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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: March 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0652-WC

DATE 4-13-06 Eli A Graham DC.

RANDALL DANIELS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-0420-WC
WORKERS' COMPENSATION NOS. 98-65600 & 02-78746

B. R. & D. ENTERPRISES, INC.;
LONE MOUNTAIN PROCESSING, INC.;
HON. SHEILA LOWTHER, CHIEF
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's application for benefits, filed against Lone Mountain Processing, Inc. (Lone Mountain), based on findings that there were falsehoods in his application for employment, that the falsehoods were a substantial factor in the hiring, and that there was a causal connection between the falsehoods and his subsequent injury. KRS 342.165(2); Gutermuth v. Excel, 43 S.W.3d 270 (Ky. 2001). The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the claimant asserts that his case is factually distinguishable from Gutermuth, that the finding under KRS 342.165(2)(b) is "problematical," and that the finding under KRS 342.165(2)(c) is not supported by medical evidence of a causal relationship between the injury that the ALJ found he

failed to reveal and the injury that is the subject of his claim. We affirm.

The claimant was born in 1956 and has a high school education. He has worked primarily in underground coal mining. In 1997, he injured his knee and back when he fell while carrying a 50-pound slice machine on his back in the course of his employment with Leeco. He testified that Dr. Dahhan diagnosed a pulled muscle, that he underwent physical therapy, and that his symptoms resolved after two or three months. In July, 1997, he began working for BR & D Enterprises, Inc. (BR & D). On September 8, 1998, he injured his back while attempting to move a large rock with a pry bar and experienced pain in his low back, hips, and legs. He was referred to Dr. Bean, a neurosurgeon, who treated him until March, 1999, then released him to return to work without restrictions. The claimant stated that he continued to have pain that extended from his back into his legs, but Dr. Bean had informed him that he could either learn to live with the symptoms of his degenerative disc disease or become a "pill head." He stated that he received no further treatment or medication for the injury and settled the claim for a lump sum based upon a permanent partial disability and 5% impairment.

In October, 2001, the claimant quit his job with BR & D and began working at Lone Mountain because it paid more and had better benefits. He stated that the work required more heavy lifting than the previous job. He lifted 40-50 pounds on a daily basis and sometimes had to lift as much as 150-200 pounds. Nonetheless, he did not miss any work until June 11, 2002, when he felt a sharp, burning pain in his lower back while pulling the slack out of a miner cable. On June 14, 2002, he saw his family physician, Dr. LeFeuvre, who referred him back to Dr. Bean. He stated that he continued to work until June 27, 2002, when the mine closed for vacation. He returned after vacation with restrictions and was informed that no light duty was available. The

parties stipulated that Lone Mountain paid voluntary temporary total disability benefits at the rate of $550.66 per week from July 8, 2002, through October 28, 2002. The claimant testified that Lone Mountain terminated him for submitting a false employment application.

The claimant filed an application for benefits against Lone Mountain, alleging physical and psychological harm from the 2002 injury. He also filed a motion to reopen the settled claim against BR & D, which was granted but later dismissed on the merits. Among other things, Lone Mountain asserted that the claim for the 2002 injury must be dismissed under KRS 342.165(2) due to falsehoods in the claimant's employment application, more specifically in the medical history questionnaire that he completed as part of his pre-employment physical.

Lone Mountain submitted evidence that it required prospective employees to complete a medical history questionnaire and undergo a pre-employment physical exam by Dr. Dahhan as part of the hiring process. Item 14 of the questionnaire asked, "Have you have ever had or do you now have" various listed conditions and to check "yes" or "no" by each condition. Next to "Back Injury or Low Back Pain," the claimant checked "No." Item 15 requested a list of injuries, surgeries, and serious illnesses. The claimant listed a "lower back" injury that occurred "6 yr ago," that resulted in "no problems," and that was treated by "Dr. Dahhan." Item 18 asked, "Have you ever had any illness or injuries other than those listed above?" The claimant checked, "No." Finally, Item 22 asked, "Have you ever filed a compensation claim or received benefits as the result of an industrial injury or disease?" Again, the claimant checked, "No." Over his signature, the questionnaire indicated that the preceding answers were true to the best of his knowledge, that they would become part of his medical record, that he

understood his employment was subject to the approval of his physical examination, and that submitting false or incomplete information was grounds for the company to reject his application or terminate employment.

