

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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-000239-WC

DATE Jan 11, 07 EIA Group, D.C.

LADONNA LUSE

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2005-CA-001214-WC
WORKERS' COMPENSATION NO. 04-WC-354

ROBERT W. GAREY, D.M.D.;
KINNEY E. SLAUGHTER, D.M.D.;
KATHY R. SLAUGHTER, D.M.D.;
HONORABLE MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant sustained a cumulative trauma injury to several parts of her body but dismissed her entire claim as being barred by the statute of limitations. Convinced that the claim for some of the hip and leg complaints may have been timely, the Workers' Compensation Board (Board) vacated that portion of the decision and directed the ALJ to analyze the evidence on remand under Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999). The Board affirmed regarding the upper body complaints, rejecting the claimant's argument that the ALJ may have misunderstood the evidence and the law when finding that no impairment remained compensable. The Court of Appeals affirmed, but the claimant continues to

assert that the decision to dismiss the entire upper body portion of the claim should be vacated and remanded for further consideration. Convinced that the decision was supported by the evidence and was not the product of a misunderstanding, we affirm.

The claimant worked as a dental hygienist, dividing her time among three dentists' offices. Although she was able to sit much of the time, she had to assume awkward positions in order to perform her work. In 1996, she began to experience neck pain. In 1999, she also began to experience back pain that she attributed to scooting around in a chair with casters that stuck when working at Dr. Garey's office. At that time, she began treatment for neck, shoulder, and upper mid-back pain with Dr. Estes, a chiropractor. On a patient information form, she indicated that she sought treatment for a work-related injury. She testified that when she informed Dr. Estes of her suspicion, he agreed. She then reported the matter to her employers and requested that the casters be repaired and certain ergonomic changes be made.

On five or six occasions from October through December, 2001, she sought treatment with Dr. Rommelman for neck and shoulder pain that he thought was myofascial in nature. She returned in October, 2003, again complaining of neck and shoulder pain. Notes from March 24, 2004, refer to right hip and lower extremity complaints. Shortly thereafter, Dr. Rommelman diagnosed right piriformis syndrome. Having found the claimant to be at maximum medical improvement (MMI) in July, 2004, he assigned a 9% whole-body impairment, attributing a 6% impairment to the upper body conditions and a 3% impairment to the piriformis syndrome.

When deposed, Dr. Rommelman attributed the claimant's upper extremity pain and sensory deficit to myofascial pain causing a thoracic outlet syndrome and her lower extremity pain to a piriformis syndrome with resulting sciatic compression. He stated

that his findings were supported by objective medical testing and were reproducible. Questioned about when he first treated the low back and right lower extremity complaints, Dr. Rommelman testified, "It looks like the first time she brought that to my attention was in March of 2004."

The claimant quit working on August 14, 2003, and later testified that she did so because her symptoms became so severe that she was unable to hold her instruments. She filed an application for benefits on February 20, 2004. She later testified that her neck, right arm, shoulder, and low back symptoms worsened gradually from 1997 until she quit working. She estimated that about 75% of her symptoms developed within the two-year period before she quit working.

Relying on Dr. Rommelman, the ALJ determined that the claimant "suffered a physical injury as defined by the Act." The ALJ concluded, however, that her entire claim was time-barred because it was not filed within two years after Dr. Estes confirmed her suspicion that her that her injury was work-related. In a petition for reconsideration, the claimant requested compensation under Special Fund v. Clark, supra, for the portion of her claim that arose within two years before she filed it. The ALJ denied the petition, after which the claimant appealed.

The Board agreed that the impairment Dr. Rommelman attributed to the upper body symptoms was barred by limitations but determined that the ALJ failed to make sufficient findings regarding the impairment he attributed to right piriformis syndrome.

In support of the first conclusion, the Board pointed to the claimant's testimony that, in 1999, Dr. Estes agreed with her supposition that work-related cumulative trauma caused her low back condition and her neck, shoulder, and right upper extremity symptoms. It also pointed to Dr. Rommelman's statement that the 6% impairment

rating for the neck, shoulder, and upper extremity symptoms would probably have been the same in 2001.

