

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky FINAL

2005-SC-0561-WC

DATE 3-16-06 E.L.A. Grawitt, D.C.

MARTY LEE EASON

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-0460-WC
WORKERS' COMPENSATION NO. 01-74304

HORNBACK CABINET COMPANY;
HONORABLE W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (Guides) sets forth two methods for assessing impairment to the spine as well as criteria for determining the appropriate method. An Administrative Law Judge (ALJ) determined from the evidence that the Guides require use of the range of motion (ROM) method where there is a multi-level fusion and based the claimant's award on an impairment that was assigned under the ROM method. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the claimant maintains that the Guides require use of the diagnosis-related estimate (DRE) method on these facts. We affirm.

The claimant sustained a work-related back injury on September 18, 2001. An

October 23, 2001, MRI revealed disc herniations at L4-5 and L5-S1 and degenerative disc disease. After conservative treatment failed, he underwent back surgery in September, 2002, and again in June, 2003. The initial procedure involved an L4-5 discectomy. The latter included a nerve decompression as well as an instrumentation and fusion at L4-5 and L5-S1.

The claimant submitted a December 17, 2003, IME report that Dr. Loeb prepared for his employer's insurance carrier. Dr. Loeb diagnosed degenerative disc disease at L4-5 and L5-S1, with a solid posterior fusion, and also diagnosed suspected scarring at the nerve root level, probably at S1 on the right side. He assigned a 13% AMA impairment using the ROM method.

The claimant also submitted a March 8, 2004, IME report from Dr. Auerbach. He diagnosed a herniated disc at L5-S1, status post-operative; a discogenic problem at L4-5; degenerative joint disease at L4-5 and L5-S1; and fusion with internal fixation from L4 through S1, status post-operative. Dr. Auerbach assigned a 23% impairment using the DRE method.

In a supplemental report dated April 3, 2004, Dr. Loeb took issue with Dr. Auerbach's use of the DRE method. He characterized it as "incorrect" and "based on one level of correction." Dr. Loeb explained that the claimant had undergone a multi-level correction, which requires use of the ROM method.

In a supplemental report dated April 23, 2004, Dr. Auerbach disagreed. Referring to page 379 of the Guides, Dr. Auerbach explained that he found the DRE method to be "more reasonable and particularly appropriate in this case" because the claimant sustained a distinct injury. Although he acknowledged that "one could argue that you could use the range of motion method," he did not testify that this was a case

where the Guides permitted the use of either method and directed the evaluator to assign the greater of the two impairments.

Rejecting Dr. Auerbach's interpretation, the ALJ determined that page 379 of the Guides (Section 15.2) requires the ROM method to be used where there is a multi-level fusion. Therefore, the ALJ based the claimant's award on the 13% impairment that Dr. Loeb assigned using the ROM method. After making additional findings, the ALJ enhanced the benefit under KRS 342.730(1)(c)1 and 3.

Section 15.2 of the Fifth Edition of the Guides, pages 379-81, is entitled "Determining the Appropriate Method for Assessment." It states, in pertinent part, as follows:

Spinal impairment rating is performed using one of two methods: the diagnosis-related estimate (DRE) or range-of-motion (ROM) method.

The DRE method is the principal methodology used to evaluate an individual who has had a distinct injury. When the cause of impairment is not easily determined and if the impairment can be well characterized by the DRE method, the evaluator should use that method. (emphasis original).

The ROM method is used in several situations:

.....

2. When there is multilevel involvement in the same spinal region (eg[.], fractures at multiple levels, disk herniations, or stenosis with radiculopathy at multiple levels or bilaterally).

3. Where there is alteration of motion segment integrity (eg[.], fusions) at multiple levels in the same spinal region

.....

In the small number of instances in which the ROM and DRE methods can both be used, evaluate the individual with both methods and award the higher rating.

Among other things, Subsection 15.2a, entitled "Summary of Specific Procedures and

Directions," directs the evaluator to: 1.) take a careful history; 2.) consider the permanency of the impairment; 3.) select the region that is primarily involved; 4.) determine whether the individual has multilevel involvement or multiple recurrences/occasions within the same region of the spine and to use the ROM method "if: . . . c. there is multilevel motion segment alteration (such as a multilevel fusion) in the same spinal region;" 5.) "If there is not multilevel involvement or multiple recurrences/occasions and an injury occurred, determine the proper DRE category." Likewise, Figure 15-4, entitled "Spine Impairment Evaluation Process," consists of a flow chart that directs the evaluator to the ROM method if an injury affects more than a single level.

The claimant asserts that the ALJ was presented with two valid impairment ratings that were determined by different methods. His argument is that KRS 342.730(1)(b) requires benefits to be based on an impairment determined under the Guides and that they require the use of a DRE impairment in this situation. He maintains, therefore, that this was not a case of conflicting medical opinions but a case where the ALJ lacked the discretion to choose between the impairments.

An injured worker has the burden to prove every element of his claim, including his impairment. The proper interpretation of the Guides is a medical question to be established by expert medical testimony. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). Where the experts differ, the ALJ must evaluate the conflicting interpretations and decide which is most persuasive. An ALJ may consult the Guides when doing so.

In the present case, the ALJ consulted the Guides and relied upon Dr. Loeb's opinion that they require the ROM method to be used where there is a multi-level

fusion. Having reached that conclusion, the ALJ relied upon the only ROM impairment in evidence. Although Dr. Auerbach's opinion regarding the proper method differed, it was not the sort of overwhelming evidence that would have compelled a decision in the claimant's favor. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). In other words, the decision was reasonable under the evidence and was properly affirmed on appeal. Id.

The decision of the Court of Appeals is affirmed.

All concur.

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