

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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

2006-SC-0049-WC

DATE 12-13-06 ELLAGRAV.M.D.C.

MARY LOU KING

APPELLANT

V.

APPEAL FROM COURT OF APPEALS  
2005-CA-1571-WC  
WORKERS' COMPENSATION NO. 00-83259

SMITH DEVELOPMENT, INC.;  
HON. A. THOMAS DAVIS,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

The Workers' Compensation Board and the Court of Appeals have affirmed an Administrative Law Judge's (ALJ's) decision to dismiss the claimant's motion to reopen. Appealing, the claimant asserts that the ALJ erred by misapplying KRS 342.125(1)(d) and requiring a "significant" increase in impairment, by failing to compare her actual disability at settlement and reopening, by failing to make sufficient findings of fact to support the legal conclusion, and by failing to award total disability. We affirm.

The claimant was born in 1969. She testified that she completed high school in special education classes and that she had no specialized or vocational training. She had worked for a while as a cashier but was let go because she had difficulty making change. She had also worked in a grocery store bakery, made biscuits at Hardee's,

and worked as a housekeeper at various hotels. In March, 2000, she began working for the defendant-employer as a hotel maid.

On May 8, 2000, the claimant slipped and fell while cleaning a bathroom at the hotel, causing her to rupture three lumbar discs. After being treated at the emergency room, she was referred to Dr. Davies, a neurosurgeon. He performed surgery shortly thereafter, and she returned to work on June 1, 2002. She testified subsequently that she had worked about 20 hours per week on an as-needed basis, rolling napkins and silverware while sitting in her wheelchair.

In November, 2001, the claimant agreed to settle her workers' compensation claim. The agreement stated that Dr. Davies had assigned a 35% impairment, that Dr. O'Brien had assigned a 37% impairment, and that the parties agreed to a 37% impairment for a partial disability. It stated that the claimant's average weekly wage at the time of injury had been \$166.28 and that she had returned to work for the employer on a part-time basis, earning about \$100.00 per week. She also received social security income of about \$341.28 per month. Consistent with the 1996 version of KRS 342.730(1)(b), the 92.5% disability rating used to calculate her benefit was the product of the 37% impairment and corresponding factor of 2.5. The agreement specifically noted that the calculation used a compromised return to work factor of 1, an amount not found in KRS 342.730(1)(c). It also noted that because any weekly award would cause the claimant to lose SSI benefits, the lump sum settlement would do more to improve her economic circumstance by enabling her to purchase a mobile home and lot. An ALJ approved the agreement on November 20, 2001.

In March, 2002, the claimant was involved in a non-work-related automobile accident. She later stated in an affidavit that the accident aggravated her back injury

temporarily but that she continued to work. She neither sought medical care after the accident nor pursued a claim for a physical injury.

On May 28, 2004, the claimant filed a motion to reopen, alleging a change of disability and requesting that her award be conformed to her work status. She testified that her job rolling napkins and silverware required her to bend forward and reach and that her back pain had gradually increased, causing her to quit in August, 2002. She stated that Dr. Davies performed a second surgery in September, 2002, and never released her to return to work. Comparing her present condition with her condition after the initial surgery, she stated that although she no longer used the wheelchair as much, the pain in her back and leg pain was much worse. It required her to lie down and to take narcotic pain medication daily. She thought that she could roll napkins and silverware on an as-needed basis but not on a regular and sustained basis. She stated that she continued to use a wheelchair when shopping or when her legs became numb and that she used a brace on her right foot.

In a Form 107 prepared in August, 2001, for the initial claim, Dr. Davies stated that MRI had revealed a huge disc rupture at L3-4 and subsequent ruptures at L4-5 and L5-S1. Because the claimant rapidly developed a severe cauda equina syndrome with severe paraparesis, he had performed surgery. He noted the claimant's return to part-time work and stated that she had severe limitations in standing, walking, bending, and lifting and also had bladder impairment. She required frequent sitting and the use of a wheelchair or cane for ambulating. He assigned a 35% impairment and stated that she did not retain the physical capacity to return to the work she performed at the time of injury, noting that her employer had provided some limited light-duty work.

