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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: January 25, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE Feb 15, 07 ELIA Grant, D.C.

2006-SC-000190-WC

LINDA ROSS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-001832-WC
WORKERS' COMPENSATION NO. 04-99906

THREAVE MAIN STUD;
HONORABLE R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
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 application for benefits. Appealing, the claimant continues to maintain that the ALJ erred by relying on an impairment rating that failed to conform to the standards set forth in the AMA Guides to the Evaluation of Permanent Impairment (Guides). Because the evidence indicates that the rating was the product of a medically sound interpretation of the Guides, albeit one that differed from that of the other medical expert, we affirm.

The claimant was an assistant manager of a horse farm. Her duties included the care and maintenance of thoroughbred horses. This appeal concerns the amount of impairment caused by the second of two work-related injuries to her right knee.

The first injury occurred in February, 2003, when the claimant was struck by a falling branch from a tree and sustained a fracture to the right tibial plateau. Surgery to repair the fracture included the placement of hardware. The claimant returned to work for the same employer. She testified subsequently that before the second injury occurred she was taking 2 Percocets per day, had stiffness in her knee, and had regular pain and swelling; that her ability to walk, squat, and kneel was limited; and that she had given up driving.

The second injury occurred on December 13, 2003, when the claimant was kicked in the right knee by a horse. She did not work thereafter. Her claim alleged that she was unable to work due to increased pain, swelling, and stiffness in her knee.

In January, 2004, the parties agreed to settle the claim for the first knee injury for a lump sum of $40, 445.16. It was based on a 3% impairment rating and the buyout of past and future medical expenses as well as the right to reopen. They litigated the claim for the second injury.

After receiving emergency treatment for the second knee injury, the claimant transferred her care to Dr. Wagner, an orthopedist. In a report dated December 29, 2003, Dr. Wagner indicated that diagnostic testing revealed a non-displaced hairline fracture of the inferior pole of the right patella. He testified subsequently that he prescribed conservative treatment and that the claimant's condition appeared to improve. In a letter dated June 23, 2004, Dr. Wagner assigned an 8% impairment rating that was based entirely upon the pre-existing condition. He explained that the December, 2003, injury "caused a contusion to an already diseased right knee joint from her previous surgery from a work-related injury."

The claimant testified that she referred herself to Dr. McEldowney for a second

opinion. A January 28, 2004, report indicates that he took a history of the two injuries and examined the claimant. He diagnosed post-traumatic arthritis of the right knee due to the injuries. Noting that the claimant had exhausted conservative treatment with Dr. Wagner, he thought that she required a total knee replacement. In his opinion, the December, 2003, injury hastened the need for the procedure.

Dr. Friesen evaluated the claimant on her own behalf in September, 2004. He reviewed the operative report regarding the first injury. He also reviewed the x-rays from Dr. Wagner after the second injury. Dr. Friesen diagnosed traumatic arthritis of the right knee, post bicondylar tibial plateau fracture, post non-displaced fracture of the inferior pole of the right patella with satisfactory healing. He assigned a 16% impairment, attributing a 13% impairment to the first injury and a 3% impairment to the second injury. In his opinion, the claimant should undergo total knee arthroplasty. Noting that the claimant was functioning until December, 2003, he stated that he thought the second injury aggravated the pre-existing traumatic arthritis and accelerated the need for surgery. However, he acknowledged that the claimant's symptoms before December, 2003, were sufficient to indicate that knee replacement would probably have been necessary even had the second injury not occurred. He also acknowledged that the fracture sustained in the second injury had healed and that he had never seen a patient with a healed, non-displaced fracture to the inferior pole of the patella require a total knee arthroplasty.

When deposed, Dr. Wagner stated that the second knee injury caused only a temporary contusion. He thought that the claimant could avoid surgery if she continued conservative treatment, including anti-inflammatory medication and exercises to strengthen her quadriceps and improve her range of motion. Dr. Wagner explained that

he thought that Dr. McEldowney's recommendation for reconstructive surgery was not in the claimant's best interest due to her age. Asked about the impairment rating that he assigned, Dr. Wagner stated that there was a slight diminution in the articular surface of the patella due to the first injury and that he had assigned an 8% impairment to that injury using the Guides. Dr. Wagner acknowledged that Table 17-33 of the Guides allows a 3% impairment to be assigned for a non-displaced patellar fracture but stated that he did not assign impairment for the December, 2003, fracture because it did not involve the articular surface of the patella and did not affect function. He explained:

> [T]hey give you an increased impairment for a patellar fracture, nondisplaced, and what they mean by that is if it involves the articular surface, where you would have a step-off on the undersurface of the patella or the kneecap involving the articular cartilage.

Asked if the impairment is greater if the fracture is to the articular surface, he explained:

> No, if it's on a step-off. Look at your next one down there, the next one down under the kneecap. But what they're doing there is basically that guideline involves – that one is for the articular surface, because the next one down gives you a higher percentage if the articular cartilage has a step-off, and that's another reason why I don't think she would qualify for that.

Dr. Wagner insisted upon further questioning that although a literal reading of Table 17-33 would appear to permit a 3% impairment for the type of fracture that the claimant sustained in December, 2003, that is not what the Guides intended. He explained that, when read as a whole, the table indicates that impairment is assigned only for patellar fractures that involve the joint surface. The claimant's did not.

Persuaded by Dr. Wagner's testimony, the ALJ determined that the claimant had received appropriate medical treatment for the December, 2003, injury and that she had

failed prove that it caused more than a temporary exacerbation of the February, 2003, injury. However, any further claim regarding that injury must be dismissed because she had settled the claim, waived the right to reopen, and waived the right to future medical expenses.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003), we explained that "the proper interpretation of the Guides and the proper assessment of an impairment rating are medical questions." Contrary to the claimant's assertion, this is not a case such as Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006), in which a physician acknowledged that the injured worker fell within the "strict definition" of one category of impairment but placed him in the next higher category, explaining only that the Guides are no more than a guide when assigning impairment. In the present case, Dr. Wagner also explained that certain things must be inferred from what is stated in the Guides and gave a medically sound reason for refusing to assign a 3% impairment based on the December, 2003, fracture. Although Dr. Friesen did assign the 3% impairment, he was not asked to address Dr. Wagner's rationale for refusing to do so. Because the evidence revealed no more than a difference of medical opinion regarding the proper interpretation of the Guides and the most accurate impairment under the Guides, the ALJ was free to choose the expert upon whom to rely.

The decision of the Court of Appeals is affirmed.

Cunningham, McAnulty, Minton, and Noble, J.J., concur. Schroder, J., dissents by separate opinion in which Lambert, C.J., and Scott, J., join.

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DISSENTING OPINION BY JUSTICE SCHRODER

I would vacate and remand to reconsider disability in light of Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006). The doctor is ignoring the AMA Guidelines.

Lambert, C.J., and Scott, J., join in this dissent.