Dr. Dahhan examined the claimant and ordered various tests. He found no limitations on the range of motion of his spine as well as full mobility, and he characterized the required A.P. and lateral x-ray of the lumbosacral spine as being negative. Dr. Dahhan reported that the claimant could perform the position for which he applied without restrictions.

John Bowman, Lone Mountain's general foreman, testified that he was part of a group that interviewed the claimant when he was hired. After the claimant passed a test of his ability to operate equipment properly, Dr. Dahhan conducted a physical examination. Bowman stated that the claimant never informed him of his history of back problems and that he had never seen a copy of Dr. Dahhan's report or the medical questionnaire. Asked whether the claimant's 1998 injury would have affected the decision to hire him, Bowman replied that the company would have investigated further and probably would have hired him if Dr. Dahhan cleared him to perform the job at issue and the company thought he could perform it in a safe and satisfactory manner. He stated that the company did not allow individuals with permanent restrictions to work. The claimant was hired to perform belt work on the second shift and general labor, and Dr. Dahhan knew that someone hired to fill those jobs was expected to be able to perform heavy manual labor. Bowman stated that the claimant performed all of his duties satisfactorily before the injury.

Ronnie Biggerstaff was Lone Mountain's human resource manager in October, 2001, when the claimant was hired. Biggerstaff testified that he participated in the

claimant's interview and that the claimant never advised him of the 1998 back injury. He stated that Lone Mountain terminated the claimant for falsifying his employment application.

Dr. Bean's records indicated that he first saw the claimant on September 28, 1998, after a recent back injury and diagnosed a lumbar strain. A subsequent MRI revealed a degenerative disc at L5-S1. When he last saw the claimant on March 1, 1999, Dr. Bean found him to be at maximum medical improvement (MMI) and assigned a 5% impairment (DRE category II, lumbosacral). His report noted that the claimant continued to experience back pain when lifting and shoveling.

Dr. Bean did not see the claimant again until August 5, 2002, after the injury at Lone Mountain. At that time, Dr. Bean ordered another MRI to rule out a herniated disc. He noted that, as in 1998, the MRI revealed a degenerative disc at L5-S1 with no evidence of herniation. He also noted that the claimant had "a new injury preceding a chronic degenerative disk," characterizing 50% of the condition as pre-existing and 50% as new. On September 16, 2002, Dr. Bean found the claimant to be at MMI. He assigned a 7% impairment, imposed permanent work restrictions, and did not think that the claimant could return to coal mining.

Dr. Templin evaluated the claimant and diagnosed chronic low back pain syndrome with a history of degenerative disc disease at L5-S1 and lumbar disc bulge at L5-S1. He assigned an 8% impairment (DRE category II, lumbar) and indicated that a 5% impairment should be deducted for the prior injury.

Dr. Sheridan evaluated the claimant for BR & D and diagnosed three episodes of acute cervical and lumbar strain. He assigned a 5% impairment to the June, 2002, incident based on nonverifiable radicular pain in the left leg that developed only after

the event.

Dr. Primm evaluated the claimant for Lone Mountain. He diagnosed chronic low back pain secondary to degenerative disc disease and superimposed strains. In his opinion, the x-rays and physical findings were unremarkable, and he found no objective evidence or a worsening of condition due to the June, 2002, injury. He tended to agree with Dr. Bean that the impairment was 5% to 7%, half of which was pre-existing and active before June 11, 2002. He attributed the remainder to a further aggravation or arousal of the chronic degenerative changes. When deposed, Dr. Primm acknowledged that there was no objective basis to assign impairment to the 2002 injury and stated that the claimant's present symptoms were consistent with the natural aging process together with a non-physiologic reaction.

At the hearing, the claimant testified that he continued to experience severe pain in his back, hips, and legs as well as numbness in his left leg. The pain was much more severe than before the 2002 injury, and prescription pain medication was of minimal benefit. He was being treated for depression, had not returned to work, and did not think that he was able to perform any type of work. Asked why he failed to reveal the 1998 injury on the medical history questionnaire, he stated that he thought he was not required to report an injury after two years.

