

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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: OCTOBER 21, 2004  
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0585-WC

DATE 11-11-04 ELLA G. GRIFFIN, D.C.

SOUTH KENTUCKY RURAL ELECTRIC  
COOPERATIVE CORPORATION

APPELLANT

V.

APPEAL FROM COURT OF APPEALS  
NO. 2002-CA-0610-WC  
WORKERS' COMPENSATION BOARD NO. 84-0023605

PAUL E. DYE; HON. LLOYD R. EDENS,  
ADMINISTRATIVE LAW JUDGE;  
WORKERS' COMPENSATION BOARD;  
AND WORKERS' COMPENSATION  
FUND

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

This appeal is from a decision of the Court of Appeals which upheld the Workers' Compensation Board in affirming an award by the Administrative Law Judge which had granted permanent and total occupational disability benefits to the claimant.

The questions presented are whether the present complaints are related to the original injury; whether the claim for psychiatric problems is barred by the statute of limitations; whether the occupational disability has increased; whether the award should be apportioned between the employer and the Special Fund; and whether the benefits should be terminated at age 65.

Dye suffered a work related injury on February 14, 1980. Initially, he settled the claim in 1987 for a lump-sum of \$36,000, representing a 20.88% occupational disability.

He filed a motion to reopen in 2000, alleging an increase in occupational disability which was sustained. In February 2001, he filed a motion to amend his reopening to assert psychological/psychiatric problems.

Dye sustained his original injury while working as a lineman when he fell from a 40 foot utility pole, still attached to his safety belt. He was impaled on a rosebush at the bottom of the pole. The bush penetrated his scrotum, pierced his right thigh, and entered his abdominal space. The rosebush branch was removed from his body and he returned to work after about eight weeks. Dye testified that a part of the branch remained in the psoas muscle and that he ultimately underwent three surgeries for the condition created by it. Dye testified that he was off work from February 1984 until March 1985 during which time a kidney was removed as well as part of his colon and a portion of the psoas muscle. Upon his return to work, he was working as a right-of-way supervisor, until May 1999. He testified that his job responsibilities caused his condition to continue to deteriorate physically as well as emotionally. He did not return to work after May 25, 1999. He also testified that his physical condition resulted in depression and instances of uncontrolled crying as well as numbness in his leg. The medical evidence as to the physical injury consisted of the deposition and records of Dr. Polk, a surgeon, the deposition and records of Dr. Stetten, an orthopedic surgeon and the deposition and report of Dr. Corbett, an orthopedic surgeon.

Dr. Polk testified that Dye was making a good recovery until he returned in May 1999, for a hydrocele surgery. The claimant's condition was a swelling on the left side of the testicle which was related to scar tissue resulting from the prior surgery. Dr. Polk stated that the hydrocele was removed and that Dye began experiencing acute anxiety and depression and developed a staggering walk. Dr. Stetten testified that Dye was

suffering leg weakness due to his injury and he assigned a 10 to 15% functional impairment but stated that it did not include the effect of the abdominal surgery or his psychological condition. Dr. Corbett examined Dye on January 5, 2001 and diagnosed S\I severe retroperitoneal infection with loss of the left psoas muscle and left kidney. Dr. Corbett noted that Dye experienced episodes of emotional breakdown while discussing his condition. The physician indicated that it was his opinion that the orthopedic evaluation did not reflect the claimant's overall condition.

The medical evidence relating to the psychiatric claims and vocational impairment consisted of the deposition and report and records of Dr. Woolley, the report of Dr. Shraberg, both of whom are psychiatrists and the report of Dr. Crystal, a vocational expert. Dr. Woolley diagnosed Dye as suffering from clinical depression and assigned a Class III moderate impairment, and stated he had a 25 to 50% functional impairment. Dr. Shraberg found no evidence of any deterioration psychologically that would prevent Dye from doing the type of work he had done in the past. Dr. Crystal believed Dye could perform jobs at a sedentary or light level exertion.

The ALJ reviewed the lay and medical testimony and determined that the psychiatric condition was based on his work injury, relying on the testimony of Dr. Polk and Dr. Woolley. Thus, he concluded that the psychiatric condition was an injury covered by KRS 342.620(1) as defined in 1980. The ALJ also determined that the motion to reopen was timely pursuant to KRS 342.125 and that the statute of limitations under KRS 342.185 was not applicable to a reopened claim. The ALJ also concluded that the claimant sustained an increase in occupational disability and found him totally disabled based on his testimony and the opinions of Drs. Polk, Woolley and Corbett. He also declined to give retroactive application to KRS 342.730(4), which

provides for the termination of benefits at age 65. The Board affirmed the decision of the ALJ as did the Court of Appeals.