Dr. Davies also prepared an April 5, 2004, report for the reopening. He noted

that the claimant underwent a second lumbar surgery in September, 2002, for spondylosis, disc degeneration, and stenosis that occurred secondary to the degenerative process. He stated that she had continued numbness and weakness in her right leg and foot and that she used a brace on that side and a cane. She continued to have cauda equina syndrome, which causes multiple radiculopathies in the lower extremities. He stated that she could walk only very short distances, could stand or sit for short periods, and could not climb or do repetitive reaching or machine operating. Based on her description of the physical requirements of her job, she was unable to do the repetitive bending or lifting that it required and lacked the physical capacity to return to the type of work that she did before. Her impairment rating increased 2% above the prior 35% but totaled 36% under the combined values chart.

Dr. Gleis evaluated the claimant on September 16, 2004. He diagnosed the injury, the resulting cauda equina syndrome, and a pre-existing, dormant degenerative disc condition. He assigned a 26% impairment rating to the injury, stating that the corticospinal tract deficits had improved since Dr. Davies assigned impairment after the initial surgery. Even if impairment for loss of lumbar flexion and extension were added, the total would be only 32%. Dr. Gleis stated that the claimant should be able to return to the sedentary job "rolling silverware" but would need to alternate between sitting and standing. She should lift no more than ten pounds occasionally, walk no more than 900 feet without sitting down, and rarely climb more than one flight of stairs per day. She would sometimes need to use a wheelchair or cane at work.

After summarizing the evidence, the ALJ noted the claimant's assertions that her permanent impairment rating had increased since the settlement and that she had become totally occupationally disabled from the effects of her work-related injury.

Whereas, the employer asserted that her disability had decreased and that her claim for increased benefits must be denied.

The ALJ noted that Dr. Davies assigned an impairment rating at reopening that was only 1% greater than what he had assigned in the initial claim. Moreover, Dr. Gleis concluded that the claimant's condition had improved, pointing to Dr. O'Brien's statement in the initial litigation that the claimant could return to light-duty work if she avoided standing and walking. Convinced that there was no significant change in the claimant's condition at reopening, the ALJ noted that she lived with her parents at the time of settlement but presently lived on her own, maintained her drivers' license, took care of her daily needs, and acknowledged that she was physically able to perform the work she performed at settlement. The ALJ concluded as follows:

The Plaintiff has not met the burden of showing a significant increase in impairment. Dr. Davies' additional increase in her impairment rating is not enough to be determinative. The ALJ is not persuaded that the Plaintiff is any more occupationally disabled than she was at the time of the settlement; in fact there is evidence that she may be somewhat improved. The undersigned does not find total occupational disability and does not find significant improvement or deterioration of the Plaintiff's condition and her ability to perform some type of labor.

The claimant's petition for reconsideration continued to assert that she was more disabled presently than she had been at settlement and to emphasize the change in her work status. It requested specific findings regarding her actual disability at settlement and at reopening. The ALJ denied the petition, stating that there was little or no substantive change in the claimant's condition since the settlement and that, to a certain extent, the petition simply reargued the merits.

KRS 342.125(1)(d) permits reopening based on:

Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

The claimant asserts that KRS 342.125(1)(d) required her to show only an increase in her permanent impairment rating in order to receive a greater award.

Relying on Smith v. Higgins, 819 S.W.2d 710 (Ky. 1991), she argues that by requiring her to show a "significant" increase in her impairment rating, the ALJ imposed a higher burden than the legislature did. She points out that despite finding Dr. Davies' report to be the most relevant, the ALJ ignored his opinion that she could no longer work and ignored the fact that she took no pain medication at settlement but required narcotic pain medication at reopening. She also complains that the ALJ failed to make specific findings comparing her actual disability at the two relevant points in time.

