

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 20, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky **NAL**

2004-SC-000946-WC

DATE 11-10-05 En A. Gray, H.D.C.

SHOREWOOD PACKAGING

APPELLANT

V. APPEAL FROM THE COURT OF APPEALS
2004-CA-000949
WORKERS' COMPENSATION BOARD NO. 2003-WC-00502

FLOYD MITCHELL BROOKS, JR.; DR.
EUGENE E. JACOB; HON. JAMES L.
KERR, ADMINISTRATIVE LAW JUDGE
AND WORKERS' COMPENSATION
BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from an opinion of the Court of Appeals which upheld the Workers' Compensation Board. The Board had affirmed in part, vacated in part, reversed in part and remanded a decision of the Administrative Law Judge.

The employer raises two issues on appeal: 1) whether the latest available edition of the American Medical Association Guides to the Evaluation of Permanent Impairment must be used for apportioning nonwork-related disabilities; and 2) whether the Board erred by substituting its judgment for that of the ALJ as to the weight of the evidence on a question of fact, specifically, the finding by the ALJ on physical capacity.

Brooks frames the issues as follows: whether the Board properly ruled that the ALJ cannot change his finding of fact on prior active disabilities on a petition for reconsideration, and whether the Board acted within its statutory authority in vacating the ruling of the ALJ on the 3 multiplier.

Brooks was employed by Shorewood Packaging as a press operator of a large printing press. Physical requirements of the job include climbing, kneeling, stooping, squatting, standing, lifting, pulling, walking and working in awkward positions. Brooks injured his right knee at work on February 6, 2002, when his right foot became lodged between two pallets loaded with paper. Apparently Brooks did not realize that his foot was caught when he turned his leg resulting in an injury to his right knee. He tore his ACL, his medial collateral ligament and his medial meniscus. At the time of his injury, he was already under the care of Dr. Jacob for knee problems and the doctor performed ACL reconstructive surgery on the knee in May of 2002.

Before his knee injury at Shorewood, he had sustained an injury to his right knee in 1998 while playing softball. The injury required multiple procedures, including surgery, in 2000 and 2001. He was able to return to his work as a press operator in October 2001, without any restrictions. Brooks received maximum medical improvement in November 2002. Brooks testified that he was advised in the fall of 2002 that, based on the medical reports of Dr. Jacob and Dr. DeGruccio, he could not return to work at Shorewood. He told the adjuster for the workers' compensation insurance company that in the fall of 2000, he started a business which designed, sold and installed custom home audio and video systems.

In 2003, Brooks filed a workers' compensation claim alleging that continuing pain in his knee prevented him from standing for very long. He also stated that he could not

run, kneel, crawl or squat -- all activities required by his work at Shorewood. Prior to the filing of the claim, the employer engaged two private investigators to document his day-to-day activities.

In response to the claim by Brooks for enhanced income benefits for workers who are disabled from performing their prior job requirements pursuant to KRS 342.730(1), Shorewood presented the report generated by its surveillance team including two video tapes. At the ALJ hearing, Brooks responded to the testimony by the investigators that he had not performed any heavy work at the various construction sites where they had filmed him carrying a small aluminum stepladder. He described his work as involving "going out and looking at jobs," "putting proposals together," "occasionally helping" those with whom he had subcontracted as well as ascertaining that the installation of the systems had been done properly.

The ALJ was presented with conflicting evidence as to the degree and severity of the preexisting active impairment of Brooks. Dr. Jacob, an orthopedic surgeon, who had performed extensive reconstruction in May of 2000 as well as treating all of the previous knee problems, stated that Brooks had a 9% impairment, 50% of which was preexisting. To this 4-1/2% impairment rating, Dr. Jacob added 4% because of his pain, arriving at a total compensable impairment of 8-1/2%. The medical expert produced by Shorewood, Dr. DeGruccio testified that Brooks had sustained a 20% impairment due to his right knee injuries and he attributed 75% of the impairment to the prior active condition with the result that 5% was assessed as a work-related injury. The ALJ accepted the opinion of Dr. Jacob with respect to the degree of impairment attributable to the right knee injury as well as the 50/50 apportionment between the prior activity and the work-related activities. The ALJ rejected the claim for the application of

the triple multiplier provided in KRS 342.730(1)(c). He based his decision on the surveillance tapes and concluded that Brooks retained the physical capacity to return to the type of work he performed at the time of the injury. Consequently Brooks was awarded \$30.96 per week for a period not to exceed 425 weeks based on the impairment rating of 8-1/2%.

Both Brooks and Shorewood filed for reconsideration and both were denied. However, the ALJ, in response to the motion by Shorewood, amended his decision and awarded benefits based on the 5% permanent partial impairment rating given by Dr. DeGruccio. In doing so, the ALJ acknowledged that Dr. Jacob had used an incorrect edition of the Guides.

In a 2 to 1 decision, the Board determined that the ALJ had incorrectly denied the enhanced income benefits because the evidence was not sufficient to support the finding that Brooks retained the physical capacity to perform his pre-injury employment. The Board stated that the surveillance tapes standing alone did not constitute substantial evidence so as to support such a finding.

The Board rejected the argument by Brooks that the ALJ had erred when he amended his previous decision to abandon the opinion of Dr. Jacob and rely instead on the overall impairment rating given by Dr. DeGruccio. It did agree with Brooks that the apportionment was a separate matter and that the ALJ was not permitted to reconsider his opinion as to the apportionment of the preexisting active impairment. The Board stated that even though the impairment rating given by Dr. Jacob was properly rejected as not being based on the proper edition of the Guides, his opinion as to the percentage of the impairment attributed to the work injury was not fatally flawed. It stated that the opinion of Dr. Jacob on that issue represented a distinct medical opinion

separable from the impairment rating and that portion of the opinion by Dr. Jacob was substantial evidence.

