

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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RENDERED: June 16, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0442WC

DATE 7-7-05 EJA Growth, PC.

MICHAEL A. THORNTON

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2003-CA-1938-WC
WORKERS' COMPENSATION BOARD NO. 01-82457

VOLT SERVICES GROUP; HON. R. SCOTT
BORDERS, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

It is undisputed that the claimant sustained a work-related back injury that was partially disabling. Central to this appeal is the amount of AMA impairment that it caused and, therefore, the amount of his income benefit. Relying on a medical report that responded to questions that were not of record and that referred to symptoms on only one side of the claimant's body, the Administrative Law Judge (ALJ) determined that the injury caused a 5% impairment due to a bulging disc although it deprived the claimant of the physical capacity to perform the type of work that he performed at the time of the injury.

A majority of the Workers' Compensation Board (Board) concluded that the ALJ erred by disregarding uncontradicted medical testimony that the claimant's injury caused impairment from a herniated disc as well as the bulging disc and by failing to award benefits for both conditions. A minority concluded that there was a difference of medical opinion and that the majority had substituted its judgment for the ALJ's.

Persuaded that the minority view was correct, the Court of Appeals reversed and reinstated the ALJ's decision. Although we agree that the majority substituted its judgment when concluding that the evidence compelled a finding that both conditions caused a 12% impairment, we are convinced that the ALJ erred as a matter of law by disregarding the uncontroverted medical evidence that the injury caused a herniated disc and resulting impairment. Therefore, we reverse and remand for the ALJ to determine the extent of the impairment and to award benefits for both conditions.

The claimant was born in 1956. He completed high school and 3 semesters of college but received no specialized vocational training. He served in the U. S. Army from 1978 through 1982, achieved the rank of E-4, and received a less than honorable discharge.

In January, 2000, the claimant began working for the defendant-employer, a company that provides temporary workers to other businesses. Sometime in April or May, 2000, his assignment was to work as a trash collector at Dynacraft. He stated that the work required him to lift garbage cans that weighed about 50 pounds when empty and that sometimes he lifted heavy objects such as car doors.

On May 30, 2000, the claimant injured his back when he attempted to lift a 6' x 7' dock plate. He stated that the dock plate had become stuck and that he pulled on the attached chain in an attempt to lift it manually. While doing so, he heard a crunching noise in his back, so he stopped. Back pain prevented him from completing his shift and continued the next morning. At that time, he went to the emergency room at Baptist Hospital East, where he was x-rayed, given an injection for pain, and referred to Baptist Worx. Treatment at Baptist Worx consisted of pain medication and muscle relaxers. At the follow-up visit, he was given additional medication and released to full-duty work.

He attempted to perform his usual duties the first two days after returning to work, but on the third day he was given lighter duty such as mopping and sweeping.

The claimant testified that eventually he came under the care of Dr. Morassuti, a neurosurgeon. Dr. Morassuti recommended surgery but apparently did not know that the claimant's pain fluctuated from one side to the other. Shortly before the surgery, Dr. Morassuti asked him where his pain was. He stated that when he explained he was presently having pain on the left side, Dr. Morassuti decided to cancel the procedure.

Dr. Guarnaschelli evaluated the claimant on June 19, 2002, for the employer. His report indicated that he interviewed and examined the claimant and reviewed some x-ray and MRI evidence, but it did not include a history, a list of the claimant's complaints, or a list of Dr. Guarnaschelli's physical findings. The report consisted of answers to four questions that it stated the employer had posed in a letter. It did not repeat the questions or include a copy of the letter to which it referred. First, the report stated that the claimant had both clinical and radiographic evidence of low back, left hip, and left leg pain, noting that diagnostic tests revealed a central and left paracentral disc protrusion without an obvious extrusion. Dr. Guarnaschelli attributed the claimant's symptoms to the May 30, 2000, injury but thought that there was some degree of pre-existing symptomatic and/or asymptomatic lumbar spondylosis and degenerative changes. Second, Dr. Guarnaschelli noted that the claimant attributed 90% of his current symptoms to back pain and "far less than 10% of his symptoms" to the pain and numbness in the legs. Dr. Guarnaschelli did not recommend surgery because although it would help relieve the claimant's leg symptoms, it would do very little to relieve the chronic and disabling back pain. Nor would it permit him to return to heavy labor or construction work. Third, Dr. Guarnaschelli thought that the claimant could perform

