

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

2004-SC-0822-WC

DATE 9-15-05 *EnA Growth P.C.*

PARKER TRANSFER

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2004-CA-0060-WC
WORKERS' COMPENSATION BOARD NO. 97-60437

LANNY RILEY; HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

KRS 342.730(1)(a) is explicit in requiring that non-work-related impairment shall not be considered when determining that an injured worker is totally disabled. An Administrative Law Judge (ALJ) determined that the claimant had no pre-existing occupational disability when he sustained a totally disabling, work-related injury; therefore, his entire disability was compensable. The employer appealed, asserting that the ALJ erred by failing to make an essential finding of fact concerning the claimant's pre-existing active impairment from non-work-related spondylolisthesis. Nonetheless, the Workers' Compensation Board and the Court of Appeals affirmed on the ground that the record contained substantial evidence that the work-related injury, by itself, caused sufficient impairment to render the claimant totally disabled. We affirm. Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003).

The claimant was born in 1948. He completed eight years of school and later earned a GED and commercial drivers' license. He injured his back several times during the early 1980's, in a motorcycle accident and in two incidents while working for a hospital. Although there was some discussion of back surgery and a possible fusion at that time, he settled claims for the latter two incidents for 33 weeks of temporary total disability (TTD) benefits. He worked continuously after 1984.

In October, 1997, the claimant began to work for the defendant-employer as a truck driver. Among his duties was to retrieve dumpsters at industrial sites. About two weeks into the employment, on October 16, 1997, he attempted to smash some boxes before loading the dumpster that contained them onto his truck. While doing so, he fell into the dumpster and injured his back. In January, 2001, he underwent lumbar surgery, which helped somewhat. Nonetheless, he experienced continuous back pain and spasm as well as pain in his left hip and leg, and the medication that he took to ease the pain caused him to be drowsy. He testified that he was unable to return to his previous work after the incident or to perform any other work on a sustained basis.

It is undisputed that the claimant suffered from spondylolisthesis before the October, 1997, injury. When determining that he sustained a compensable injury, the ALJ noted that he testified to the onset of pain when he fell into the dumpster and that Drs. Gleis, Guarnaschelli, and Quader all were of the opinion that the claimant's present symptoms were "due to the impact of his fall on the spondylolytic condition." Turning to the questions of extent and duration, TTD, and pre-existing active disability, the ALJ noted that the claimant was working as a truck driver at the time of his injury and that his previous work included construction, welding, pest control, and managing a carpet cleaning business. After the injury, his treating physicians assigned a 24% impairment

and restricted him from sitting for more than three hours, standing for more than two hours in an eight-hour day, lifting more than 20 pounds, or occasionally carrying no more than 10 to 20 pounds; they prohibited bending, squatting, crawling, climbing; and they imposed mild restrictions on driving and being around moving machinery. Also, Dr. Norsworthy stated that the severity of the claimant's pain impaired his ability to concentrate and that he could not perform work requiring him to sit and stand or walk for eight hours per day without needing to lie down.

Pointing to the claimant's age, education, and work experience, the ALJ determined that he was unable to earn an income by providing services for another on a regular and sustained basis in a competitive economy; therefore, he was permanently and totally disabled. KRS 342.0011(11)(c); Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The ALJ determined that because he was totally disabled rather than partially disabled, prior active disability must be excluded from the award rather than prior active impairment. Noting the claimant's testimony that he had worked as a truck driver for two previous employers as well as the defendant-employer, his testimony that he had experienced no back pain immediately before the injury, and the lack of any medical evidence that he had been treated for a back condition since 1984, the ALJ concluded that he had no active disability at the time of the injury. The employer petitioned for reconsideration requesting a specific finding regarding the extent of pre-existing active impairment and requesting that it be excluded from the award. Nonetheless, the ALJ denied the petition as being no more than a re-argument of the merits.

In Roberts Brothers Coal Co. v. Robinson, *supra*, the court considered the very question that the employer raises in this appeal. The decision explained that since

December 12, 1996, awards under KRS 342.730(1)(a) continue to be based upon a finding of disability; therefore, an exclusion from such an award must be based upon pre-existing disability. Id. at 183. It also explained that if an individual working without restrictions sustains a totally disabling work-related injury, a finding of pre-existing impairment would not compel a finding of pre-existing disability. Id. Furthermore, a properly supported finding that no active disability existed at the time of the injury would preclude a finding that pre-existing impairment accounted for a pre-existing disability and would imply a finding that work-related impairment, by itself, was totally disabling. Id.

In the present case, the ALJ determined that the claimant had no active disability at the time of his injury, noting his ability to work as a truck driver, his lack of pain while doing so, and the lack of any evidence that he had been treated for a back condition since 1984. The finding was reasonable under the evidence. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). It implied a finding that impairment due to the work-related injury, itself, caused the claimant to be totally disabled. Also, it precluded a finding that pre-existing impairment caused pre-existing disability, making it unnecessary for the ALJ to determine the extent of pre-existing impairment. Roberts Brothers Coal Co. v. Robinson, supra.

The decision of the Court of Appeals is affirmed.

All concur.

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