The Board also stated that the decision by the ALJ to adopt the opinion of the employers' medical expert was a departure from the rule announced in Wells v. Beth-Elkhorn Coal Corp, 708 S.W.2d 104 (Ky.App. 1985), which held that on a petition for rehearing, an ALJ may not consider the case on the merits or change his factual findings. The Court of Appeals affirmed the opinion of the Board.

The ALJ was faced with conflicting evidence as to the severity and degree of the preexisting active impairment. Dr. Jacob related that Brooks had a 9% impairment, 50% of which was preexisting in a prior active condition. Thus, he arrived at an initial 4-1/2% impairment rating to which he added 4% because of the patient's pain and arrived at a total compensable impairment of 8-1/2%. Dr. DeGruccio, the expert for the employer, declared that Brooks had sustained a 20% impairment because of his right knee injuries, however, he attributed 75% of the impairment to a prior active condition with the result that 5% was assessed as to the work-related injury. The ALJ accepted the opinion of Dr. Jacob with regard to the degree of impairment attributable to the right knee injury as well as the 50% apportionment between the prior active condition and the work-related injury. Shorewood filed a petition for reconsideration and the ALJ acknowledged that Dr. Jacob had used the incorrect edition of the Guides and granted the petition. The issue involved was whether the 4th or 5th edition of the Guides should be used in this circumstance.

Both the Board and the Court of Appeals determined that the ALJ erred on the issue as to whether the apportionment of impairment is controlled by the latest edition of the AMA Guides. Permanent impairment rating is defined in KRS 342.0011(35) as

the percentage of whole body impairment caused by the injury as determined by the latest available issue of the Guides. Consequently, an apportionment of the AMA impairment under KRS 342.730(1)(e) for the purpose of excluding nonwork-related disability has no reference to the Guides and is not determined under the Guides principles.

Neither George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004), nor Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001), nor KRS 342.730 supports the arguments presented by the employer.

Apportionment of an impairment is a separate and distinct medical opinion based on the extent of the preexisting condition when compared to the condition of the employee after the work-related injury. The Guides have no applicability in making such an apportionment. As noted by the Court of Appeals, the impairment rating was properly rejected as not based on the current edition of the Guides, but the opinion of Dr. Jacob regarding the percentage of impairment attributable to the work injury was not fatally flawed. The opinion by Dr. Jacob on this issue represents a distinct medical opinion separate from the impairment rating he assigned and is substantial evidence.

Here, sufficient medical evidence was presented by both the employer and the employee and the ALJ believed the testimony of Dr. Jacob. It is well settled that the ALJ as a finder of fact has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Where there is conflicting evidence, the ALJ may choose whom and what to believe. Pruitt v. Bugg Bros., 547 S.W.2d 123 (Ky.1977). Additionally the ALJ may choose to believe part of the evidence and disbelieve other parts. Pruitt, supra. In this situation, Dr. Jacob had the opportunity to view both before and after the condition of the employee in regard to the

apportionment as well as all other matters. Thus the substantive evidence presented by him was more than sufficient to support the findings of the ALJ.

The ALJ held that Brooks retained the physical capacity to return to the type of work he had performed at the date of the injury and did not enhance the benefits by a factor of 3 as permitted by KRS 342.730(1)(c). He reached this conclusion based on his review of the surveillance tapes presented by the employer. The Board vacated the findings of the ALJ as insufficient and remanded for an additional finding to support the ultimate conclusion. The Court of Appeals affirmed that decision.

The Board acted within its statutory authority in vacating the ruling by the ALJ on the multiplier. The Board's scope of review is determined by KRS 342.285 and includes ascertaining whether any decision of the ALJ was supported by substantial evidence. The review accorded to the Court of Appeals is limited to situations where the Board has overlooked or misconstrued controlling statutes or precedents or committed an error in assessing the evidence so flagrant as to cause a gross injustice. Western Baptist Hosp. v. Kelly, 827 S.W.2d 685 (Ky. 1992). The ALJ founded his decision on his review of the surveillance tapes. Upon additional review of the same tapes, we must conclude that the decision of the ALJ was inappropriate and erroneous. As enunciated by the Board, the video tapes show Brooks carrying a stepladder and other lightweight objects to and from a pickup truck. The tapes do not show him working at a construction site. They do not show him stooping, crawling, kneeling, lifting heavy objects or working in an awkward position.

Again, as found by the Board, a proper analysis of whether the employee is physically capable of performing the same job as he was performing at the time of his injury must take into account the component parts of the job requirements. A proper

consideration requires a comparison of the physical requirements of the pre-injury employment and the post-injury capabilities based on a totality of the lay and medical evidence in the record. See Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky.App. 2000). In this situation the tapes do not, standing alone, constitute substantial evidence to support a finding that the employee is physically capable of performing pre-employment injury on a regular and sustained basis. Thus, the findings of the ALJ are insufficient and the order of remand was correct. We agree with the Court of Appeals and the Board that the ALJ had no reasonable basis to conclude that the employee had the same range of mobility to move and work that he had prior to his injury.

The decision of this Court is to affirm the Court of Appeals and the Board in their vacation for further proceedings the findings of the ALJ as regards the denial of the 3 multiplier, as well as their opinions holding that the ALJ findings of fact on apportionment for prior active disability cannot be changed on a petition for reconsideration.

The opinion of the Court of Appeals is affirmed.

All concur.

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