light-duty work that involved minimal lifting or bending and allowed frequent breaks but could not return to heavy labor, repetitive bending, working overhead, or prolonged standing, sitting, or crawling. Fourth, convinced that the claimant had reached maximum medical improvement (MMI), Dr. Guarnaschelli assigned a 5% impairment for an unspecified condition using the AMA's Guides to the Evaluation of Permanent Impairment (Guides), 2000 ed., Table 15-3, DRE Category II.

Dr. Lach evaluated the claimant on August 1, 2002, at the request of counsel and completed a Form 107 report. His report relates the history he took from the claimant but contains nothing to indicate that he conducted a physical examination. Dr. Lach reviewed the course of treatment, noting that an MRI done on September 25, 2001, revealed, among other things, a right paracentral disc herniation at L5-S1, with associated right S1 nerve root effacement but no evidence of spinal canal or neural foraminal narrowing; underlying disc degeneration; and a central disc bulge at L4-5, with underlying findings suggesting a small annular tear but no evidence of spinal canal or neural foraminal encroachment. Dr. Lach noted that the herniation was consistent with the radicular pain in the right leg that was no longer severe on the eve of the proposed surgery; whereas, the left-sided pain that predominated was consistent with the L4-5 disc bulge on the left. A March, 2002, MRI revealed degenerative disc disease at L4-5 and L5-S1; the L5-S1 disc protrusion, which continued to touch the right S1 nerve root; and the L4-5 bulge, which had increased slightly.

Dr. Lash agreed with Dr. Guarnaschelli that the claimant was not a candidate for surgery; that he should be urged to undergo a physical therapy program; and that he was presently at MMI but did not retain the physical capacity to return to the type of work he performed at the time of injury. He thought that the claimant did not have a

pre-existing active impairment. Noting that Dr. Guarnaschelli assigned a 5% impairment rating, Dr. Lach stated that he thought a slightly higher rating was warranted. Using the 2000 edition of the Guides, Range of Motion model at Table 15-7, Dr. Lach noted that there were lesions on opposite sides that caused opposite problems, assigned separate impairments for the bulging and herniated discs, and then combined them. He assigned a 7% impairment for the L5-S1 herniation as described in Category II(C) and a 5% impairment for the L4-5 bulge as described in Category II(B). This yielded a combined impairment of 12%. Dr. Lach then stated that the DRE model, Table 15-3, permitted a 10-13% impairment for the herniated disc and associated radiculopathy under lumbar Category III, explaining as follows:

Table 15-3, p. 384 DRE Category III: *history of herniated disc at the level and on the side that would be expected from objective clinical findings, associated with radiculopathy.*
Impairment to Whole Person 10-13%

I believe Michael Thornton is still having some radiculopathy. At the time he saw Dr. Guarnaschelli, he apparently did not have these complaints so Dr. Guarnaschelli used the DRE Lumbar Category II.

When deposed in November, 2002, the claimant testified that presently he was not under medical care because the insurance carrier would not approve it. He stated that he was still experiencing numbness, excruciating pain, and severe spasms in his back. He also experienced pain in both legs.

At the hearing held on January 3, 2003, the claimant testified that he had not worked since he was deposed. He continued to experience chronic pain. Asked what pain or symptoms he had in his legs, he responded that the left leg would go numb, that he had a lot of pain in both legs, and that he had back spasms. His symptoms were on both sides. He stated that his work history consisted primarily of general labor,

involving heavy lifting and long hours of standing. He stated that he had attempted to get additional medical treatment but that it had been denied.