### I. Original Injury

This work-related injury occurred in 1980 and this case continues to be governed by the factors set out in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). Considerations of age, education and work experience are acceptable. It is the responsibility of the ALJ on reopening to translate functional impairment into percentage of occupational disability. The ALJ has the discretion to rely on the testimony of the claimant relative to his ability to work. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979). There is substantial evidence in the record that the employee's complaints are related to his original injury. Dr. Polk testified that it was more likely than not that the hydrocele was due to scar tissue from the original injury. Dr. Woolley stated that the current psychological condition was due to the most recent surgery. Dr. Corbett, the examining physician referred to the mobility and orthopedic problems connected to the initial injury. Dr. Woolley believed that there was a cumulative effect from the original injury. Thus it was proper for the ALJ and the Board to find that the claim was properly reopened. On reopening the claim, Dye had the burden of proving that there had been a change of conditions resulting from his original compensable injury. KRS 342.125. It has long been held that KRS 342.285 means that the finder of fact, rather than a reviewing court has the sole discretion to determine the quality, character and substance of the evidence. Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925 (2002). We are not persuaded that the ALJ abused that discretion.

## II. Statute of Limitations – Psychological Problems

The ALJ found that Dye was a credible witness and was persuaded by his testimony as well as that of Drs. Polk and Woolley. Dr. Polk testified that it was more than likely that the hydrocele was due to scar tissue from the original injury and Dr. Woolley testified that the psychological condition was due to his most recent surgery. As such, this constituted substantial evidence in support of the findings of the ALJ. This is a case in which additional occupational disability resulted from the development of a new condition that was caused by the original work-related injury. See Brooks v. University of Louisville Hospital, Ky., 33 S.W.3d 526 (2000). The only basis for the reopening was a change of disability or a worsening of the impairment. KRS 342.125(1)(d). The arguments presented by the employer are not persuasive.

## III. Disability Increase

Here there was substantial medical and lay evidence to support the conclusion by the ALJ that Dye did suffer an increase in occupational disability from the original injury. It was appropriate for the ALJ to rely on the lay testimony to determine the extent of the occupational disability as presented by the testimony of both Dye and his spouse. See Hush, supra. The ALJ is authorized to determine the quality, character and substance of all the evidence. Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993) and is authorized to weigh and draw inferences from the evidence. Miller v. East Ky. Beverage/PepsiCo Inc., Ky., 951 S.W.2d 329 (1997). Where the evidence is in conflict, the ALJ may choose whom and what to believe. Pruitt v. Bugg Bros., Ky., 547 S.W.2d 123 (1977). Additionally, the ALJ may choose to believe part of the evidence and disbelieve other parts. Pruitt, supra.

#### IV. Apportionment

The employer argues that any award should be apportioned between the employer and the Special Fund because the only medical evidence supporting the claim of psychiatric disability comes from Dr. Woolley. The employer contends that the testimony of Dr. Woolley suggests that the psychiatric problems are due to either a previously dormant, nondisabling condition which was aroused, or due to a preexisting underlying, psychological problem and any award should be apportioned between the employer and the Fund. Our review of the record indicates that there is no evidence to support such a theory. There was no evidence of a psychological condition prior to 1980 or of any ongoing condition prior to 1999. The mere allegation that the Board improperly assessed the testimony of Dr. Woolley is unacceptable as support for this argument. The employer does not contend that the Board overlooked or misconstrued controlling statutes or precedents. There is no reason to reverse the determination of the ALJ and the Board.

#### V. Termination at Age 65

There can be no question that the law in effect on the date of the accident controls the amount of income benefits which a worker is entitled to receive and which the defendants may be required to pay for the disability caused by a resulting injury. Spurlin v. Adkins, Ky., 940 S.W.2d 900 (1997). The employer contends that KRS 342.730(4), which would terminate benefits upon qualification for old age social security retirement, is a remedial statute which can be applied retroactively. We disagree.

The ALJ found that KRS 342.730(4), which was effective December 12, 1996, was not in effect at the time of the original injury and it was not designated by KRS 342.0015 to have retroactive application. Accordingly, the statute was not applicable to

his award. See Maggard v. International Harvester Co., Ky., 508 S.W.2d 777 (1974).

The work-related injury occurred in 1980, but the statute urged by the employer was not effective until 1996. Therefore, the rights of the claimant were already vested when the statute was enacted. KRS 446.080(3), provides that no statute shall be construed to be retroactive unless expressly so declared. As observed in Leeco Inc. v. Crabtree, Ky., 966 S.W.2d 951 (1998), the primary purpose of KRS 342.730(4) was to minimize the duplication of other sources of benefit.

As has been noted many times, the standard of review is whether the decision by the ALJ was erroneous as a matter of law. As to factual issues, the standard is whether the determination is supported by substantial evidence. It may be said that although a party may cite evidence which would have supported a different conclusion, such is not an adequate basis on appeal. The standard is whether the findings which were made are so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. We do not find it so in this case.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Bradford L. Breeding  
Farmer, Kelley, Brown, Williams &  
Breeding  
P.O. Box 490  
London, KY 40703-0490

COUNSEL FOR APPELLEE:

John G. Prather, Jr.  
Winter R. Huff  
Law Offices of John G. Prather  
P.O. Box 616  
Somerset, KY 42502-0616