As the claimant points out, even a 1% difference in an impairment rating may have a substantial impact on a worker's disability rating under the post-1996 versions of KRS 342.730(1)(b). KRS 342.125(7) provides that no statement contained in a settlement agreement is binding as an admission against interest at reopening, including the extent of disability. Therefore, the worker's actual disability at settlement must be compared with the disability at reopening to determine if a change of disability occurred. See Newberg v. Davis, 841 S.W.2d 164 (Ky. 1992); Beale v. Faultless Hardware, 837 S.W.2d 893 (Ky. 1992).

We acknowledge that the ALJ's opinion of December 22, 2004, might be construed as adding an additional requirement to KRS 342.125(1)(d), i.e., a "significant" worsening of impairment rather than simply a worsening of impairment. Had the ALJ determined in the December 22, 2004, order the claimant's actual impairment and her

actual disability at the two relevant points in time, it would have been clear from the outset that the ALJ applied KRS 342.125(1)(d) and (7) correctly. Although the order denying the claimant's petition for reconsideration also failed to make findings of actual impairment and disability, it indicates that the ALJ considered the claimant's arguments but was convinced that her condition had not changed since the settlement. It appears, therefore, that the ALJ neither raised the bar for awarding additional benefits nor overlooked KRS 342.125(7) but thought it unnecessary to make the requested findings under the circumstances.

The evidence regarding the claimant's permanent impairment rating at reopening was conflicting. Even if her actual impairment rating at settlement had been 35% rather than the 37% to which the parties agreed, Dr. Gleis testified that her condition had improved at reopening and that her impairment rating had decreased. Under the circumstances, the evidence did not compel a finding that it had increased.

The claimant raises two final arguments. She asserts that her ability to perform the part-time "made work" was an inadequate basis for concluding that she was capable of regular and sustained employment in a competitive economy. She also asserts that the ALJ made insufficient findings to preclude an award of total disability.

The claimant acknowledged at reopening that she could perform the part-time job rolling napkins and silverware on an as-needed basis. A conclusion that the job did not come within the statutory definition of "work" would apply equally to her disability at settlement and reopening. Therefore, we fail to see how it would show that she was not totally disabled at settlement but subsequently became totally disabled.

This is not a case in which the recitation of the evidence failed to include sufficient facts from which to discern the reason for the finding less than total disability

at reopening. After reviewing the standard for distinguishing total and partial disability, the ALJ relied specifically on the claimant's testimony that she had established and was able to manage her own household; that she could drive an automobile to take care of her daily needs; that she did not use her wheelchair as much as she had before the settlement; and that she was physically capable of performing the work she performed at the time of the settlement. Evidence recited from Dr. Gleis's testimony also supported the decision.

As the party seeking additional benefits, it was the claimant's burden to convince the ALJ that she had become totally disabled at reopening. The ALJ had the sole discretion to determine the quality, character, and substance of the evidence and to believe or disbelieve various parts of it. Although a worker's testimony is competent evidence of her ability to perform various activities at relevant points in time, even the uncontroverted testimony of an injured worker is not conclusive on such matters. See Grider Hill Dock, Inc. v. Sloan, 448 S.W.2d 373 (Ky. 1969). Likewise, the testimony of the worker's treating physician is not entitled to greater weight than that of another physician. Wells v. Morris, 698 S.W.2d 321 (Ky. App. 1985).

Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986), explains that where the party with the burden of proof is not successful before the ALJ, that party must show on appeal that the favorable evidence was so overwhelming that that no reasonable person could have failed to be persuaded by it. In other words, the party must show that the evidence compelled a favorable finding. Having considered the evidence in the present case, we are not convinced that it was so overwhelming as to have compelled such a finding.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and McAnulty, Roach, Scott and Wintersheimer, JJ., concur. Graves, J.,  
dissents by separate opinion. Minton, J., not sitting.

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# Supreme Court of Kentucky

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## DISSENTING OPINION OF JUSTICE GRAVES

At the time of settlement, the claimant was not only gainfully employed but also free of pain medication. As time went by, she not only became physically unable to work but also became dependent on narcotic pain medication. Such undisputed facts compel a finding of a significant increase in impairment. The Administrative Law Judge failed to translate this increased physical impairment to an enlarged functional disability.