Addressing the question of impairment, the ALJ stated as follows:

In this instance, Dr. Guarnaschelli assessed Plaintiff a 5% functional impairment rating categorizing him under DRE II, which would entitle him to a 5% rating. This appears to be due to the L4-5 disk bulge that is bulging to the left, which Dr. Guarnaschelli felt was causing Mr. Thornton's leg problems.

On the other hand, Dr. Lach felt Mr. Thornton was suffering from problems not only from the L5-S1 disk, but also from the L4-5 disk and felt he would be entitled to a 12% functional impairment rating under the Range of Motion model or fall under a DRE category III and be entitled to a functional impairment within the 10-13% range.

. . . the [ALJ] is persuaded by the opinion of Dr. Guarnaschelli, neurosurgeon, who found that Mr. Thornton suffered a 5% functional impairment rating as a result of his work-related injury. This is consistent with Mr. Thornton's testimony at the Hearing that his legs bother him. His left leg will go numb while he has pain in both legs. This is consistent with the testimony given by Dr. Lach wherein Mr. Thornton advised him that at the time Dr. Morassuti was to perform the L5-S1 surgery that Mr. Thornton really was not having severe right-sided pain, and that now the pain was more on the left side. That side was more consistent with the L4-L5 disk bulge on the left. Therefore, this evidence persuades the Administrative Law Judge the 5% rating given by Dr. Guarnaschelli is more accurate as it appears that the right leg problems had resolved to the point where surgical intervention was not now necessary.

Multiplying the impairment by a statutory factor of 0.75 yielded a disability rating of 3.75 for the purpose of calculating the claimant's income benefit. Persuaded that the claimant lacked the physical capacity to return to the type of work he performed at the time of his injury, the ALJ enhanced his benefit by a factor of 1.5. Based on an average weekly wage of \$260.68, the claimant received a temporary total disability benefit of \$172.79 from May 31, 2000, until July 2, 2002, followed by a permanent income benefit of \$9.78 per week for 425 weeks.

Appealing, the claimant maintained that Dr. Guarnaschelli's impairment rating was not supported by his own findings on physical examination or by the criteria for DRE Category II. Furthermore, his report failed to mention the herniated disc at L5-S1 or right leg symptoms. The claimant asserted that the evidence of herniated discs and of radiculopathy in both legs warranted a DRE Category III impairment.

The Board's majority found it impossible to determine from Dr. Guarnaschelli's report whether he was asked to consider or did consider the L5-S1 herniation and associated symptoms. The majority thought it reasonable for the ALJ to conclude that Dr. Guarnaschelli assigned the 5% DRE impairment for the L4-5 disc bulge because his report referred only to that level. Furthermore, it was consistent with the 5% impairment Dr. Lach assigned to the bulging disc under the Range of Motion model.

The majority noted that Dr. Lach was the only physician to testify concerning the L5-S1 herniation on the right and the right-sided symptoms and that his findings were documented by two MRI's. His uncontradicted opinion was that the claimant continued to experience some radiculopathy on the right side and that the condition warranted an impairment rating. Noting that the Range of Motion model permitted a 7% impairment for a herniated disc and that DRE lumbar Category II (Table 15-3) allowed a 5-8% impairment even where radiculopathy has resolved following conservative treatment, the majority concluded that the ALJ erred by failing to find an impairment for the condition based solely on the fact that the right leg condition had resolved sufficiently that surgery became unnecessary. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Stating that Dr. Lach assigned the same combined impairment under both models, the majority concluded that evidence compelled an award based on a combined impairment of 12%.

KRS 342.730(1)(b) bases the amount of an income benefit for partial disability on the injured worker's impairment as determined under the standards set forth in the AMA Guides. Thus, the claimant bore the burden of proving that the injury caused both an L5-S1 herniation and L4-5 disc bulge and of proving the amount of impairment that the Guides would authorize. The proper interpretation of the Guides with regard to orthopedic injuries is a complex matter that requires medical expertise. This is particularly true when the experts assign impairments using different models or more than one model. See Thomas v. United Parcel Service, 58 S.W.3d 455 (Ky. 2001). When medical experts differ concerning the proper application of the Guides and an injured worker's impairment rating, it is the ALJ's function to weigh the conflicting evidence and to decide which is more persuasive. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). When medical evidence is uncontradicted, the ALJ may not disregard it. See Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., supra. If an ALJ finds against the party with the burden of proof, their burden on appeal is to show that the finding was unreasonable because the favorable evidence was so overwhelming that it compelled a favorable finding. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). We are convinced that the claimant met that burden.

