

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-0647-WC

DATE 9-15-05 E.A.Grawford

TNT LOGISTICS

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2004-CA-360-WC
WORKERS' COMPENSATION BOARD NO. 02-WC-96461

OTHO R. MULLINS;
WORKERS' COMPENSATION BOARD;
AND HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from an opinion of the Court of Appeals which upheld the Workers' Compensation Board which had reversed a decision of the Administrative Law Judge that Mullins was entitled to permanent partial disability benefits based on an 11% impairment rating.

The Court of Appeals and the Board determined that the ALJ erred in choosing a rating which failed to include that portion of Mullins' disability caused by the arousal of a dormant condition and that the impairment rating of 22% should have been the basis for the award.

TNT argues that the Court of Appeals and Board usurped the finding of fact function of the ALJ. Mullins responds that the Court of Appeals and the Board applied the correct law in reversing the ALJ and the full impairment rating should be used.

Mullins was employed as a truck driver and suffered an injury to his back and neck as a result of a work-related automobile accident in 2002. He had been operating a truck in conjunction with his son, who was also an employee of TNT. His son was driving at the time of the collision and Mullins was in the sleeping compartment. Immediately following the accident, he experienced mid and low-back pain and shortly thereafter also developed neck pain, bilateral arm pain and pain in his left groin. He was initially treated at a local emergency room in Indiana.

Mullins was evaluated by Dr. Lovejoy and treated with medication and light physical therapy for approximately two weeks. He was released to return to work but did not do so until April 2002. In February 2002, two days after being released by Dr. Lovejoy, Mullins began a series of chiropractic treatments with Dr. Hutchinson. He was released to return to work by Dr. Hutchinson on April 8, 2002, and continued to work until May 3, 2002. He testified before the ALJ that he was having a lot of pain and was unable to do all his truck driving duties. Although his son drove with him and helped him as much as possible, his job was terminated on May 3, 2002. In August 2002, Dr. Hutchinson referred Mullins for an evaluation by Dr. Weinsweig. He also underwent an evaluation by Dr. Love during that period and was continuing to see Dr. Hutchinson at the time of his deposition in this matter on February 5, 2003. He has not returned to work since being terminated.

Before the ALJ, Mullins presented evidence through his deposition and testimony at the formal hearing. He also introduced medical reports from Dr. Hutchinson, a chiropractor, Dr. Weinsweig, a neurosurgeon, and Dr. Lyons, an orthopedic surgeon. TNT presented the medical reports of Dr. Love and Dr. Wagner, both orthopedic surgeons. The major source of conflict in this matter is the proper interpretation of the report submitted by Dr. Lyons, who performed an independent medical examination of

the claimant. The ALJ found the report by Dr. Lyons to be more persuasive than the other medical evidence presented. The doctor stated that the claimant did not have an active impairment before the injury. He attributed one-half of the claimant's DRE Category III lumbar and cervical impairments to the accident, and the remaining 50% to the arousal of a preexisting dormant condition. As a result, he assigned Mullins a "permanent whole body impairment" of 11%. Despite the argument by Mullins to the effect that he was entitled to benefits based on a full 22% impairment, the ALJ determined that the claimant had sustained a permanent impairment of only 11% due to the back injuries in the accident. When reciting the evidence, the ALJ explained that Dr. Lyons had reduced the impairment rating by 50% because of the arousal of a preexisting dormant, nondisabling condition. Nonetheless, the ALJ refused to use the 22% rating, reasoning that he did not have the authority to substitute his own interpretation of the AMA Guidelines over that of the reporting physician. The ALJ also stated he did not find any other medical opinion regarding this matter. Thus, the ALJ found an 11% whole body permanent impairment.

On review, the Board determined that Dr. Lyons' decision to reduce the claimant's Category III impairments by 50% to exclude the portion that was attributable to the arousal of the dormant disability was contrary to the rule that workers are entitled to be compensated for work-related injuries that cause the arousal of a preexisting dormant condition. See Commonwealth, Transportation Cabinet v. Guffey, 42 S.W.3d 618 (Ky. 2001); Bright v. American Greetings Corp., 62 S.W.3d 381 (Ky. 2001); and McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). The Board determined that the ALJ was required to calculate Mullins' impairment so as to include the 11% that Dr. Lyons had improperly excluded from his impairment rating. The Board acknowledged that the ALJs are the primary finders of fact. However, the

Board concluded that an ALJ cannot arbitrarily ignore evidence and select an impairment rating that is erroneous for which there is no reasonable basis. The Board determined that as a matter of law, the ALJ in this case was compelled to find the totality of the impact on the injury compensable. Accordingly, the Board reversed the decision of the ALJ and directed a new award of income benefits be entered based on the sum total of the impairment assessment provided by Dr. Lyons, absent any exception due to dormant preexisting conditions aroused into disabling reality by the work-related injury.

We must agree with the Board and the Court of Appeals that the ambiguity in the report was not based on any medical error, but rather that Dr. Lyons made a legal error in erroneously assuming that any impairment attributed to the arousal of a dormant condition should not be included in the impairment rating.

We fully recognize that the ALJ may choose to believe parts of the evidence or disbelieve other parts and that the ALJ is the sole authority to determine the quality, character and substance of the evidence; however, there must be some reasonable basis for choosing to rely on certain parts of the evidence and disregarding others. Here, the ALJ failed to exercise appropriate discretion when he decided to apply the 11% rating which was set forth in item J.1. of the report and which the ALJ acknowledged to be legally in error. The Court of Appeals and Board recognized that the legal effect to give medical evidence is a matter within the authority of the ALJ rather than a physician. A review of the report demonstrates that the impairment under the AMA Guidelines to the Evaluation to Permanent impairment was 12% for the lumbar and 10% for the cervical. Therefore, it was legally incorrect for the ALJ to accept the portion of the medical report that in effect reduced the two ratings by one-half rather than the portion that set forth the full impairments. For that reason, the Court of

Appeals and the Board properly remanded this matter for the entry of an award that is legally correct, that is consistent with the full Category III impairments set forth in item J.2. of Dr. Lyons' report, and that grants Mullins the full compensation to which he is entitled.

The function of the Board is to determine whether the evidence is sufficient to support a particular finding made by the ALJ or whether such evidence as there was before the ALJ compelled a different result. Western Baptist Hosp. v. Kelly, 827 S.W.2d 685 (Ky. 1992); Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). In other words, its function is to determine whether the finding was erroneous as a matter of law. See Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). Having concluded that the Board correctly reversed a finding that was erroneous as a matter of law, we also conclude that the Court of Appeals correctly affirmed the Board. Id.

The opinion of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Walter E. Harding
BOEHL, STOPHER & GRAVES, LLP
2300 Aegon Center
400 W. Market St.
Louisville, KY 40202

COUNSEL FOR APPELLEE:

William C.O. Reaves
1544 Winchester Ave., Suite 1101
P.O. Box 2557
Ashland, KY 41105-2557