 S.W.2d 370, 372 (1979). Since December 12, 1996, partial disability benefits are awarded on the basis of the impairment that an injury causes rather than under the Osborne v. Johnson standard. Therefore, as a rule, any pre-existing impairment must be excluded when determining the impairment that is compensable. See Roberts Brothers Coal Co. v. Robinson, Ky., 113 S.W.3d 181 (2003). Where a condition results in a pre-existing impairment, the extent that it accounts for a pre-existing disability under the Osborne v. Johnson standard is immaterial.

Despite the claimant's assertion that the decisions below were unreasonable because she no longer retains the physical capacity to perform the type of work that she performed at the time of injury, an award of income benefits under KRS 342.730(1)(b) requires a finding that the underlying injury caused a permanent impairment. Dr. Wolens testified that the claimant had a 20% cervical impairment, but he also testified that it was entirely due to the pre-existing cervical fusion. He explained his calculation of the impairment under the Guides as well as his reasons for concluding that although the claimant's work aggravated the cervical condition, it caused no additional impairment. Furthermore, he explained why Dr. Fadel's assessment of the cervical impairment and his attribution of an impairment to the August, 1999, incident were incorrect under the Guides. Under the circumstances, the ALJ's decision to rely upon Dr. Wolens was not unreasonable; therefore, different findings of fact were not compelled. Special Fund v. Francis, *supra*.

The decision of the Court of Appeals is affirmed.

All concur.

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