The claimant asserted that the injury caused a bulging disc at L4-5 on the left and a herniated disc at L5-S1 on the right. Dr. Lach testified that both conditions were due to the work-related accident and that the claimant continued to experience some radiculopathy. When addressing impairment, he explained that the Range of Motion model accounted for lesions on opposite sides that caused opposite problems. Using the Range of Motion model, he assigned a 7% impairment for the herniated disc and a 5% impairment for the bulging disc, for a combined impairment of 12%. Dr. Lach also

stated that the DRE model permitted a 10-13% impairment for a herniated disc and associated radiculopathy under lumbar Category III. He explained that the claimant apparently did not have the associated radicular complaints when he saw Dr. Guarnaschelli, so Dr. Guarnaschelli placed him in Category II. Dr. Lach did not assign an impairment for the bulging disc under the DRE model or state that the model would permit an impairment rating for a bulging disc. Nor did he state that the Guides preferred the use of one model over the other in the present situation.

The questions to which Dr. Guarnaschelli responded were not made part of the record. It may well be that he considered the claimant's entire condition. Nonetheless, it is impossible to determine from his report whether he did so or whether the questions to which he was responding concerned only the left-sided symptoms and their cause. His report refers to radiographic and MRI evidence, but it does so solely in the context of addressing the central and left paracentral disc bulge and the low back, left hip, and left leg pain. It makes no reference whatsoever to an L5-S1 herniation or to any right-sided symptoms. Although Dr. Lach thought that Dr. Guarnaschelli assigned the 5% Category II impairment based upon the herniated disc, the ALJ determined that he assigned it based upon the bulging disc. Neither party has asserted that the finding was erroneous under the Guides. Furthermore, although Dr. Lach did not assign a DRE impairment to the condition, he did assign a 5% impairment under the Range of Motion model. Under the circumstances, the conclusion that Dr. Guarnaschelli assigned the impairment based upon the bulging disc was reasonable under the evidence. It may not be disturbed on appeal. Special Fund v. Francis, supra.

Dr. Lach testified affirmatively that in addition to the bulging disc, the claimant had a herniated disc at L5-S1 on the right side with associated radiculopathy. His report

stated that it was caused by the work-related accident and that it warranted a DRE Category III impairment because there was associated radiculopathy or warranted a 7% Range of Motion impairment. His report also indicated that a herniated disc warranted a DRE Category II impairment if radiculopathy had been present but later resolved. Absent the questions to which Dr. Guarnaschelli was responding, absent any reference in his report to the herniated disc or right-sided symptoms, and absent any other indication that he directed his report to the claimant's entire condition, the impairment Dr. Guarnaschelli assigned could not reasonably be viewed as being the product of a difference of opinion regarding the existence of the herniated disc, its cause, or any resulting impairment.

Although the claimant testified that he continued to experience symptoms in both legs, the ALJ was persuaded by the evidence that his right leg problems had resolved to the point that surgery was no longer necessary. Therefore, the ALJ was compelled to rely on Dr. Lach's uncontradicted testimony that a herniated disc with radiculopathy that later resolved would come within DRE Category II, which warranted a 5-8% impairment, or his uncontradicted testimony that the herniated disc warranted a 7% Range of Motion impairment. There was no evidence that the use of either model was preferred or required by the Guides under the circumstances. On remand, the ALJ must determine the impairment the herniated disc caused and award income benefits based on the claimant's entire condition.

The decision of the Court of Appeals is reversed, and the claim is remanded to the ALJ for further consideration.

Lambert, C.J., and Cooper, Graves, Johnstone, Scott, and Wintersheimer, JJ.,
sitting.

All concur.

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