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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: January 20,2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL DATE 2-10-05 ELA Grant, D.C.

2004-SC-0146-WC

ADVANCE AUTO PARTS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-1303-WC
WORKERS' COMPENSATION BOARD NO. 02-0720

WESLEY BRENT MATHIS; HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

AND

2004-SC-0188-WC

WESLEY BRENT MATHIS; HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — CROSS-APPELLANTS

APPEAL FROM COURT OF APPEALS
2003-SC-1953-WC
WORKERS' COMPENSATION BOARD NO. 02-0720

ADVANCE AUTO PARTS — CROSS-APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Affirming a decision of the Workers' Compensation Board (Board), the Court of Appeals has determined that the claimant's award was supported by substantial evidence but that the evidence did not compel an award of the temporary total disability (TTD) benefits he requested. In a direct appeal, the employer maintains that the

Administrative Law Judge (ALJ) abused his discretion by failing to independently review the validity of the claimant's AMA impairment rating. Cross-appealing, the claimant asserts that the ALJ erred in determining that he was not entitled to TTD. We affirm.

The claimant attended approximately six and one-half years of college although he did not receive a degree. His primary work experience was in retail management, most recently as manager of an auto parts store. On January 23, 2001, he was injured while working when he slid on some ice, fell, and landed on his back.

After the incident, the claimant continued to work as store manager but did not perform all of his previous duties and sometimes missed work altogether. He last worked in March, 2001. Although he attempted to find less physically demanding work in the retail field, he was unable to do so.

The claimant sought treatment from Dr. Lockstadt, a board-certified orthopedic surgeon, complaining of back pain, with leg pain and a burning sensation in the right foot. Based on the results of an MRI, Dr. Lockstadt diagnosed a small herniated disc at L4-5 "just touching up onto the spinal cord or nerves at that level" and a very small herniated disc at L5-S1, touching the nerve at that level but not compressing it. There were also arthritic changes in the facet joints. In his opinion, the claimant's complaints were consistent with the MRI findings. Although he thought the claimant did not have a pinched nerve, he was convinced that something was irritating the nerve.

Dr. Menke evaluated the claimant for the employer on January 29, 2002. He reviewed the MRI Dr. Lockstadt had obtained and stated there was a disc bulge at L4-5 with no impingement, disc dessication at L5-S1 but no bulge, and chronic low back pain. He attributed the right leg pain to a nerve root irritation. Dr. Menke assigned a 5% impairment based on the MRI findings, the claimant's symptoms, and a restricted range

of motion. Dr. Menke anticipated that the claimant would be at maximum medical improvement (MMI) six weeks after starting physical therapy. If he was not offered physical therapy or refused it, he would currently be at MMI.

When deposed in August, 2002, and questioned about the claimant's permanent impairment rating, Dr. Lockstadt stated:

> Well, I don't have the exact AMA guidelines with me, but I do know them relatively well to make a judgment on that. And we do know that he does have a herniated disc, as confirmed on the MRI scan; he does have radiculopathy; he has possibly two herniated discs that could be causing these symptoms. We do know that according to the guidelines, that if you have a herniated disc, and possibly two herniated discs with radiculopathy, that this could have up to a 15 percent impairment rating, which is fairly significant.

Dr. Lockstadt also stated that if the claimant were treated successfully, his impairment would decrease to 5-6%. On cross-examination, he explained that the term "radiculopathy" is descriptive and refers to a symptom rather than a diagnosis. He repeated that the claimant had herniated discs at L4-5 and L5-S1 but did not have actual nerve root compression.

When deposed on August 5, 2002, the claimant testified that he had not had physical therapy. He stated that he had contacted the benefits department and his health insurance carrier and was informed that they would not pay for an MRI or physical therapy without a clear diagnosis. When the claim was heard, he continued to experience constant and significant low back pain. He testified that he could not return to work as a store manager because he could not be on his feet constantly.