The ALJ determined that the claim could not be distinguished from Gutermuth, supra, noting that the claimant suffered a previous back injury for which he underwent diagnostic testing and treatment by a neurosurgeon. He missed several weeks of work due to the injury and ultimately settled the claim based on a 5% impairment. The written questionnaire that he completed when applying for subsequent employment with Lone Mountain would have revealed a history of the 1998 injury and claim if he had

completed it properly. Both Messrs. Bowman and Biggerstaff testified that they were unaware of the claimant's history of back problems and that the medical examination was an essential part of the decision to hire an applicant. Yet, by misrepresenting his physical condition both to Dr. Dahhan and his prospective employer, the claimant defeated the entire purpose of the examination. For that reason, the ALJ concluded that the claim must be dismissed.

The claimant petitioned for reconsideration. Among other things, he asserted that the employer failed to meet its burden to submit medical evidence showing a causal relationship between the present injury and the injury that was misrepresented. He also asserted that neither Mr. Bowman nor Mr. Biggerstaff testified that he would not have been hired if he had informed Dr. Dahhan of the 1998 injury. The ALJ denied the petition, and the claimant appealed.

KRS 342.162(2) provides as follows:

> No compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable falsely represents, in writing, his physical condition or medical history, if all of the following factors are present:
>
> (a) The employee has knowingly and willfully made a false representation as to his physical condition or medical history;
>
> (b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring; and
>
> (c) There is a causal connection between the false representation and the injury for which compensation has been claimed.

It was the employer's burden to prove all three of KRS 342.165(2)'s factors in order to prevail. The claimant concedes that there was evidence from which the ALJ could reasonably conclude that he knowingly and willfully made a

false representation regarding his physical condition or medical history. The ALJ determined that the false representation was a substantial factor in the hiring as required by KRS 342.165(2)(b); therefore, the finding must be upheld if it is reasonable under the evidence. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Messrs. Bowman and Biggerstaff clearly testified that the pre-employment physical exam was an essential part of Lone Mountain's hiring process and that the company did not hire a worker without Dr. Dahhan's approval. When completing the medical history questionnaire, the claimant listed the 1997 injury for which Dr. Dahhan had treated him briefly. He later testified that the injury was a "pulled muscle" that resolved in two to three months. Yet, he failed to list the 1998 back injury for which Dr. Bean had treated him although that injury continued to be symptomatic, caused a 5% AMA impairment, and resulted in a lump sum settlement. Although the evidence did not rise to the level of that in Gutermuth, supra, it was sufficient to permit reasonable conclusions that Dr. Dahhan's report was a substantial factor in the hiring and that the claimant's false representation regarding his medical history defeated the purpose of Dr. Dahhan's examination, which was to determine the claimant's fitness to perform the heavy manual labor that the job at Lone Mountain required.

The claimant's arguments focus on KRS 342.165(2)(c). Relying on Dr. Bean, he asserts that although the 2002 incident affected the same level of his spine as the 1998 incident, it caused a new and distinct injury that resulted in additional impairment and permanent restrictions. He maintains that medical

evidence is required to prove a causal relationship between the two injuries. He also maintains that the record contains no such evidence.

Contrary to the claimant's assertion, KRS 342.165(2)(c) requires there to be substantial evidence of a causal connection between the false representation and the subsequent injury. Although medical evidence may be a means for proving such a connection, it is not the sole means for doing so. As in Gutermuth, supra, it is significant that the false representation and subsequent injury both involved the same portion of the body. The claimant falsely represented to Dr. Dahhan that the "pulled muscle" was his only prior back injury, and Dr. Dahhan cleared him to perform a job requiring heavy manual labor. In the presence of a reasonable finding that the claimant's failure to disclose the 1998 back injury was a substantial factor in the hiring and the claimant's own testimony regarding the physical demands of the work and the events of June 11, 2002, it was reasonable for the ALJ to conclude that a causal connection existed between the false representation and the 2002 back injury, which occurred while pulling on a miner cable.

The decision of the Court of Appeals is affirmed.

All concur.

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