Turning to the second conclusion, the Board explained that the ALJ's findings were insufficient under Special Fund v. Clark, supra, and its progeny regarding the impairment due to piriformis syndrome. It reasoned that Dr. Rommelman first mentioned right hip and leg radiculopathy in early 2004, that he attributed a 3% impairment to the condition, and that he testified that his conclusions regarding the condition were based on objective medical evidence. Noting that such evidence could represent a worsening of the work-related, repetitive low back condition, the Board found that the ALJ's explanation for dismissing the claim was inadequate as it did not specifically address the hip and leg complaints. Therefore, it vacated the dismissal of that portion of the claim and remanded for additional findings.

As an initial matter, Dr. Garey argues that the Board's and the Court of Appeals' decisions were not final and appealable because they did not terminate the action, decide the matter litigated by the parties, or determine some rights in such a manner as to divest the Board of power. As authority for this argument, he relies on CR 54.01 and King Coal Company v. King, 940 S.W.2d 510 (Ky. App. 1997) (an action that is remanded for a disposition that would not terminate the action is not final and appealable under CR 54.01). His reliance is misplaced.

This court determined in Davis v. Island Creek Coal Co., 969 S.W.2d 712, 713 (Ky. 1998), that the "final and appealable" analysis found in CR 54 applies to the orders of a trial level court. Noting that the Board has had appellate jurisdiction since the 1987 Act, the Davis court determined that the rule "has no application to the Board's orders" and overruled Stewart v. Lawson, 689 S.W.2d 21 (Ky. 1985), to the extent that it held

otherwise. Because the Board's order set aside Davis's award and permitted the ALJ to divest him of the award on remand, the court concluded that it was final and appealable although it did not finally dispose of the claim.

In the present case, the Board's order to vacate the dismissal of the portion of the claim regarding hip and back complaints was final and appealable under Davis v. Island Creek Coal Co., supra, because it permitted the ALJ to enter an award in the claimant's favor on remand (i.e., to divest the employers of their previous victory on that issue). Contrary to Dr. Garey's assertion, this appeal is not "a strategic pre-emptive strike against the ALJ" because it does not concern that portion of the claim. Because his arguments do not require us to address the matter further, we will not.

Special Fund v. Clark, supra, stands for the principle that although part of a gradual injury claim may be time-barred, harmful changes attributable to trauma incurred within two years before a claim is filed remain compensable. In denying the claimant's petition for reconsideration, the ALJ stated, in pertinent part, as follows:

Plaintiff asks for part of her claim to be found compensable as having arisen within two years of the date she filed her claim. However, Dr. Rommelman wasn't able to attribute any of the 9% impairment he assessed within that two years that would have enabled me to find it compensable. I could not find any impairment to have arisen within the two years prior to February 20, 2004. Therefore, I had to dismiss the claim in its entirety.

Seizing on this language, the claimant asserts that the ALJ felt compelled to dismiss the entire upper body claim despite the favorable evidence and also asserts that the evidence permitted an award. She points to her own testimony that 75% of her symptoms developed in the two-year period before she filed her claim. She also points to Dr. Rommelman's testimony that she did not reach MMI until June or July, 2004, and

that it was medically reasonable to accept her testimony that her condition had worsened up until August, 2003, when she quit working. Finally, she points to testimony by the employers' expert, Dr. Baker, that she had not reached MMI in 2004.

Although a worker's testimony is competent evidence of her physical condition and ability to perform various activities at various points in time, only a medical expert is competent to testify regarding the extent of AMA impairment and its cause. A fair reading of Dr. Rommelman's testimony is that he did not conclude that the claimant was at MMI until June or July of 2004. He acknowledged that her condition was no different than it had been when he first saw her in October, 2001, but noted that that could only be determined with hindsight. The employers' expert, Dr. Baker, diagnosed rotator cuff tendonitis but stated that it would not have been caused by work as a dental hygienist. He also stated that although the claimant was not at MMI, there was no AMA impairment for the condition.

Although she appeals, the claimant has failed to show that there was substantial evidence that part of her upper body impairment was caused by trauma incurred within the two-year period before she filed her claim. The finding that none of the upper body impairment remained compensable was supported by Dr. Rommelman's testimony and was properly affirmed on appeal. Under such circumstances, the ALJ's statements imply a conclusion that was based on the evidence and the law rather than a misunderstanding.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Graves, Minton, Noble, Scott, and Wintersheimer, J.J., concur. McAnulty, J., not sitting.

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