After considering the evidence, the ALJ determined that the claimant's injury caused a permanent partial disability. Finding Dr. Lockstadt to be more persuasive than Dr. Menke, the ALJ determined that the claimant's permanent impairment was 15%. Although noting that the claimant had requested a period of TTD benefits, the ALJ

determined that the medical evidence did not support a finding of TTD under KRS 342.0011(11)(a), stating as follows:

> While Dr. Lockstadt ordered physical therapy on April 26, 2001, there is no notation that plaintiff could not work. Likewise, Dr. Lockstadt's office notes thereafter do not reflect that plaintiff cannot work. Review of the November 27, 2001 note does indicate that plaintiff has restrictions but these alone are insufficient to conclude that plaintiff was temporarily totally disabled. Further, Dr. Lockstadt does not address plaintiff's ability to work in his deposition.

Relying on Caldwell Tanks v. Roark, 104 S.W.3d 753 (Ky. 2003), the employer maintains an ALJ is obliged to consult the American Medical Association's Guides to the Evaluation of Permanent Impairment (Guides) independently to be certain that the impairment rating a physician assigns is valid. The employer asserts that it takes no medical expertise to review the chart regarding the ranges of impairment for lumbar injuries and compare it with the impairment rating a physician assigns. According to the employer, the 15% impairment Dr. Lockstadt assigned does not correspond to any of the DRE categories in the Fifth Edition; therefore, it is both invalid and not in conformity with the Guides. For that reason, the ALJ erred in relying on it.

Contrary to the employer's argument, we are not convinced that the ALJ erred in relying upon Dr. Lockstadt. In Kentucky River Enterprises v. Elkins, 107 S.W.3d 206 (Ky. 2003), we were asked to determine whether an ALJ had relied on impairments that were determined in conformity with the Guides. Rejecting the employer's reference to certain pages in the Guides in an attempt to show that the impairments in question were erroneous, we explained that "the proper interpretation of the Guides and the proper assessment of an impairment rating are medical questions." Id. at 210. Noting the absence of any medical testimony to establish that the method the physician had used was erroneous, we concluded that the ALJ's reliance on the physician's testimony was

reasonable. Caldwell Tanks v. Roark, supra, stands only for the principle that an ALJ is required to read the table that converts a binaural hearing impairment into an AMA impairment if a medical expert fails to do so. Id. at 757. Our rationale was that a medical expert had determined the hearing impairment, and reading the table that converted it into an AMA impairment required no medical expertise.

The claimant maintains that it was patent error for the ALJ to refuse to award TTD benefits. He asserts that the only physician who testified regarding when he reached MMI was Dr. Menke. Based on Dr. Menke's testimony and the fact that he did not undergo physical therapy, the claimant argues that he did not reach MMI until January 29, 2002, when Dr. Menke evaluated him. Relying on Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), he also argues that because the physical restrictions that Drs. Lockstadt and Menke imposed prevented him from performing his customary work, he was entitled to TTD benefits.

Kentucky does not recognize the concept of temporary partial disability. As defined in KRS 342.0011(11)(a):

> "Temporary total disability" means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

The term "total disability" refers to a complete inability to perform any type of work. See KRS 342.0011(11)(c).

In Central Kentucky Steel v. Wise, supra, the worker fractured his left arm on April 28, 1997. On July 11, 1997, his treating physician released him to return to work with a restriction against lifting more than five pounds with his left hand. On September 30, 1997, he returned to work. His physician testified that he did not reach MMI until October 28, 1997. Interpreting KRS 342.0011(11)(a) to favor itself, the employer

asserted that if a worker has either reached MMI or been released to return to work, TTD must be terminated. Nonetheless, the ALJ rejected the argument and awarded benefits through September 30, 1997. The decision was affirmed on appeal and stands for the principle that if a totally disabled worker has not reached MMI, a release to perform minimal work is not the equivalent of "a level of improvement that would permit a return to employment." It does not alter the definition of total disability or stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.

Unlike the situation in Wise, the ALJ was not convinced from the medical evidence that the claimant was totally disabled for a period of time after his injury. Although the claimant was unable to work as a store manager after his injury, evidence of an inability to perform his usual work did not compel a finding that he was totally disabled. The claimant had several years of college-level education and years of retail and managerial experience. Despite his restrictions, it could not reasonably be said that the evidence compelled a finding that he became totally disabled due to his injury. Absent such evidence, questions regarding the duration of total disability such as were addressed in the Wise decision do not arise.

The decision of the Court of Appeals is affirmed.

All concur.

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